NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Competition Appeal (AT) No. 04 of 2023

IN THE MATTER OF:

Alphabet Inc. & Ors. **...Appellant**

Versus

Competition Commission of India & Anr. **...Respondents**

Present:

For Appellant: **Mr. Sajan Poovayya and Mr. Ritin Rai, Sr. Advocates with Mr. Karan Chanhiok, Mr. Kaustav Kondu, Ms. Deeksha Manchanda, Ms. Tarun Donadi, Ms. Bhavika Chhabra, Mr. Palash Maheshwari, Mr. Daayar Singla and Ms. Raksha Agarwal, Advocates.**

For Respondents: **Mr. Balbir Singh, Sr. Advocate with Mr. Samar Bansal, Mr. Manu Chaturvedi, Mr. Kaustubh Chaturvedi, Mr. Vedant Kapur, Mr. Karan Sachdev, Ms. Shivali Singh, Ms. Ananya Singh, Mr. Vedant Kohli, Mr. Khwaja Umair and Ms. Monica Benjamin, Advocates for R-1/ CCI.**

Mr. Jayant Mehta, Sr. Advocate with Mr. Abir Roy, Mr. Vivek Pandey, Mr. Aman Shankar, Mr. Sasthibrata Panda, Ms. Biyanka Bhatia and Ms. Shreya Kapoor, Advocates for R-3.

J U D G M E N T
(28th March, 2025)

Ashok Bhushan, J.

This Appeal has been filed challenging the order dated 25.10.2022 passed by the Competition Commission of India (hereinafter referred to as "Commission") under Section 27 of the Competition Act, 2002 (hereinafter referred to as "Act") in Case No. 07 of 2020, Case No.14 of 2021 and Case

No.35 of 2021. The Commission after receipt of the information in the above cases passed an order under Section 26 of the Act directing for investigation. Director General (DG) conducted the investigation as per the Act and submitted a report to the Commission. Thereafter, after hearing the parties the Commission passed the impugned order under Section 27 of the Act. By the impugned order, the Commission has issued various directions against the Appellant as envisaged in Section 27 and also imposed penalty under Section 27(b) of the Act. Aggrieved by the order passed by the Commission, this Appeal has been filed.

2. Brief background facts which are necessary to be noticed for deciding the Appeal are:-

2.1. This Appeal has been filed by Alphabet Inc. with three other Google entities who are referred hereinafter as "Google". Google LLC launched an app store for Android phones called Android Market which was subsequently named as Play Store i.e. Google Play. On 17.08.2017, Google India Digital Private Limited launched a payment app- 'Tez' based on Unified Payment Interface (UPI). In August 2018, Tez App was renamed as 'Google Pay'. On 20.02.2020, an information under Section 19 of the Act was submitted to the Commission. On the information, the Commission registered Case No.07 of 2020. On 09.11.2020, the Commission issued an order under Section 26(1) in Case No.7 of 2020 directing the DG to conduct an investigation against the Appellant. On 29.06.2021, a second information was sent by Match Group Inc. on the basis of which the Commission registered a Case No.14 of 2021. The Commission passed an order for

clubbing Case Nos. 07 of 2020 and 14 of 2021. Another information was sent by Alliance of Digital India Foundation (ADIF) to the Commission on 18.10.2021 on the basis of which the Commission registered Case No.35 of 2021. On 02.11.2021, the Commission passed an order clubbing Case Nos. 07 of 2020, 14 of 2021 and 35 of 2021. On 10.12.2021, Google LLC extends the deadline for Indian developers to comply with the Policy Clarifications from 31.03.2022 to 31.10.2022. DG issued various notices to the Appellants. Appellants submitted responses both to confidential and non-confidential versions. On 16.03.2022, the DG after concluding its investigation submitted a report of confidential and non-confidential versions of its investigation. On 16.03.2022, the Commission passed an order directing the Appellants and informants to file their objections to the DG Report. On 04.04.2022, the Commission passed an order deleting First Informant (Case No.07 of 2020) from the proceedings. Other two informants filed their responses to DG Report. Appellant on 04.05.2022 filed its financial information and on 01.08.2022, Appellants submitted its response to the DG Report. Hearing was conducted by the Commission in August 2022. On 01.09.2022, Google issued policy decision giving user choice billing pilot for all non-game developers in India. Appellants as well as Informants filed their submissions before the Commission. On 12.09.2022, Appellants submitted its submission on potential penalties. On 14.09.2022, the Commission passed an order requesting the information in relation to revenue and profit of Google Play in India including Ads and overall Google revenue and profit in India. On 06.10.2022, Appellants submitted their financial information as required by letter dated 14.09.2022. The

Commission passed final order on 25.10.2022 against which this Appeal has been filed.

3. We have heard Shri Sajan Poovayya, Learned Senior Counsel and Shri Ritin Rai, Learned Senior Counsel for the Appellants, Shri Balbir Singh, Learned Senior Counsel and Shri Samar Bansal, Counsel for the Competition Commission of India and Shri Jayant Mehta, Sr. Counsel with Shri Abir Roy, Learned Counsel for the Respondent No.3.

4. Learned Counsel for the Appellants submits that the Commission's identification of the market is demonstrably wrong. The determination of the relevant market as "market for apps facilitating payment through UPI in India" is demonstrably flawed. There is no basis for such narrow market definition. All digital modes of payments i.e. Wallets, UPI, net banking, credit and debit cards are substitutable both from a customer and merchant perspective. Survey data presented by Google and the response of Amazon clarified that all modes of digital payments such as wallets, UPI, credit and debit cards etc. are substitutable from the consumer perspective. DG did a wrong inquiry i.e. "a write-up of UPI as a payment system and its ecosystem in India including the advantages/disadvantages in comparison with other modes of doing digital transactions in India". The question ought to have been asked by the DG that whether various forms of payment were substitutable. This error vitiates the finding returned by the Commission in paragraph 392.6 and the direction at paragraph 395.8 of the order. The Google has given sufficient justification to establish that there was no abuse of dominance by integrating UPI apps using different methodologies on

Google Play. Google Pay was Google's own app which was easier to integrate it on a flow which required more monitoring and technical integration. DG never inquired into the reasons for differential integration from Google or examined this aspect in any detail. Commission accepted observations of DG without any factual examination. Both intent and collect flow are different ways of achieving the same result. The findings and directions of the Commission are based only on exclusive and mandatory use of Google Play's Billing System (GPBS). Commission found that "different methodologies used by Google to integrate its own UPI apps vis-à-vis other rival UPI apps with the Play Store results in violation of Sections 4(2)(a)(ii), 4(2)(c) & 4(2)(e) of the Act". The Commission applied wrong legal test to assess the alleged abuse of dominance. Commission itself has found that the Appellant is not dominant in market for apps facilitating payment through UPI in India. When the Appellant is not dominant in the above market then there is no occasion to return any finding of abuse of dominance in the above market. The Commission incorrectly held that Google Play's Billing System requirement violated Section 4(2)(a)(i) of the Act without applying the two parts "fairness or reasonability test" as laid down by the Commission in ***"Indian National Shipowners' Association vs. Oil and Natural Gas Corporation Limited"***. The test which has been laid down is required Commission to examine (i) how the condition affects the trading partners of the dominant enterprise; and (ii) whether there is any legitimate and objective necessity to impose such a condition. The observation of the Commission that 'mandatory usage of GBPS for paid apps and in-app purchases is one sided and arbitrary and devoid of any

legitimate business interests' is without any basis. The finding that the said is 'devoid of any legitimate business interests' is only bare conclusion without giving any reason and without considering the objective necessity to impose such a condition as explained by Google in its reply. The requirement of Google for requiring app developers to adopt GPBS did not harm competition. The Commission failed to apply the relevant test while examining abuse of dominance. The finding of the Commission that Google discriminated by not using GPBS for YouTube, thereby violating Section 4(2)(a)(i) & (ii) is also unsustainable. No finding has been returned that two requirements i.e. (i) dissimilar conditions applied to equivalent transactions with other trading partners and (ii) harm to competition due to trading partners suffering a competitive disadvantage that led to competitive injury in the downstream market has been established. The Commission also ignored Google defence to the discrimination claimed that after 2020 Google required those Google apps that did not use GPBS to make necessary changes. YouTube is subject to the same policies. The finding of the Commission that Google limited the technical development in the market for in-app payment processing services in violation of Section 4(2)(b)(ii) of the Act is also unsustainable. The Commission failed to establish that the GPBS requirement limited technical development in a way that caused prejudice to consumers and account for evidence of actual and potential growth in the market for payment processing services. The Commission did not identify even an iota of evidence of technical development being impeded. To the contrary, Google showed that development and growth in that sector has only increased. The Commission also incorrectly held that Google denied

market access to payment processors and app developers in violation of Section 4(2)(c) of the Act. The Google is a buyer of payment processing services and is actually facilitating (rather than denying) market access for payment processors. Google's choice of payment processors reflects a party's sacrosanct right to choose its service provider. The Commission failed to identify the market where the alleged denial of access has taken place. Commission failed to establish anti-competitive effect in that market. The Commission incorrectly equated a reduction in market share with a denial of market access. The Commission failed to note that Google Play constitutes only a miniscule portion i.e. less than 1% of the wider digital payment ecosystem in India. Further, the Commission incorrectly held that Google's practices resulted in leveraging of its alleged dominance in the market for licensable mobile operating systems and app stores for Android, to protect its position in the downstream markets in violation of Section 4(2)(e) of the Act. The Commission's reasoning failed to (i) identify the two relevant markets; (ii) identify the alleged anticompetitive conduct in the market where dominance is being alleged to be leveraged; (iii) establish a causal link between dominance in one market and its use to enter or maintain dominance in another market. Commission failed to demonstrate that Google's conduct caused anticompetitive effects in the undefined downstream markets. It is submitted that the Commission was required to carry an effect analysis to prove an abuse of dominance. It is submitted that this Tribunal in ***"Google LLC & Anr. vs. Competition Commission of India and Ors."*** (hereinafter referred to as "1st Google Case") has held that effect analysis is required to be conducted before coming to a finding that a

dominant player has abused its dominance. The Commission has adopted the legally flawed premise that the Commission is not required to conduct an effect analysis stating that "once an entity is found to be dominant in the relevant market, the Act recognises its ability to adversely affect competition in the market". The Commission's submission that Act has been enacted to prevent "likely" effects whereas Section 4 of the Act does not support any such submission. The materials on the record clearly demonstrate that there has been no anticompetitive effect in the market considering the minimal share of UPI transactions on Google Play vis-à-vis transactions in UPI ecosystem. The transactions on Google Play are a mere 0.1% of the total payments processed through UPI in India. The Commission has issued various directions on premise that Google is a gatekeeper which direction amounts to a form of ex ante regulation for undefined "gatekeepers" beyond the Commission's powers under Sections 4 and 27 of the Act. The Report of the Committee on Digital Competition Law and Raghavan Committee Report has made certain recommendations on the law which is yet to be enacted providing for obligations of a gatekeeper. Remedial direction issued under paragraph 395 of the impugned order suffers from several legal infirmities. Directions under paragraphs 395.2 to 395.7 are unsupported by any corresponding finding of contravention of the Act and therefore *ultra vires.* Absence of finding of contravention, no remedial action can be directed under Section 27 of the Act. Directions under paragraphs 395.2 to 395.8 amounts to a form of ex ante regulation for undefined "gatekeepers" beyond the Commission's powers. Many of the directions are vague, disproportionate and unnecessary. Failing to correct these *ultra vires*,

overboard and disproportionate remedial directions will have serious consequences for Google which include exposure to proceedings for non-compliance which attracts civil and criminal penalties. Shri Sajan Poovayya challenging the penalty imposed under Section 27(2) submits that the CCI erred in quantifying the penalty based on Google's entire turnover in India rather than Google's relevant turnover i.e. turnover attributable to Google Play. The submission of the Commission that relevant turnover does not apply to abuse of dominance cases is incorrect. Judgment of the Hon'ble Supreme Court in ***"Ecel Corp Care vs. CCI"*** had already laid down that penalty can be imposed only on the relevant turnover. Thus, relevant turnover would have been Google's turnover attributable to Google Play's Billing System for the purchase of paid apps and IAPs on Play in India. Commission did not restrict itself to Google Pay and Google Play Store. It considered Google's total turnover from its entire business operations in India based on a legally untenable rationale. Google has also provided details of its revenue earned from advertising which is not attributable to Play and is generated through distinct Ads service. Commission failed to demonstrate any link between Ads revenue and Play revenue. The fact that data was provided with disclaimers and caveats cannot be a basis for imposing penalty on entire turnover. Commission's reliance on the judgment of this Tribunal in Google LLC vs. CCI is erroneous as a fact that case was vastly different. If Commission's stance is accepted, Google will be penalised based on its total turnover every time it is found to be in contravention of the Act for any of the product/service it operates. This is against the principles of proportionality set out by the Hon'ble Supreme Court in Excel

Crop's case. Commission could not have imposed a provisional penalty which are against the pronouncement made by this Tribunal in Google LLC vs. CCI (1st Google Case). All directions issued by the Commission in paragraph 395 need to be set aside as well as the penalty imposed. Actual anti-competitive effect has not been proved by any effect analysis. No violation of any of the provision of Section 4 has been established. There was no occasion to pass any order under Section 27. DG's investigation was not in accordance with the principle of natural justice. The DG posed leading questions to the select group which he chooses to include in inquiry. DG excluded key stakeholders from its inquiry, including Google's largest competitor for app distribution, Apple. DG Report cherry picked evidence while ignoring swathes of contrary evidence and submissions from Google and third parties. In submissions, Appellants has raised objections to the procedure adopted by DG in conducting the investigation which was all ignored by the Commission. Google has legitimate business consideration for providing Google Play's Billing System for purchases made in the different apps hosted on Google Play for ease of keeping a track of revenue generated and with further ability to deduct its commission without any hassle and incurring any extra efforts of mechanism for realising its commission. The use of a payment processor by Google for its app YouTube has no comparison with app hosted on Google Play. Google has not to deduct any commission from revenue generated from YouTube. However, modification of policy as was enforced from 01.04.2022 that all Google owned app are also required to use GPBS, thus, the above could not be any basis for finding out any discrimination on the part of the Google.

5. Shri Balbir Singh, Learned Senior Counsel appearing for the Commission refuting the submissions of the Appellants submits that a holistic reading of the Act would show that it aims to combat the evils of not only anti-competitive harm that has already occurred but also to prevent conduct likely to cause such anti-competitive harm. Counsel referring to the judgment of this Tribunal in 1st Google Case submits that this Tribunal held that 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. It is, however, submitted that this Tribunal in 1st Google Case did not elaborate whether the effects analysis would encompass only conduct leading to actual harm or also include conduct that was capable of causing such harm. It is submitted that various judgments which have referred to by this Tribunal in 1st Google Case with approval has clearly laid down that effect based analysis would include an analysis of conduct likely to cause harm to competition. In addition to conduct that has already caused to such harm, it is submitted that in event the Commission can act only after actual harm has occurred, the Commission would have always to wait for actual harm in the form of market distortion and consumer detriment to occur which cannot be the object of the Act. Counsel for the Commission further submits that the Commission has correctly analysed the DG Report, response given by Google and other materials and evidence and returned the finding regarding violation of Section 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b), 4(2)(c) and 4(2)(e). The submission of the Appellant that no independent finding has been

returned by the Commission on various violation is not correct. The Commission has returned independent finding on each of the violation after considering the material and evidence on record. Coming to the market determination by the Commission, it is submitted that the Commission has determined the relevant market. The submission of the Appellant that other digital payments like wallet, debit card, credit card, net banking are substitutable with payment through UPI app cannot be accepted. The Commission has considered the submissions elaborately and has returned its finding. The Commission has rightly held that UPI enable digital payment apps and debit/credit cards based payments do not fall in the same market. The Commission has also noticed the difference between payment through UPI and net banking and held that there is no substitutability between payment through UPI and transfer through net banking. Similarly, the Commission has also examined and held that payment to UPI and mobile wallets are two different. The Commission has also rightly held that Google to be dominant in the market for licensing OS for smart mobile device in India and market for app stores for android smart mobile in India. Google charges service fee which in few cases extend to 30% of revenue which is unfair and discriminatory. Google has also been adopting discriminatory practices. Google is paying only fee of 2.35% to payment processor with regard to its app 'YouTube' whereas it imposes service fee of 15 to 30% on other apps. Discriminatory practices result in competitive disadvantages to the competitor of Google in downstream market by increasing their costs. GBPS providing for mandatory and exclusive imposition, GBPS imposes an unfair condition on app developers. App developers should have been given

freedom to use their own payment system and initially upto year 2020, app developers were permitted to use their own payment mechanism. With respect to anti-steering provisions, ability of app developers to inform consumers within an app of the ability to purchase in-app content elsewhere, violates Section 4(2)(a)(i). Discriminatory conduct arising from different imposition of service fee violates Section 4(2)(a)(i), 4(2)(a)(ii) and 4(2)(e) of the Act. Discriminatory practices result in competitive disadvantage to the competitors of Google in the downstream market by increasing their costs. It is further submitted that the mandatory imposition of GPBS limits innovation in the market. Evidences were placed before the DG by other market players to the effect that charging of exorbitant service fee of 15 to 30% has a cascading impact. Increased cost is to be absorbed by the developer leaving lessor amount to research to improve app quality. The mandatory requirement for GPBS has significant negative effect on the improvements and innovative solutions that third party payment processors would be able to bring to the market. Counsel for the Respondent has referred to several evidences which was collected and referred to by the Commission in the impugned order. Shri Balbir Singh referring to Data Collection Policy of Google submits that Google has access to significant volume and category of granular data of the app users including complete personal as well as financial transaction information. By having control on the data, Google is in position to put its competitors in a disadvantageous position in the downstream market. Google has provided unfairly long settlement period which is being perpetuated through mandatory GPBS. Unlike, industry practice of making payment in 2-3 days, Google provides

itself a leeway wherein the payments are released after a gap of 15 to 46 days from the day of transaction, this is unfair for app developers especially small app developers. If the app developers would have freedom to choose a payment processor of their choice, they would be able to receive payment in shorter time.

5.1. Coming to the imposition of penalty, it is submitted that the Commission follows the two stage analysis prescribed in Excel Crop Care Ltd. case i.e. identifying the relevant turnover for imposing of penalty and (ii) considering all aggravating and mitigating factors in arriving at the quantum of penalty. The impugned order correctly holds that relevant turnover must cover all relevant revenue streams. The Google generates revenue through both advertising and by charging service fees. The conduct of Google is a continuation of its vertical integration strategy based on data collection and monetisation. Data given by Google was incomplete accompanied by several caveats and unsupported by certificates of Chartered Accountants. The impugned order has correctly considered the turnover of Google as a whole for the purpose of calculating monitoring penalty. The submission of the Google that only turnover based on Google Play revenue should be considered is incorrect and inappropriate in cases involving digital market platforms. The imposition of penalty is in accordance with law and the Act.

6. Shri Jayant Mehta, Learned Senior Counsel appearing for the Respondent No.3 submits that where the app developers had choice 80% were using non-GPBS payment system. Learned Counsel has referred to paragraph 295 of the order of the Commission. By mandatory imposition of

GPBS, all other options were ousted. Google is both Gatekeeper and dominant player in the market. The mandatory use of GPBS is taking data from customers of app developers. Counsel for the Informant has also supported the impugned order and submits that the Commission has rightly returned the finding with respect to abuse of its dominant position and the finding of violation of Section 4(1)(a)(i) & (ii), 4(2)(b), 4(2)(c) and 4(2)(e) are based on the evidence on record and needs no interference.

7. We have considered the submissions of learned Counsel for the parties and have perused the record.

8. Before we enter into respective submission of parties, it is relevant to notice the provisions of the Competition Act, 2002 (as applicable in the facts of the present case). Section 2, which is a definition clause, defines 'relevant market', 'relevant geographic market' and 'relevant product market' in Section 2(r), (s) and (t), which are as follows:

> *"(r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;*
>
> *(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;*

(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;"

9. 'Turnover' has been defined in Section 2(y). The CCI has found violation of provisions of Section 4 in the present case. Section 4 contains heading of 'Abuse of dominant position'. Section 4 of the Act provides as follows:

"Abuse of dominant position

4. (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.

10. Section 19 deals with 'Inquiry into certain agreements and dominant position of enterprise'. Section 19, sub-section (1), sub-clause (a) and sub-section (4) are as follows:

> *"**19.** (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"*
>
> *(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."

11. Section 26 deals with 'Procedure for inquiry under Section 19. Section 26, sub-section (1), (3) and (4) are as follows:

*"**Procedure for inquiry under section 19**]*
26.(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:
Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in sub section (3) to the parties concerned:

Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub- section (3) to the Central Government or the State Government or the statutory authority, as the case may be."

12. Section 27, which deals with 'Orders by Commission after inquiry into agreements or abuse of dominant position', 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: -

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(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:

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.

(c) Omitted by Competition (Amendment)Act, 2007

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any:;

(f) Omitted by Competition (Amendment)Act, 2007

(g) pass such other order or issue such directions as it may deem fit.

Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause(b) of the Explanation to section

> *5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group."*

13. In the present case, after receipt of the information dated 20.02.2020, the CCI registered Case No.07 of 2020. An order under Section 26(1) was passed by the CCI in Case No.07 of 2020 forming a *prima facie* view that the Opposite Party (Appellant herein) has contravened various provisions of Section 4 of the Act, which warrant detailed investigation. Two further information were also received by the CCI i.e., from Match Group Inc. on 29.06.2021 and Alliance of Digital India Foundation ("ADIF") on 18.10.2021, on which information Case Nos.14 of 2021 and 35 of 2021 were registered. All cases were clubbed together. The DG conducted the investigation after issuing notice to the Appellant. The Reports dated 16.03.2022 was submitted by the DG, both confidential and non-confidential version of Investigation Report. The Reports were forwarded to the Appellant and the Informants, who were asked to submit their objections/ suggestions to the DG's Report. The Appellant submitted its response before the CCI. After completing the hearing, the CCI has passed the impugned order dated 25.10.2022 determining the relevant market and assessment of dominance and noticing the observations of DG. The CCI noticed that DG has identified three different issues for determination where Google has abused its dominant position in respect of each of such alleged conduct. In paragraph 238, Issue No.1 has been noticed in following words:

> *"Issue 1: Whether making the use of Google Play's billing system (GPBS), exclusive and mandatory by Google for App developers/owners for processing of payments for App and in-app purchases and charging 15-30% commission is violative of Section 4(2) of the Act?"*

14. Issue No.2 has been noticed after paragraph 327, which is as follows:

> *"Issue 2: Whether exclusion of other UPI apps/mobile wallets as effective payment options on Play Store is unfair and/or discriminatory as per Section 4(2) of the Act?"*

15. Issue No.3 has been noticed after paragraph 361, which is as follows:

> *"Issue 3: Whether pre-installation and prominence of Google Pay UPI App (GPay) by Google is in violation of Section 4(2) of the Act?"*

16. While analyzing Issue Nos.1 and 2, the CCI has found breach of Section 4, sub-section (2)(a)(i) and Section 4(2)(c) and (e) of the Act. While answering Issue No.3, the CCI has held that Investigation did not find sufficient evidence to indicate that Google has abused its dominant position so far as issue pertaining to pre-installation of Google Pay UPI App is concerned. The CCI has determined the following relevant markets in paragraph 234, which is as follows:

> *"**234.** To summarize, the Commission determines following five relevant markets in the present matter:*
>
> *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 Apps facilitating payment through UPI in-India"*

17. The CCI in paragraph 235 has also held Google to be dominant in the first two relevant markets, i.e., market for licensable OS for smart mobile devices in India and for app store for Android smart mobile OS in India. Paragraph 235 is as follows:

> *"**235.** Further, the Commission also holds Google to be dominant in the first two relevant markets i.e., market for licensable OS for smart mobile devices in India and market for app store for Android smart mobile OS in India."*

18. After holding the Google to be dominant in first two relevant markets, the CCI proceeded with the assessment of alleged abuse of dominant position by Google and proceeded to notice the observations of the DG, response given by the Google, its averments have been noticed by the CCI from paragraph 301 onwards. The CCI concurred with the observations of the DG that Google has imposed unfair and discriminatory conditions in violation of provisions of Section 4(2)(a)(i) and 4(2)(a)(ii) of the Act. The observation of the CCI are contained in paragraph 312 of the order, which are to the following effect:

> *"312. The Commission notes that Google has made the use of GP.BS mandatory and exclusive for processing of payments for apps and in-app purchases. If the app developers do not comply with*

Google's demand of using GPBS, they are not permitted to list their apps on the Play Store and thus, would lose out the vast pool of potential customers in the form of Android users. Further, making access to the Play Store dependent on mandatory usage of GPBS for paid apps and in-app purchases is one sided and arbitrary and devoid of any legitimate business interest. The app developers are left bereft of the inherent choice to use payment processor of their liking from the open market. The Commission is of the view that the conduct of Google constitutes an imposition of unfair condition on app developers. It has also been found during investigation that Google is following discriminatory practices by not using GPBS for its own applications i.e., YouTube. Therefore, the Commission concurs with the finding of the DG that Google has imposed unfair and discriminatory conditions in violation of the provisions of Section 4(2)(a)(i) of the Act. This also amount to imposition of discriminatory pricing as Google's own apps i.e., YouTube is not paying the service fee as being imposed on other apps covered in the GPBS requirements. Thus, the Commission is of the view that Google has violated Section 4(2)(a)(n) of the Act."

19. The CCI has recorded its conclusion in paragraph 392, pointing out various violations of the provisions of Section 4(2) of the Act. Paragraph 392 of the judgment is as follows:

"392. The Commission concluded that,

392.1. making access to the Play Store, for app developers, dependent on mandatory usage of GPBS

for paid apps and in-app purchases constitutes an imposition of unfair L:umlilion on app developers. Thus, Google is found to be in violation of the provisions of Section 4(2)(a)(i) of the Act.

392.2. Google is found to be following discriminatory practices by not using GPBS for its own applications i.e., YouTube. This also amount to imposition of discriminatory conditions as well as pricing as YouTube is not paying the service fee as being imposed on other apps covered in the GPBS requirements. Thus, Google is found to be in violation of Section 4(2)(a)(i) and 4(2)(a)(ii) of the Act.

392.3. mandatory imposition of GPBS disturbs innovation incentives and the ability of both the payment processors as well as app developers to undertake technical development and innovate and thus, tantamount to limiting technical development in the market for in-app payment processing services. Thus, Google is found to be in violation of the provisions of Section 4(2)(b)(ii) of the Act.

392.4. mandatory imposition of GPBS by Google, also results in denial of market access for payment aggregators as well as app developers, in violation of the provisions of Section4(2)(c) of the Act.

392.5. practices followed by Google results in leveraging its dominance in market for licensable mobile OS and app stores for Android OS, to protect its position in the downstream markets, in violation of the provisions of Section 4(2)(e) of the Act.

392.6. different methodologies used by Google to integrate its own UPI app visa-vis other rival UPI

apps with the Play Store results in violation of Sections 4(2)(a)(ii), 4(2)(c) and 4(2)(e) of the Act."

20. The order of the CCI is contained from paragraphs 393 to 420. In paragraph 394, the CCI again hold that the Google has abused its dominant position in contravention of the provisions of Section 4(2)(a)(i), Section 4(2)(a)(ii), Section 4(2)(b)(ii), Section 4(2)(c) and Section 4(2)(e). Paragraph 394 of the judgment is as follows:

"394. The Commission holds Google to be dominant in in the first two relevant markets i.e., market for licensable OS for smart mobile devices in India and market for app store for Android smart mobile OS in India. Further, Google is also found to have abused its dominant position in contravention of the provisions of Section 4(2)(a)(i), Section 4(2)(a)(ii), Section 4(2)(b)(ii), Section 4(2)(c) and Section 4(2)(e) of the Act, as already discussed in the earlier part of this order."

21. The remedies are contained in paragraph 395.1 to 395.8, which are as follows:

"395.1. Google shall allow, and not restrict app developers from using any third party billing/ payment processing services, either for in-app purchases or for purchasing apps. Google shall also not discriminate or otherwise take any adverse measures against such apps using third party billing/ payment processing services, in any manner.

395.2. Google shall not impose any Anti-steering Provisions on app developers and shall not restrict

them from communicating with their users to promote their apps and offerings, in any manner.

395.3. Google shall not restrict end users, in any manner, to access and use within apps, the features and services offered by app developers.

395.4. Google shall set out a clear and transparent policy on data that is collected on its platform, use of such data by the platform and also the potential and actual sharing of such data with app developers or other entities, including related entities.

395.5. The competitively relevant transaction/ consumer data of apps generated and acquired through GPBS, shall not be leveraged by Google to further its competitive advantage. Google shall also provide access to the app developer of the data that has been generated through the concerned app, subject to adequate safeguards, as highlighted in this order.

395.6. Google shall not impose any condition (including price related condition) on app developers, which is unfair, unreasonable, discriminatory or disproportionate to the services provided to the app developers.

395.7. Google shall ensure complete transparency in communicating to app developers, services provided, and corresponding fee charged. Google shall also publish in an unambiguous manner the payment policy and criteria for applicability of the fee(s).

395.8. Google shall not discriminate against other apps facilitating payment through UPI in India vis-a-vis its own UPI app, in any manner."

22. The discussion of imposition of penalty is contained in paragraph 398. The CCI imposed penalty of Rs.936.44 crores upon Google for violation of Section 4. Paragraphs 416 and 417 are as follows:

> *"416. On a holistic appreciation of the facts and circumstances of the case and the mitigating factors put forth by the OPs, the Commission is of the view that the ends of justice would be met if a penalty of 7 % of the relevant turnover. Accordingly, the Commission imposes a penalty on Google@ 7 % of its average of the average of relevant turnover for the last three preceding financial years 2018-19, 2019-20 and 2020-21, as provided by Google. Accordingly, the computation of the quantum of penalty imposed on Google is set out below:*

Turnover for FY 2018-19	Turnover for FY 2019-20	Turnover for FY 2020-21	Average turnover for three preceding financial years	Penalty @ 7% of the average turnover
10,365.32	13,025.10	16,742.52	13,377.65	936.44

> *417. Consequently, the Commission imposes a penalty of Rs. 936.44 crore (Rupees Nine Hundred Thirty-Six crore and forty-four 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."*

23. After having briefly noting the findings and order of the CCI, we proceed to enter into respective submissions of the parties advanced before us.

24. On the submissions advanced by learned Counsel for the parties and materials on the record, following are the questions, which need to be considered and answered:

(1) Whether identification of 'relevant market' by the CCI insofar as market for apps facilitating payment through UPI in India is wrong and whether all digital modes of payment, i.e. wallets, UPI net banking, credit and debit card are substitutable both from customer and market perspective?

(2) What are the legal standards for effect based analysis. Whether effect based analysis means both proof of conduct leading to actual restriction as well as conduct which is capable of restricting competition?

(3) Whether Commission has conducted any effect analysis in its decision or not?

(4) Whether the Appellant by requiring app developers to mandatory use of Google Play (GPBS) have imposed a discriminatory condition in sale of goods and services and violation of Section 4(2)(a)(i) was proved?

(5) Whether requirement of payment of commission/fee by the app developers to the extent of 15-30%, which fee is not

being paid by the YouTube for which payment processor is engaged by Google on payment of 2.3% is discriminatory and violates Section 4(2)(a)(ii)?

(6) Whether Google restrictions for mandatorily using of GPBS have significant negative effect on the improvements and innovative solutions that third party payment processors/ aggregators would be able to bring to the market and is in violation of Section 4(2)(b)(ii) of the Act?

(7) Whether Google has abused its dominant position in the app store market and indulged in practices resulting in denial of market access, which is violative of Section 4(2)(c) of the Act?

(8) Whether practices followed by Google making developers dependent on Google to access the users on its platform, result in leveraging its dominance in market for licensable mobile OS and app stores for Android OS, to protect its position in the downstream markets, is in violation of the provisions of Section 4(2)(e) of the Act?

(9) Whether the CCI found charging of commission/ service fee from 15% to 30% discriminatory?

(10) Whether directions in paragraphs 395.2 to 395.8 of the impugned order amounts to form of *ex ante* regulation for undefined "gatekeepers" beyond the CCI power under Section 4 and 27 of the Act?

(11) Whether mention of directions contained in paragraph 395 are *ultra vires*, overboard and disproportionate remedial directions?

(12) Whether penalty imposed by CCI on entire turnover of the Google is unsustainable and the CCI could have imposed penalty only on the relevant turnover, i.e., turnover of Play Store and the penalty imposed is unsustainable?

(13) To what relief, if any, the Appellant is entitled?"

Question No.(1)

(1) Whether identification of 'relevant market' by the CCI insofar as market for apps facilitating payment through UPI in India is wrong and whether all digital modes of payment, i.e. wallets, UPI net banking, credit and debit card are substitutable both from customer and market perspective?

25. As noted above, the CCI has determined following markets for purposes of the case:

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 Apps facilitating payment through UPI in-India"

26. The challenge mounted by the learned Counsel for the Appellant is principally on the determination of the market for Apps facilitating payment

through UPI in India. The submission of the Appellant is that there is no basis of this narrow market definition. The submission is that all digital mode of payment i.e. wallet, UPI, net-banking and credit and debit cards are substitutable, both from customers' and market perspective. It is submitted that Google as well as Amazon has given evidence that all modes of digital payment, such as wallet, UPI, credit and debit card are substitutable from the consumer perspective. The transaction by Google is less than 1% by UPI. The UPI Apps were on two methodology, i.e. intent flow and collect flow. Google Play work on intent flow. The submission which has been pressed by the Appellant is that the payment system introduced by Google Pay by UPI Apps is substitutable with other modes of payment like Wallet, credit and debit card and net banking and determination of market on only market for licensable OS for smart mobile devices and Apps for facilitating payment through UPI in India as determined by the Commission is not in accordance with the scheme of the Act.

27. We have noticed the statutory provisions of Act, including the definition of relevant market and relevant product market. The definition of relevant product market contained in Section 2(t) means 'a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use'. The Hon'ble Supreme Court had occasion to consider the concept of 'market' under the Competition Act, 2022 in ***Competition Commission of Inida vs. Bharti Airtel Ltd. & Ors. – (2019) 2 SCC 521***. The Hon'ble Supreme

Court held that market definition is a tool to identify and define the boundaries of competition between firms. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. In paragraph 87 of the judgment, following was laid down:

> *"87. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which the competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. Therefore, the purpose of defining the "relevant market" is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned. In*

> *essence, it is the notion of "power over the market" which is the key to analyse many competitive issues."*

28. We notice that CCI has dealt upon substitutability of UPI and other method of digital payments. The DG's observations have been noticed in paragraph 216 with regard to difference between UPI and cards. With regard to UPI and net banking the difference has been noticed in paragraphs 218 and 219. The CCI has recorded it concurrence with the opinion of the DG that UPI-enabled digital payments Apps provide several convenient and value-added features, which make it a distinct payment system and there is no substitutability between payments through UPI enabled digital payments Apps and transfers through net banking. In paragraph 221, following has been laid down:

> *"221. Based on the above, the Commission concurs with the DG that UPI enabled digital payments apps provide several convenient and value-added features which make it a distinct payment system. Thus, there is no substitutability between payments through UPI enabled digital payments apps and transfers through net banking (NEP'T, RTGS and IMPS)."*

29. The CCI concluded following in paragraph 224:

> *"224. On the basis of the above analysis, it can be concluded that there is no substitutability between UPI enabled digital payments apps and mobile wallets."*

30. The CCI while considering the question of substitutability between UPI, digital payments and other payments has also noticed the evidence, which were on the record, i.e. evidence of Amazon Pay Pvt. Ltd., Paytm, PhonePe, Xiaomi. The observations and findings of the CCI were recorded noting that there is no substitutability between UPI enabled payment system and other payment system, i.e. Wallets, credit and debit cards and net banking.

31. We are of the view that findings entered by the CCI while determining the relevant market and holding the relevant markets, i.e. market for Apps facilitating payment through UPI in India has been correctly determined. The said product market is not interchangeable or substitutable by the consumer by other payment system, i.e. payment by credit or debit cards, Wallet and net banking. Thus, we do not find any infirmity in such determination of product market by the CCI.

Question No. (2)

(2) What are the legal standards for effect based analysis. Whether effect based analysis means both proof of conduct leading to actual restriction as well as conduct which is capable of restricting competition?

32. Submission of Counsel for the Appellant is that it is now well settled that effect based analysis is requirement before finding out any breach of Section 4. Counsel for the Appellant has referred to judgment of this

Tribunal in 1st Google Case where this Tribunal has held that effect basis analysis is required for establishing any contravention of Section 4. It is submitted that the effect based analysis should consider actual harm which has caused to the competition and unless actual harm is not determined, no violation of Section 4 can be found. It is submitted that the Commission has not conducted any effect based analysis. It is submitted that the Commission did not analyse whether different integration methods produced any adverse effect on competition in India. The Commission proceeded on the basis that there is no requirement to conduct an effect analysis. Counsel for the Appellant has referred to paragraph 347 of the order of the Commission. Appellant submits that it is demonstrable from the material on record that there has been no anti-competitive effect in the market and it is not possible thereto to have any such effect considering the minimal share of UPI transaction on play vis-à-vis transaction in UPI eco system.

33. Shri Balbir Singh, Learned Senior Counsel appearing for the Commission elaborating his submission submits that the Commission proceeds without prejudice to its submissions made in the Appeal pending before the Hon'ble Supreme Court challenging the 1st Google Case order of this Tribunal that an "effect based analysis" is necessary to establish abuse of dominance. It is submitted that the Appellant has canvassed an incorrect legal standard when it asserts that the only evidence relevant to an effects based analysis is that of actual harm which has already occurred. It is submitted that the analysis means both proof of conduct leading to actual restrictions as well as conduct which is capable of restricting competition

are relevant to the effects based analysis. Accepting the interpretation put up by the Appellant would be that the Commission would always have to wait for actual harm in the form of market distortion and consumer detriment to occur and would be barred from protecting the consumer before such harm has occurred, even in cases where evidence was available of the fact that a dominant enterprise was capable and likely to cause such harm. Counsel for the Commission has referred to the scheme of Act especially, preamble, Section 3, Section 6, Section 19(4)(1), Section 20(2) r/w 20(4) and Section 32. It is submitted that although this Tribunal in 1st Google Case has laid down that 'effect analysis' of anti-competitive conduct is required to be done but this Tribunal did not elaborate in the above judgment whether the effects analysis would encompass only conduct leading to actual harm or also include conduct that was capable of causing such harm, in reaching its conclusion. Counsel for the Commission has referred to the various paragraphs of the 1st Google Case and certain foreign judgments which have been referred to and relied in 1st Google Case. Counsel for the Respondent has also referred to and relied on various judgments of European Court of Justice, European Commission and Competition Appeal Board of Singapore.

34. We have considered the submissions of the Counsel for the parties and perused the record.

35. We need to first notice the judgment of this Tribunal in 1st Google Case delivered between the parties while deciding an Appeal challenging the order of the Commission holding violation of Section 4 of the Act by Google.

In the above case decided by this Tribunal on 29.03.2023 against which judgment, although an appeal is pending before the Hon'ble Supreme Court but there is no interim order staying the judgment.

36. In the above case, one of the issues which has been framed by this Tribunal was *"Whether for proving abuse of dominant position under Section 4 of the Competition Act, 2002 any 'effect analysis' of anticompetitive conduct is required to be done? And if yes; what is the test to be employed?".* This Tribunal proceeded to consider the above issue. This Tribunal has referred to and relied upon 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. Paragraph 135 of the judgment of the Commission was noticed. It is relevant to extract following part of paragraph 135 which laid down that while 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. It is useful to extract following from paragraph 135, which is as follows:-

> *"135. ……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."*

37. This Tribunal in the aforesaid case has noted various other judgments of the Competition Appellate Tribunal. Judgment of the Hon'ble Supreme Court in ***"(2019) 8 SCC 697 – Uber (India) Systems Pvt. Ltd. vs. Competition Commission of India"*** was referred in paragraphs 55 and 56 of the 1st Google Case which are as follows:-

> *"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."*

38. Report of the Competition Law Review Committee (July 2019) was also noticed in detail. The Committee took the view that effect analysis by the Commission is well within the test of Section 4(2) of the Act, hence, no amendment is required in Section 4(2). It is useful to notice paragraph 58 of the judgment which is as follows:-

> *"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."

39. This Tribunal in 1st Google Case has also noticed Article 102 of Treaty on the Functioning of the European Union which contains provision of abuse of dominant position. It is useful to extract paragraphs 60 and 61 of the judgment where this Tribunal has noticed the treatment of the subject by **Richard Whish & David Bailey**. Paragraphs 60 and 61 is as follows:-

"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 anticompetitive foreclosure of the market, thereby having an adverse effect on consumer welfare."

40. After considering the relevant cases, this Tribunal recorded its conclusion that effect analysis has to be undertaken. In paragraphs 65 and 66, following has been held:-

"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."

41. Counsel for the Commission has proceeded to make his submission relying on the ratio of the judgment in 1st Google Case. However, Shri Balbir Singh submits that this Tribunal in 1st Google Case did not elaborate whether the effect analysis would encompass only conduct leading to actual harm or also include conduct that was capable of causing such harm.

Counsel for the Commission submits that effect based analysis would include an analysis or conduct likely to or capable of causing harm to competition, in addition to conduct that has already caused such harm. Counsel for the Appellant has referred to the preamble of the Act which provides:-

> *"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."*

42. We may refer to Section 18 of the Act which provides for 'duties of commission'. Section 18 provides as follows:-

> *"**Duties of Commission***
> *18. 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."*

43. Section 18 thus, enjoins 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. Counsel for the Commission has relied on certain other cases. Counsel for the Commission has referred to paragraphs 59 to 62 of the judgment of this Tribunal in 1st Google case especially, the passage from Richard Whish & David Bailey where it has observed:-

> *"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"*

44. Counsel for the Commission had also relied on the judgment of the European Court of Justice in ***"Tomra Systems ASA v. Commission- Case C-549/10 P, EU:2012:221"*** wherein in paragraph 68, it was held that it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect. Reliance has also been placed on the judgment of the European Court of Justice in ***"Post Danmark A/S vs. Konkurrenceradet, Case C-209/10, EU:C:2012:172"*** wherein paragraph 44, following was laid down:-

> *"44. Having regard to all the foregoing considerations, the answer to be given to the questions referred is that Article 82 EC must be*

interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests."

45. Commission has also relied on judgment of the European Court of justice in ***"Intel vs. Commission, Case C-413/14 P, EU:C:2017:632"*** where in paragraphs 138 and 139, following was laid down:-

"138. 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 its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

139. [As rectified by order of 19 September 2017] In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the

> *challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (see, by analogy, judgment of 27 March 2012, Post Danmark, C-209/10, EU:C:2012:172,paragraph 29)."*

46. The Commission also referred to judgment of the European Court of Justice in case of Google LLC itself where violation of Article 102 TFEU is under consideration in ***"Google Android- AT. 40099, C (2018) 4761"***. In paragraph 733 of the said judgment, it was held that the Commission is not therefore required to demonstrate that a particular practice has actual anti-competitive effects. Paragraph 733 of the above judgment is as follows:-

> *"733. Concerning the effects of the dominant undertaking's conduct, while they must not be of a purely hypothetical nature, they do not necessarily have to be concrete. It is sufficient that the conduct tends to restrict competition or is capable of having that effect, regardless of its success. The Commission is not therefore required to demonstrate that a particular practice has actual anti-competitive effects."*

47. We need to notice one more judgment of the Competition Appeal Board of Singapore in ***"Re. Abuse of a Dominant Position by SISTIC.com Pte. Ltd., CCS/600/008/07"***. In paragraph 290 of the above judgment, it was held that it is sufficient for the competition authority to show a likely

effect, and is not necessary to demonstrate an actual effect on the process of competition. In paragraph 290, following was held:-

> *"290. The legal test of abuse of dominance as established under EU/UK law, is neatly summarised by the CCS at [212] of its Closing Submissions as follows:*
>
> > *"...an abuse will be established where a competition authority demonstrates that a practice has, or likely to have, an adverse effect on the process of competition. In particular:*
> >
> > *(a) It is sufficient for the competition authority to show a likely effect, and is not necessary to demonstrate an actual effect on the process of competition.*
> >
> > *(b) If an effect, or likely effect, on restricting competition by the dominant undertaking is establish, the dominant undertaking can advance an objective justification. If it can adduce evidence to demonstrate that its behaviour produces countervailing benefits so that it has the net positive impact on welfare. However, the burden is on the undertaking to demonstrate an objective justification."*

48. From the above discussions, it is clear that in "effect analysis assessment", the conduct of dominant entity which has caused anti-competitive effect or it is likely to have an adverse effect on the competition, both need to be looked into. Effect analysis cannot only confine to conduct which has caused actual anti-competitive effect. If an effect is likely to have

effect on the restricting competition by the dominant undertaking that can very well also be examined by Competition Authority to find out abuse by dominant entity.

49. We, thus, are of the view that the submission made by the Commission that effect analysis need to include both conduct leading to actual harm and also conduct that was capable of causing such harm has to be accepted. We need to put a caveat, the conduct with regard to which effect analysis has to take place is a conduct which has already happened or occurred. No contravention can be proved on any likely conduct of dominant entity. It is only in effect analysis likely effect can be looked into. Whether it has caused actual harm or capable of resulting in anti-competitive effect need also to be looked into.

Question No. (3)

(3) Whether Commission has conducted any effect analysis in its decision or not?

50. Counsel for the Appellant contended that the Commission has taken the view that once an entity is found to be dominant in the relevant market, the Act recognises its ability to adversely affect competition in the market unilaterally through its conducts, the contravention of the Act stands established. Counsel for the Appellant has referred to paragraph 347 of the order of the Commission, which is as follows:-

> *"347. In view of the above regulatory framework as provided under the Act, the Commission has carefully*

perused the provisions of Section 4 of the Act and on a holistic consideration thereof, it is observed that "dominant position" under the Act has been defined as meaning a position of strength, enjoyed by an enterprise, in the relevant market which enables it to operate independently of competitive forces or to affect its competitors or consumers in its favour. Thus, once an entity is found to be dominant in the relevant market, the Act recognizes its ability to adversely affect competition in the market unilaterally through its conducts. As such, the dominant enterprise is clothed with a special responsibility not to indulge in the conducts which are enumerated in Section 4(2) of the Act. Resultantly, once a dominant undertaking is found to have indulged in any of the acts provided in Section 4(2) of the Act, the contravention of the Act stands established. This is further evident from the phraseology used in Section 4(2) of the Act which, inter alia, provides that there shall be an abuse of dominant position if an enterprise directly or indirectly "imposes" unfair or discriminatory condition/ price in purchase or sale of goods or services. The moment there is any imposition of any unfair or discriminatory condition by a dominant player, the statutory prohibitions shall trigger. The same is true for other instances of abuse as enshrined in Section 4(2) of the Act as well and the same also have to be read in this manner, which is consistent with the avowed objectives of the Act, as highlighted above."

51. In paragraph 347 as noted above, the Commission had observed that "*Resultantly, once a dominant undertaking is found to have indulged in any of the acts provided in Section 4(2) of the Act, the contravention of the Act stands*

established". The observations made in paragraph 347 cannot be read to mean that the mere fact that entity is dominant its conduct and act shall lead to contravention. The Commission has used expression "*is found to have indulged in any of the acts provided*", thus, indulgence by the entity in any of the prohibited acts is pre-condition for proving any contravention. We, thus, are of the view that the order of the Commission cannot be read to mean that the Commission has held that merely because Appellant is dominant any of its act shall lead to contravention. We, while considering Question No.(2), have laid down that effect analysis is required to be held with respect to conduct complained off. Both the conduct which has caused actual harm i.e. anti-competitive conduct which is capable of causing anti-competitive effect contravention can be proved. We are not persuaded to accept the submission of the Appellant that the Commission in its order has not conducted any effect analysis rather Commission in various paragraphs have noticed the Report of the DG, the response given by the Appellant and its conclusion and finding. Thus, we find substance in the submission of the Counsel for the Commission that effect analysis was conducted by the Commission.

Question No. (4)

(4) Whether the Appellant by requiring app developers to mandatory use of Google Play (GPBS) have imposed a discriminatory condition in sale of goods and services and violation of Section 4(2)(a)(i) was proved?

52. The Commission in paragraphs 246, 247 and 248 of the impugned order has noted and made observations with regard to GPBS. Paragraphs 246, 247 and 248 of the order are as follows:-

> *"246. One of the primary allegations, in the present matter, is mandatory use of Google Play Billing System (GPBS) for distributing paid apps as well as in-app paid content by the app developers to the users. Google defines and describes the Google Play Billing System as:*
>
> > *"Google Play's billing system is a service that enables you to sell digital products and content in your Android app."*
>
> *247. GPBS is the proprietary billing system of Google. It is an App developer facing system whereby the App developers create account with Google. Further, Google remits App developers the payments collected from users of these Apps who (i) purchase the App from the Google Play Store; or (ii) make purchases of digital goods/services and/or subscriptions within the App. In the process, Google deducts its "service fee" or commission for facilitating this process of collecting payments from users and remitting to App developers.*
> *248. The relevant extract of Google payment policy (DPP)18 for Google Play is as under:*
> *"Payments*
> *1. Developers charging/or app downloads from Google Play must use Google Play's billing system as the method of payment for those transactions.*
>
> *2. Play-distributed apps requiring or accepting payment for access to in-app features or services,*

including any app functionality, digital content or goods (collectively "in-app purchases"), must use Google Play 's billing system for those transactions .....

Examples of app features or services requiring use of Google Play's billing system include, but are not limited to, in-app purchases of

- *Items (such as virtual currencies, extra lives, additional playtime, add-on items, characters and avatars);*
- *subscription services (such as fitness, game, dating, education, music, video, service upgrades and other content subscription services);*
- *app functionality or content (such as an ad-free version of an app or new features not available in the free version); and*
- *cloud software and services (such as data storage services, business productivity software, and financial management software).”*

53. The Commission has also noted the response given by Google with respect to allegation regarding violation of Section 4(2)(a)(i). Google contended that GPBS is safe billing system which protects users. It was further pleaded that GPBS allows Google to efficiently collect its service fee without incurring additional costs. The plea of the Google has been captured by the Commission in paragraph 300.1 which is as follows:-

“300.1. Users and developers benefit from a safe and uniform billing system. As ·a safe billing system, GPBS helps Google to protect users. A secure billing

system increases user trust and willingness to buy online, which helps increase revenues for app developers. Further, GPBS allows Google to efficiently collect its service fee without incurring additional costs to monitor and enforce recovery of service fees or impose an additional administrative burden on developers."

54. Google further had pleaded that there is no violation of Section 4(2)(a)(i) since the Google's payment policy is fair, and the use of standard terms that reduces the potential for discrimination. Paragraph 300.2 of the order is as follows:-

"300.2. There is no violation of Section 4(2)(a)(i) of the Act because Google's Payments Policy is fair, and the use of standard terms reduces the potential for discrimination. Further, Google Play's developer policies - including the requirement that apps use GPBS for IAPs of digital goods - apply to all apps on Google Play, including Google's own app."

55. The Commission has considered the Report of the DG and defence / reply given by the Google and held that Google has made the use of GPBS mandatory and exclusive for processing of payments for apps and in-app purchases. Making access to the Play Store dependent on mandatory usage of GPBS for paid apps and in-app purchases is one sided and arbitrary and devoid of any legitimate business interest. In paragraph 312, the Commission found violation of Section 4(2)(a)(i) in following words:-

> *"312. .....The Commission is of the view that the conduct of Google constitutes an imposition of unfair condition on app developers. It has also been found during investigation that Google is following discriminatory practices by not using GPBS for its own applications i.e., YouTube. Therefore, the Commission concurs with the finding of the DG that Google has imposed unfair and discriminatory conditions in violation of the provisions of Section 4(2)(a)(i) of the Act. This also amount to imposition of discriminatory pricing as Google's own apps i.e., YouTube is not paying the service fee as being imposed on other apps covered in the GPBS requirements. Thus, the Commission is of the view that Google has violated Section 4(2)(a)(ii) of the Act."*

56. We need to consider the question as to whether mandatory conditions put by Google on app developers to make purchases of digital goods service and subscription within app is a discriminatory condition put by the Google. It is on the record that app developers who are desirous of listing their apps on Google Play Store are required to enter into a Developer's Distribution Agreement with Google. App developers had been using different payments mechanism with respect to their paid apps and in-app purchases and requirement of all app developers to accept for GPBS is discriminatory condition which discriminate the developers to use any other payment system. It is further to be noticed that the users who download paid apps and in-app purchases are also now conditioned to make payments as per the GPBS and they have no freedom to make their payments as per the payment system which was being used by them. Google had also given time

to all app developers who have not switched to the GBPS to integrate the GPBS by 31.03.2020. Now, it is mandatory for all app developers to use GPBS. We may refer to the explanation to Section 4(2) which provides as follows:-

> *"(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.]"

57. What explanation provides is that the unfair and discrimination condition in purchase or sale of goods or services referred to in sub-clause (i) shall not include such discriminatory condition or price **which may be adopted to meet the competition**. Thus, to take out a discriminatory condition out of the provision under Section 4(2)(a)(i), it has to be proved that the condition has been adopted to meet the competition. There is no material or pleadings on behalf of the Google to satisfy that condition of mandatory requirement of use of GPBS has been adopted to meet the competition. The Commission after noticing the report of DG and the plea

taken by the Commission has already recorded its concurrence with finding and observations of the DG that Google has imposed unfair and discriminatory condition which finding of the Commission is contained in paragraph 312 which we have already extracted above. We, thus, are of the view that the conclusion drawn by the Commission that there is breach of Section 4(2)(a)(i) of the Act is based on materials on record. We, thus, uphold the decision of the Commission insofar as it held that Appellant has violated provision of Section 4(2)(a)(i).

Question No. (5)

(5) Whether requirement of payment of commission/fee by the app developers to the extent of 15-30% which fee is not being paid by the YouTube for which payment processor is engaged by Google on payment of 2.3% is discriminatory and violates Section 4(2)(a)(ii)?

58. The Commission in its order in paragraph 312 has held that Google has violated Section 4(2)(a)(ii). In paragraph 312 of the order, following has been held:-

> *"312.....This also amount to imposition of discriminatory pricing as Google's own apps i.e., YouTube is not paying the service fee as being imposed on other apps covered in the GPBS requirements. Thus, the Commission is of the view that Google has violated Section 4(2)(a)(ii) of the Act."*

59. The DG in its report has concluded that charging of 15-30% fee by Google is excessive, therefore, unfair in terms of Section 4(2)(a)(ii) of the Act.

60. Google's defence with respect to allegation of violation of Section 4(2)(a)(ii) is that charging of fee of 15-30% from app developers by asking them to use GPBS and engaging a payment processor for its own app YouTube is not comparable. It is submitted that for finding out discrimination between both the entities which are being compared should be based on same footing. App developers who host their apps in Play Store are liable to pay fee on the revenue which are earned by the app developers from the Play Store whereas YouTube is own app of the Google and not claiming fee of 15-30% with regard to said app cannot be said to be discriminatory condition under Section 4(2)(a)(ii). Section 4(2)(a)(ii) is attracted only when price in purchase of sale of goods or services is discriminatory. With regard to YouTube which is own app of the Google, no concept of sale of goods or services by Google is involved. The revenue generated by YouTube is a revenue of the Google and no elements of sale on goods or services with regard to revenue of YouTube is involved nor Google is fixing a price for sale of goods or service with respect to YouTube. Thus, alleged discrimination with regard to not claiming 15-30% fee from YouTube is wholly unfounded and without any basis. We, thus, are satisfied that no allegation of discrimination with regard to condition by which Google claims fee of 15-30% from its app developers who host their paid app and that of engaging a payment processor on lesser payment for its payment in YouTube can be held. The Commission has not adverted to this important aspect of the matter and has erroneously came to the conclusion that there is violation of Section 4(2)(a)(ii) i.e. by imposing discriminatory as Google's

own app i.e. YouTube in not paying service fee as being imposed on the other app. The above conclusion is wholly incorrect and cannot be sustained. We, thus, hold that no violation of Section 4(2)(a)(ii) has been established and the finding and decision of the Commission to that extent deserves to be set aside.

Question No.(6)

(6) ***Whether Google restrictions for mandatorily using of GPBS have significant negative effect on the improvements and innovative solutions that third party payment processors/ aggregators would be able to bring to the market and is in violation of Section 4(2)(b)(ii) of the Act?***

61. The above question relates to Section 4(2)(b(ii) of the Act. The Google's response to abuse has been captured by the Commission in paragraph 300.5 of the order, which is as follows:

> *"300.5. There is no violation of Section 4(2)(b) of the Act because the requirement to use GPBS does not impact the developers' ability to improve their services and compete. Apart from unsubstantiated statements, the DG has not relied on any other evidence to support the allegations that competition has been distorted or innovation has been prevented by Google's collection and use of data from third party developers. The Report relies merely on speculative theories of what Google may do with data collected."*

62. The Commission returned its finding with respect to violation of Section 4(2)(b) (ii) in paragraph 313, which is as follows:

> *"313. The Commission also concurs with the DG that Google's restrictions for mandatorily using GPBS also have significant negative effect on the improvements and innovative solutions that third party payment processors / aggregators would be able to bring to the market. It takes away the incentives and ability that such payment aggregators would have to innovate in payment solutions designated for IAPs, by restricting their entry into this market Further; mandatory imposition of GPBS also discourages app developers from developing"*

63. What is held by the Commission in the impugned order is that Google's restriction for mandatory using GPBS have significant negative effect on the improvements and innovative solutions that third party payment processors / aggregators would be able to bring to the market. Learned Counsel for the Appellant has contended that despite lengthy investigation and having submission from over 40 App developers and payment processors, the CCI does not identify even an iota of evidence of technical development being impeded. To the contrary, the Google showed that development and growth in that sector has only increased. The requirement of Google for App developers to use Google Pay Billing System cannot led to any limit or restriction to technical or scientific development relating to goods or services to the prejudice of consumers. It is on record that payments under the Google Pay Billing System with respect to Play Store are less than 1% with respect to payments made through UPI. It is

useful to notice non-confidential version of Appellant's response to the Report of DG dated 01.08.2022. In paragraph 4.59, 4.60, 4.61 and 4.63, following has been pleaded:

> *"4.59. The Report failed to establish that GPB has caused a denial of market access to payment processors or that such denial has any material effect. An assessment of the performance and level of competition amongst payment processors shows that this market is rapidly expanding, which proves that GPB has in no way stymied market access or materially impacted payment processors.*
>
> *4.60 The use of payment processors in India has shown significant growth, and is expected to become the second largest e-commerce market in the world by 2034.289 Indeed, statements made by payment processors relied on by the DG - including in their submissions to the DG - also support that payment processing is expanding. In light of this, it cannot be said that GPB has had any effect of denying market access to payment processors:*
>
> *a. PayTM, has seen a 200% increase in downloads and a merchant base which increased from 800,000 to 5 million within one year.*
>
> *b. Mobikwik has stated that they are expecting to double their revenue by the end of the current 2022 FY. Mobikwik has confirmed this in its submission to the DG, which states that 'the Indian digital*

payment industry has witnessed extraordinary growth in the last few years, with the volume of transactions growing at double digit numbers as per industry sources'.

c. *Razorpay reported a 65.2% increase in sales in the 2021 FY. Razorpay claims to enable digital payments for more than 200,000 small and large businesses and provides services to banking, lending, payments and insurance companies.*

d. *lnfibeam Avenues has stated that it has more than 3 million merchants on its platform and expects to reach 1 0 million merchants as there is further adoption of digitalization. 295 lnfibeam also states that it has processed INR 1.4 trillion (US$ 19 billion) in the 2021 FY for its 2.5 million plus clients.*

4.61. *Accordingly, it cannot plausibly be said that GPB has had the effect of reducing the ability for these companies to innovate and improve their products by reducing their revenue streams given the strong financial performance they themselves have reported. The DG has failed to critically assess accuracy of these submissions.*

4.63. *The DG has ignored submissions from payment processors that do not support the DG's purported theory of harm. For example, Atom Technologies' Limited (Atom), in its submissions, stated that it did not consider Google to be a competitor as "our focus is on different business*

segments and different merchant categories". Instead Atom listed a number of payment processors - PayTM, PayU, Razorpay, Billidesk, CC Avenue and Mobikwik - as its competitors. This establishes that, contrary to the Report's findings, payment processors do not consider Google a competitor in payment processing. The Report conveniently ignores this submission."

64. It is relevant to notice that Google is not a payment processor or payment aggregator. Google's GPay is an UPI app for making payment with regard to paid app and in-app payments and with regard to different apps hosted by developers in Google Play. Payments through the UPI market has been growing upwardly, which is reflected from pleas made and materials provided by the Appellant before the DG. Growth in the sector having increased upwardly, the observation and finding of the Commission that Google's requirement for mandatorily using of GPBS have limited or restricted technical or scientific development relating to goods or services to the prejudice of consumers, are unsustainable. The payments under Google Play under GPBS being less than 1%, the finding of the Commission that Google has restricted or limited technical or scientific development relating to market of payment processors/ aggregators, cannot be sustained. When more than 99% market of payment through UPI is open and available, it does not appeal to reason that Google has limited or restricted technical or scientific development. It is further relevant to notice that three markets, which were determined, on which entire investigation was conducted by the DG and findings have been returned by the DG, the market of payment

processors/ aggregators, was not determined as relevant market. The market of payment processors/ aggregators, having not been established as relevant market, nor relevant facts have been evidenced regarding payment processors/ aggregators, the findings of violation of Section 4(2)(b)(ii), cannot be sustained.

65. We thus, do not find any violation of Section 4(2)(b)(ii) of the Act proved before the Commission.

Question No.(7)

(7) Whether Google has abused its dominant position in the app store market and indulged in practices resulting in denial of market access, which is violative of Section 4(2)(c) of the Act?

66. The above question relates to Section 4(2)(c) of the Act. Section 4(2)(c) prescribes abuse of dominant position by dominant player in indulging in practices or practices resulting in denial of market access in any manner. Google's response with respect to above allegation has been captured by Commission in paragraph 300.3, which is as follows:

> *"300.3. There is no violation of Section 4(2)(c) of the Act because Google is not active in the alleged payment processing market, and as such cannot have abused that position to deny payment processors access to that market. Google does not carry out payment processing in India. Google subcontracts with third parties to conduct the payment processing for payments made through Google Play. Further, payment*

processors can and do provide their services through Google Play."

67. Google pleaded that Google is not active in the alleged payment processing market and as such cannot have abused that position to deny payment processors access to that market. Google does not carry out payment processing in India. Google sub-contracts with third parties to conduct the payment processing for payments made through Google Play with regard to its own app, i.e. YouTube as noted above. The Commission has returned its finding in paragraph 315, which is as follows:

"315. The Hon'ble Supreme Court in Competition Commission of India vs. Fast Way transmission Pvt. Ltd. & Ors. (Civil Appeal No. 7215 of 2014), has interpreted denial of market access under Section 4(2)(c) widely, noting that denial of market access 'in any manner' would fall under its ambit, regardless of whether it is a denial of access to competitors or denial of access to players in vertically affected markets. The Commission notes that payment processors are placed vertically with Google in relation to providing Play Store services to the app developers and app users. In the present matter, the practices followed by Google, by virtue of its dominant position in the app store for Android OS market, results in denial of market access to the payment processors in the vertically affected market. Google argues that DG has not defined the relevant market in which the denial is alleged in order to assess whether there has been any

anti-competitive effect. In this regard, the Commission notes that there is no legal requirement to precisely define a separate relevant market where the impact of an abusive conduct takes place. Be that as it may, as already stated above, the dominant position in the app store market has been abused to cause denial to payment processors in general. This is sufficient to give a finding under Section 4(2)(c) of the Act. Further, as already stated, access to Play Store is dependent on agreeing to use GPBS and thus, app developer would lose access to market, if it does not agree to mandatory use of his GPBS. Thus, the Commission finds that the practices followed by Google results in denial of market access for payment aggregators as well as app developers, in violation of the provisions of Section 4(2)(c) of the Act."

68. In the above paragraph, the Commission has referred to judgment of Hon'ble Supreme Court in ***(2018) 4 SCC 316 – Competition Commission of India vs. Fast Way Transmission Pvt. Ltd. and Ors.*** The Hon'ble Supreme Court had occasion to consider the word "in any manner" in Section 4(2)(c) in the above case. The Hon'ble Supreme Court held that words "in any manner" are words of wide import and must be given their natural meaning. There can be no quarrel to the proposition laid down by the Hon'ble Supreme Court in the above case. The above was a case where there was agreement between broadcaster – Respondent No.5 and Respondent Nos.1 to 4, who were multi-system operators, who carried the aforesaid channel to persons who watch cable TV. In the above case, the

agreement was terminated, due to which the broadcasters were denied the market access due to an unlawful termination. In paragraph 16 of the judgment, following was held:

> *"**16.** It can be seen that in the facts of the case, the broadcaster, namely, Respondent 5, had a broadcast agreement which was entered into for a period of one year from 1-8-2010. This was sought to be terminated within the aforesaid period by the respondent by notices dated 19-1-2011. The TDSAT has, by its order dated 25-4-2012 [Kansan News (P) Ltd. v. Fastway Transmission (P) Ltd., 2012 SCC OnLine TDSAT 310] , adverted to Regulation 4.2 of the relevant Telecom Regulations, and has found that the respondents have not followed the aforesaid Regulations, inasmuch as no reasons for termination have been given in the notices of termination. This being the case, it is clear that, on the present facts, there is an abuse of the dominant position enjoyed by Respondents 1-4 only for the reason that the broadcaster was denied market access on and after 19-2-2011 until 1-8-2011. The words "in any manner" are words of wide import and must be given their natural meaning. This being the case, it is difficult to appreciate the reasoning of the Appellate Tribunal that, as the broadcaster and MSOs are not in competition with one another, the provisions of Sections 3 and 4 do not get attracted. As has been held by us, the "dominant position" held by the respondent MSOs is clearly established for the purpose of Section 4 in the present case, and the Commission's finding in that behalf is also not set*

aside by the Appellate Tribunal. If this be so, then once a dominant position is made out on facts, whether a broadcaster is in competition with MSOs is a factor that is irrelevant for the purpose of application of Section 4(2)(c) which, as has been found by us, becomes applicable for the simple reason that the broadcaster is denied market access due to an unlawful termination of the agreement between the said broadcaster and Respondents 1-4."

69. In the present case, market access to payment processors is not being denied by the Google. As noted above, payments with respect to Google Play by GPBS being less than 1%, for which payment Google has launched Google Pay, its own UPI based app for payments to be done under this app. When more than 99% market is open for payment processors, Google's requirement by app developers to use the GPBS for pay app and in-app payments, with respect to above apps hosted on Google Play, cannot be said to be denial of market to payment processors. There can be no quarrel that expression "in any manner" has to be given wide and natural meaning, but present is not a case, where in no manner, the Google is denying the market access to payment processors.

70. We notice that Google is a buyer of payment processing service and is actually facilitating market access for payment processors. Google's choice of payment processors reflects Google's right to choose its service, to service provider. The CCI has failed to identify the market, where the alleged denial of access has taken place and further failed to establish anti-competitive effect in that market. Reduction of market share by less than 1%, cannot be

read to mean denial of market access. Payment under Google Play constitute only miniscule, which is less than 1% of the wider digital payment ecosystem in India, which continues to flourish. The Appellant has also pleaded that in the year 2021-22, share of transactions through GPay on Play has decreased. The market definition as determined by the Commission has been noted. The market of payment processors/ aggregators is not being determined as relevant market. In paragraph 234 of the Commission's order only three markets have been referred, i.e., market for licensable OS for smart mobile devises in India; market for app store for Android smart mobile OS in India; and market for Apps facilitating payment through UPI in India. Google share payment in Google's Play account is less than 1% of the payments made through UPI. Hence, it cannot be said that Google has abused its dominant position in the app store market to cause denial of payment processing.

71. We, thus, find that no violation of Section 4(2)(c) was proved and the Commission's finding that Appellant being dominant in app store market has caused denial of market access to the payment processors and aggregators is unsustainable.

Question No.(8)

(8) Whether practices followed by Google making developers dependent on Google to access the users on its platform, result in leveraging its dominance in market for licensable mobile OS and app

stores for Android OS, to protect its position in the downstream markets, is in violation of the provisions of Section 4(2)(e) of the Act?

72. Question No.8 relates to violation of Section 4(2)(e), which is used for dominant position in one relevant market to enter into, or protect, other relevant market. The findings of the Commission regarding breach of Section 4(2)(e) are contained in paragraph 317 of the order, which are as follows:

> *"317. Google claims that app developers have several alternative options to distribute their apps on Android devices, if they do not agree with Google Play's policies and thus do not wish to distribute through Google-Play. The Commission is of the view that these theoretical possibilities of alternative distribution channels for the app developers are not substitutable with app stores for various reasons, as discussed supra. Therefore, the app developers are dependent to Google to access the users on its platform. Accordingly, there is no merit in the assertions made by Google in this regard. Accordingly, the Commission is of the view that the practices followed by Google results in leveraging its dominance m market for licensable mobile OS and app stores for Android OS, to protect its position in the downstream markets, in violation of the provisions of Section 4(2)(e) of the Act."*

73. The Google's response to the above violation is contained in paragraph 300.7, which is as follows:

> *"300.7. There is no violation of Section 4(2)(e) of the Act because Google does not leverage its alleged dominance in the markets for licensable mobile OS and app stores for Android OS. As noted above, developers have several alternative options to distribute their apps on Android devices, if they do not agree with Google Play's policies and thus, do not wish to distribute through Google Play."*

74. Learned Counsel for the Appellant in support of his submission has placed reliance on few judgments of Competition Appellate Tribunal ("COMPAT"), which need to be looked into, which are relevant on the question falling for consideration. Reliance has been placed on the judgment of COMPAT in ***National Stock Exchange of India Ltd. vs. Competition Commission of India – (2014) SCC OnLine Comp AT 37*** wherein the COMPAT has held that the language of Section 4(2)(e) of the Act itself suggest that there have to be two markets, one in which the enterprise has a dominant position and the other in which it intends to enter or protect. Paragraph 115 of the judgment is as follows:

> *"115. The language of section 4(2)(e) of the Act itself suggest that there have to be two markets, one in which the enterprise has a dominant position and the other in which it intends to enter or protect. However, both the markets must be relevant markets distinct from each other. In the wake of our finding, as also the finding by the D.G. that the relevant market in this case is the services by the stock exchange, there is no question of two markets and on that short ground itself the allegation about being guilty of the breach of*

section 4(2)(e) of the Act must fail. In our opinion, that will be the correct position in law."

75. Next judgment relied is judgment of COMPAT in ***Schott Glass India Pvt. Ltd. vs. Competition Commission of India – (2014) SCC OnLine Comp At 3***. The Competition Appellate Tribunal in paragraph 67 laid down following:

"67 ….In our opinion, the very language of Section 4(2)(e) is clear to show that in order to be guilty of Section 4(2)(e) there have to be two markets, wherein the guilty party would have the participation. It is nobody's case that the Appellant is in any way dealing with or has any presence in the downstream market of ampoules, vials, dental cartridges and syringes etc. In fact the biggest contradiction to be found is that Schott Kaisha is not even a party to the present proceedings, nor has it been dealt with by the CCI. If it was through Schott Kaisha and to favour the interest of Schott Kaisha that the Appellant was vociferously working, then it would have been in the fitness of the case that Schott Kaisha was joined as a party and dealt with by the CCI. That was simply not done. Once it was established that the Appellant has no presence in the downstream market in any manner, there would have been no question of applying Section 4(2) (e). Even if it was held that Schott Kaisha was being favoured, so as to make it strong in the downstream market, it will have to be established, the lack of which would not be sufficient for breach of Section 4(2)(e) Breach would be possible only, if a finding is given, that the Appellant was itself trying to

> *enter into the downstream market or was trying to secure its presence in the downstream market. Both these factors are absent and therefore, there is no question of any such breach of Section 4(2)(e) In that view, we do not find the Appellant guilty of Section 4(2)(e) and exonerate the same. We set aside the finding of the CCI in that behalf."*

76. The statutory scheme as delineated by Section 4(2)(e) and the judgment of Competition Appellate Tribunal as noted above, has clearly laid down that there should be existence of two markets, one in which entity is dominant and another where the entity seeks to enter and protect. The submission of learned Counsel for the Appellant is that the Commission has not determined any downstream market, although it held that Google practices resulting in leveraging its dominance in the market for licensable mobile operating systems and app stores for Android and to its position in the downstream market. It is submitted that the Commission failed to identify two relevant markets and failed to identify any anti-competitive conduct in the market, where dominance is alleged to be leveraged nor even a casual link between dominance in one market and its use into to enter or maintain dominance in another market has been established. It has not been demonstrated that Google's conduct caused anti-competitive effects in the undefined downstream markets. There was sufficient evidence that developers have access to various alternative app distribution channels. The Commission also sought to raise certain observations regarding settlement period, data collection policies and discriminatory conduct, leading to finding of contravention of Section 4(2)(e) of the Act.

77. Learned Counsel for the Commission elaborating his submission contends that the market where entity is dominant i.e., market for licensable mobile OS and app stores for Android OS. The market where Google was leveraging its position and wanted to enter was in the market of all apps competing with Google set of apps. Causal link has been established. Due to dominance in the relevant market through Play Store, the Google is able to give itself 15 to 45 days for payment, while in industry practice, payment is received in only three days or less. With respect to access and control over data, it is clear that Google dominance with respect to Play Store allows it to access control over the data, which it can then use to improve its position in the downstream market. The dominance of Google in first two market is clearly being used by the Google in entering into the third market. The Commission in the impugned order has noticed the use of dominant position for including discriminatory condition in its Agreements with App Developers to provide for mandatory use of Google Billing Payment System and it was due to the dominance in apps store market and its access to data, the same is being used to earn revenue. The payment settlement with App Developers take place between 15 to 45 days, whereas payment processors and aggregators, as per the industry practice, make the payment to App Developers within three days. The App Developers, specially the small App Developers suffer due to non-payment. The Commission after analyzing has returned its finding in paragraph 357, where it was held that Google's imposition of collect flow technology on other UPI, while only allowing Google Pay to use intent flow technology for payments on the Play Store, amounts to leveraging of its position in the

markets for the licensable of mobile OS and app stores for Android mobile to protect and promote its position in the market for UPI enable digital payment apps. The findings recorded by the Commission in paragraph 357 are as follows:

> *"357. Further, being the gateway to Android smartphones due to dominance in the markets for licensable mobile OS and app stores for Android OS, Google is uniquely placed to (and is) leveraging this dominance in favour of Google Pay. These markets are closely related to each other as UPI is used as a method of payment (both for paid apps as well as IAPs on the Play Store). Accordingly, Google's imposition of collect flow technology on other UPI apps, while only allowing Google Pay to use intent flow technology for payments on the Play Store, amounts to leveraging of its position in the markets for the licensable of mobile OS and app stores for Android mobile to protect and promote its position in the market for UPI enabled digital payment apps. The situation is worsened by the fact that Google forces users to only use the Google Payment System for processing paid downloads and IAPs, and therefore, Google Pay essentially gets an advantage on every transaction on the Play Store."*

78. In this context, we may notice the submissions of Shri Ritin Rai, learned Senior Counsel, who has contended that identification of the market is incorrect. We have already considered the issue regarding relevant market while considering Question No.(1), which need no repetition. We

have already found that market of digital payment in India is not substitutable with UPI.

79. In view of foregoing discussions and findings returned by the Commission in paragraph 357, which finding is based on assessment of evidence available on record and the observations made by the DG, we are satisfied that dominance in first two markets has been used to leverage to promote and protect its position in the market for UPI enabled digital payment apps. Thus, violation of Section 4(2)(e) stands proved.

Question No.(9)

(9) Whether the CCI found charging of commission/ service fee from 15% to 30% discriminatory?

80. Question No.(9) relates to imposition of unfair and discriminatory prices in sale of goods and services. The DG has returned its observation in paragraph 319.9 that charging of 15% to 30% fee is excessive and therefore, unfair in terms of Section 4(2)(a)(ii) of the Act. The above question need no elaboration, since the Commission itself has returned its finding in paragraph 327 that information available on record is not sufficient to give a finding on the monetization model, as followed by Google. Thus, the Commission did not give any finding on violation of Section 4(2)(a)(ii), with regard to charging of 15% to 30% fees. Finding in paragraph 327 is as follows:

> *"327. Based on the foregoing, the Commission is of the view that information available on record is not sufficient to give a finding on the monetization model,*

> *as sketched supra, followed by Google. Therefore, the Commission is not inclined to give any finding on this aspect, at this stage. Google is, however, directed, to ensure that its policies are in alignment with the aforesaid principles given the special responsibilities cast upon it being a dominant entity holding the position of a gatekeeper in the Android ecosystem."*

81. Thus, no violation on the basis of charging fee of 15% to 30% of Section 4(2)(a)(ii) has been proved.

Question No.(10)

(10) Whether directions in paragraphs 395.2 to 395.8 of the impugned order amounts to form of ex ante regulation for undefined "gatekeepers" beyond the CCI power under Section 4 and 27 of the Act?

82. The Commission in the impugned order has found Appellant dominant in two relevant market, i.e. market for licensable OS for smart mobile devices in India and market for app store for Android smart mobile OS in India and has also termed the Appellant as gatekeeper. The Commission had made observations and findings in the order that Appellant being gatekeeper has certain special responsibilities. The Appellant has been held to be in gatekeeper position. The observation holding Appellant in the gatekeeper position has been made in paragraph 323 and 327 by holding that the Appellant has special responsibilities, it being dominant in

holding the position of the gatekeeper. In paragraphs 325 and 327, the Commission noted following:

> *"325. Google has submitted that about 97% app developers pay only a nominal registration fee of USD 25 to access Google Play, whereas only 3% of developers on Google Play are subject to a service fee. Even with-in this 3%, a limited number of apps are subjected to a service fee of 30% and others pay a service fee of 10% of 15% depending on various parameters. Going by these assertions of Google, it is noted that the monetization model of Google is based on cross subsidization by Google where the 3% of the apps offering paid apps or IAPs are made to bear the entire cost of the Play Store, even though all the apps are using similar services of the Play Store. Therefore, the question to be determined is whether it is reasonable and fair for these 3% of the apps to bear the 100% cost of the Play Store. In the same vein, the Commission also notes that amongst these 97% are those apps also, which have significant business operations but are not contributing towards recoupment of Play Store costs, directly through service fee. The Commission also notes that Google has other revenue streams also from the 'free apps' listed on Play Store, in the form of advertisement related revenue earned by Google from the apps hosted on Play Store and otherwise. These revenue streams are also contributing towards recoupment of the costs associated with Play Store and Android ecosystem, in addition to the service fee. The determination of issues at hand requires examination of all these aspects.*

> *327. Based on the foregoing, the Commission is of the view that information available on record is not sufficient to give a finding on the monetization model, as sketched supra, followed by Google. Therefore, the Commission is not inclined to give any finding on this aspect, al this stage. Google is, however, directed, to ensure that its policies are in alignment with the aforesaid principles given the special responsibilities cast upon it being a dominant entity holding the position of a gatekeeper in the Android ecosystem."*

83. Violation of Section 4, entails penal consequences, which is clear from the power of the Commission contained in Section 27, sub-section (b). It is settled law that interpretation of the penal provisions has to be strictly construed. In this context, we may refer to the judgment of this Tribunal in ***Rakesh Arora & Anr. vs. Acute Daily Media Pvt. Ltd. & Ors.– Company Appeal (AT) (Ins.) No.1606 of 2024***. Paragraphs 8 and 9, which are relevant are as follows:

> *"8. ….. We need to examine the statutory scheme under Section 65, unless the promoters can also be covered under the statuary scheme, the prayer of the appellants to impose penalty on the promoters cannot be accepted. Section 65 is a penal provision. Hon'ble Supreme Court in AIR 1954 SC 496- "Tolaram Relumal and Anr. vs. State of Bombay" laid down:-*
>
> > *"……..if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from*

penalty rather than the one which imposes penalty."

9. …. It is well settled that penal statute are to be strictly construed. We may refer to the judgment of the Hon'ble Supreme Court in "(2013) 8 SCC 71- Aparna A. Shah vs. Sheth Developers Pvt. Ltd. & Anr." where in reference to Section 138 of the NIA Act, the Hon'ble Supreme Court has occasion to consider the construction of penal provision. In paragraphs 15 & 16, following was laid down:-

"15. In S.K. Alagh v. State of U.P. [(2008) 5 SCC 662 : (2008) 2 SCC (Cri) 686] this Court held: (SCC p. 667, para 19) "19.

… If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. (See Sabitha Ramamurthy v. R.B.S. Channabasavaradhya [(2006) 10 SCC 581 : (2007) 1 SCC (Cri) 621] .)"

16. In Sham Sunder v. State of Haryana [(1989) 4 SCC 630 : 1989 SCC (Cri) 783] , this Court held as under: (SCC p. 632, para 9)

"9. … The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does

not make all the partners liable for the offence whether they do business or not."

84. Learned Counsel for the Appellant has submitted that gatekeeper, i.e. special responsibility of dominant entity has not taken shape of law. Learned Counsel for the Appellant has referred to the Report of the Committee on Digital Competition Law submitted on 27 February 2024. It is submitted that the said Report has noticed the structure of the Competition Act and it was observed that CCI under the present statutory regime is based on *ex-post facto* model. The Committee opined that new tools that strengthen and supplement the CCI's existing *ex-post* powers are the need of the hour. Learned Counsel for the Appellant has referred to paragraph 2.3 and 2.4 of the Report, which are as follows:

"2.3. The Committee deliberated on how the present ex-post framework under the Competition Act is not designed to facilitate timely and speedy redressal of anti-competitive conduct by digital enterprises given the extensive fact-finding and a tiered adjudicatory process involved in ex-post enforcement proceedings. The Committee further discussed the factors which contribute to prolonged enforcement proceedings.

2.4. First, the Committee noted that the structure of the Competition Act itself involves several stages in enforcement proceedings, i.e. formation of a prima facie view by the CCI; investigation by the Director General; and passing of final order by the CCI, without specifying outer timelines for the same."

85. It is relevant to notice that in paragraph 2.5 of the Report, the facts of the present case arising out of order passed by Commission dated 25.10.2022 has been noticed. In paragraph 2.5, the Committee's observations are as follows:

> *"2.5. For instance, the Committee noted that in one case involving allegations of abuse of dominant position by a large digital enterprise in the market for licensable operating system ("OS") for smart mobile devices in India, the Director General submitted their investigation report to the CCI after more than two years of passing of order under Section 26 of the Competition Act by the CCI. The CCI passed final order imposing monetary penalty on the enterprise in question a year later in October 2022. The Committee noted that this matter was filed before the CCI in 2018, and even after a period of five years, it is yet to reach finality as the matter is currently sub-judice before the Supreme Court."*

86. The Committee, thus, opined that strengthening and supplementing the CCI's existing *ex-post facto* powers are the need of the hour. Paragraph 2.11 of the Report is as follows:

> *"2.11. In line with the deliberations above and taking into account the pace at which the Indian digital market is evolving, the Committee feels that the powers of the CCI under the present ex-post model may not sufficiently enable early*

detection and intervention required to prevent digital markets from irreversibly tipping. As such, the Committee is of the view that new tools that strengthen and supplement the CCI's existing ex-post powers are the need of the hour. Although the ex-ante framework may still be subjected to judicial interventions, it will be a much more efficient market correction mechanism compared to Sections 3 and 4 of the Competition Act which are essentially ex-post interventions."

87. The Committee in Chapter-IV of the Report dealt with "*the need for an ex-ante competition intervention in digital markets*". Paragraph 1.6, 1.7 and 2.12 states as follows:

"1.6. Third, ex-post competition investigations are limited to the narrow claims made in each specific case. As such, they may not effectively address repeated conducts by the same digital enterprise, or similar conducts by different enterprises. The Committee observed that addressing such recurring patterns of anti-competitive behaviour through an ex-ante digital competition law will lead to significantly increased administrative efficiency.

1.7. ***In light of the above discussions, the Committee recommends that a de novo Digital Competition Act that enables the CCI to selectively regulate large digital enterprises in an ex-ante manner be enacted. The Committee further notes that the proposed Digital Competition Act should complement and strengthen the existing***

competition framework governing large digital enterprises by ensuring timely detection, enforcement, and disposal of proceedings in digital markets."

88. The above Report also clearly captures that the existing powers of CCI, which is based on *ex-post facto* model and the need of law. With regard to regulating digital market on the mode of *ex-ante* has also been emphasized.

89. The Commission observation are that as gatekeeper, the Appellant has special responsibility. As per the statutory regime existing on the date, violation of Section 4 has to be proved for issuing any directions and penalty under Section 27(b). By terming the Appellant as gatekeeper, the observation that certain special responsibilities are on there on the Appellant, cannot be the basis for reaching to any conclusion for violation of Section 4. Violation of Section 4 has to be specifically pleaded and proved for imposing any penalty under Section 27. We, thus, are of the view that the Commission could not have issued any *ex-ante* directions. The correctness of directions 395.2 to 395.8 shall be considered hereinafter.

Question No.(11)

(11) Whether directions contained in paragraph 395 are *ultra vires*, overboard and disproportionate remedial directions?

90. In paragraph 394, the Commission holds the Google dominant and has held that contravention of provisions of Section 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b)(ii), 4(2)(c) and 4(2)(e) of the Act have been proved and on the basis of

said findings, the remedies has been dealt in paragraph 395 and directions from 395.1 to 395.8 have been issued, which have been challenged in this Appeal. Before we come to individual directions under paragraph 395, we need to notice paragraph 392, where the Commission has recorded its conclusion. Paragraph 392.1 records following observation:

> *"392.1. making access to the Play Store, for app developers, dependent on mandatory usage of GPBS for paid apps and in-app purchases constitutes an imposition of unfair L:umlilion on app developers. Thus, Google is found to be in violation of the provisions of Section 4(2)(a)(i) of the Act."*

91. We in our foregoing discussions have upheld the findings of the Commission with regard to violation of provisions of Section 4(2)(a)(i) and 4(2)(e). We, thus, are of the view that conclusion recorded in paragraph 392.1 cannot be faulted.

92. Now we come to the other conclusions as contained in paragraph 392.2 to 392.6. Coming to the conclusion under paragraph 392.2, we having found that Google is not following discriminatory practices by not using GPBS for its own application, i.e. YouTube, we having already held that violation of Section 4(2)(a)(ii) is not proved, hence, directions and conclusions in paragraph 392.2 are not sustainable. With regard to conclusion in paragraph 392.3, we have already found that violation of Section 4(2)(b)(ii) has not been proved. Hence, conclusions in paragraph 392.3 are not sustainable. Conclusion in paragraph 392.4 relates to

violation under Section 4(2)(c) of the Act. We having already found that violation of Section 4(2)(c) has not been proved, the conclusion in paragraph 392.4 is unsustainable. Coming to direction in paragraph 392.5, we having come to the conclusion that the Google is leveraging its dominant position and the violation of Section 4(2)(e) has been proved, the conclusion in paragraph 392.5 are sustained. Conclusion in paragraph 392.6 are sustainable insofar as violation of Section 4(2)(e) of the Act is concerned. Paragraph 394 of the judgment of the Commission is approved, insofar as it has found that Google has abused its dominant position in contravention of provision of Section 4(2)(a)(i) and 4(2)(e) of the Act.

93. Now, we come to remedies as provided in paragraph 395, where in terms of provisions of Section 27 of the Act, the Commission has directed Google to 'cease' and 'desist' from indulging in anti-competitive practices. The measures indicated by the Commission are contained in paragraph 395.1 to 395.8. Now coming to directions under 395.1, we having found that breach of Section 4(2)(a)(i) having been proved in putting discriminatory condition on use of Google Payment Billing System by App Developers, the direction issued under 395.1 are sustained. Directions in paragraph 395.2 and 395.3 are also sustained, in view of findings with regard to violation of Section 4(2)(a)(i) of the Act. Directions under paragraph 395.4 and 395.5 related to the finding of violation of Section 4(2)(e), which directions are sustained. Directions under paragraph 395.6 and 395.7 are general and insofar as price related condition, the commission itself found no discrimination with regard to fee and commission. Hence, direction under

paragraph 395.6 and 395.7 are not sustained. Directions under paragraph 395.8 are sustained.

94. Coming to paragraph 396, the said direction to the extent of breaches as identified above, are sustained.

Question No.(12)

(12) Whether penalty imposed by CCI on entire turnover of the Google is unsustainable and the CCI could have imposed penalty only on the relevant turnover, i.e., turnover of Play Store and the penalty imposed is unsustainable?

95. The Commission imposed penalty under Section 27, sub-section (b) of the Act. The penalty imposed by the Commission is captured in paragraphs 416 and 417, which for ready reference is again extracted below:

> *"416. On a holistic appreciation of the facts and circumstances of the case and the mitigating factors put forth by the OPs, the Commission is of the view that the ends of justice would be met if a penalty of 7 % of the relevant turnover. Accordingly, the Commission imposes a penalty on Google @ 7 % of its average of the average of relevant turnover for the last three preceding financial years 2018-19, 2019-20 and 2020-21, as provided by Google. Accordingly, the computation of the quantum of penalty imposed on Google is set out below:*

Turnover for FY 2018-19	*Turnover for FY 2019-20*	*Turnover for FY 2020-21*	*Average turnover for three preceding*	*Penalty @ 7% of the average*

			financial years	*turnover*
10,365.32	*13,025.10*	*16,742.52*	*13,377.65*	*936.44*

417. Consequently, the Commission imposes a penalty of Rs. 936.44 crore (Rupees Nine Hundred Thirty-Six crore and forty-four 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."

96. The challenge to imposition of penalty by the learned Counsel for the Appellant is on the ground that Commission is entitled to impose penalty only on the relevant turnover. The Commission has found Google to be dominant in Play Store and findings of the Commission are based on dominance of Google in the Play Store, leading to abuse of its dominance. It is relevant to notice that Commission itself has noted and referred to the judgment of the Hon'ble Supreme Court in ***Excel Crop Care Ltd. vs. Competition Commission of India & Anr.*** in ***Civil Appel No.2480 of 2014***, where Hon'ble Supreme Court has laid down that adopting the criteria of 'relevant 'turnover' for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles. The Commission has stated in paragraph 404 that it proceeds to determine relevant turnover and thereafter, would calculate appropriate percentage of penalty, which observation has been made in paragraph 404. The Commission ultimately although proceeded to determine the relevant turnover, but has ultimately imposed the penalty on total turnover of the Google, which is clearly

reflected in turnover as captured in paragraph 416. Learned Counsel for the Appellant has submitted that Google has pleaded before the Commission that relevant turnover attributable to use of GPBS for the purchase of paid apps and IAPs on Play in India, ought to have been based on turnover from carrying out transactions on Google Play in India. The Commission did not restrict itself to GPay and Google Play Store, it considered Google's total turnover from the entire business operation in India. The Commission for taking the total turnover for imposition of penalty has based its finding on the rationale that Google's products/ services (including Play) are monetized through advertising revenue; Play generates more revenues through advertising than through service fee; and Google provided data with various disclaimers and caveats and failed to provide an affidavit of Chartered Accountant, as required by the CCI. Learned Counsel for the Appellant submitted that even if CCI was not satisfied with the data of turnover provided by the Google, it would have made its best judgment on the relevant turnover, but that could not have caused the Commission to impose penalty on the entire turnover of the Google. Learned Counsel for the Appellant further submitted that in the submissions given by the Google to CCI on 06.10.2022, the revenue from advertisement was also included and the Commission could have imposed penalty on the relevant turnover, i.e. revenue earned in the Google Play as well as from advertisement. Learned Counsel for the Appellant has referred to the confidential letter dated 06.10.2022, by which it made submissions and has given the revenue and financial data as requested in the order dated 12.09.2022. Google was required to submit information for the three preceding Financial Year, i.e.

2018-19, 2019-20 and 2020-21 within seven days. The information which were asked for have been captured in paragraph-2 of the letter dated 06.10.2022, which is as follows:

> *"2. On September 15, 2022, the Opposite Parties received the Hon'ble Commission's Order in relation to the Submission on Potential Penalties dated September 12, 2022. Through its Order, the Hon'ble Commission directed the Opposite Parties to submit the following information for the three preceding financial years (i.e., 2019, 2020 and 2021) within 7 days of receipt of the Order, i.e., by September 22, 2022:*
>
> *(a) "Google's turnover and profit generated or arising /accruing from India, including any of its group entities in relation to revenue streams associated with the Google Play, including:*
>
> *(i) advertising (delivered or displayed in-app or from apps hosted on Google Play);*
>
> *(ii) paid apps and in-app purchases; and*
>
> *(iii) developer fees*
>
> *(b) Google's turnover and profits generated or arising /accruing from its entire business operations in India (including any of its group entities)."*

97. In the letter dated 06.10.2022, the Appellant pleaded that any penalty calculation should be limited to relevant turnover. It was pleaded that penalty can be based on relevant and product-specific turnover of the

products affected by any contravention. Financial information were provided by the letter in two tables. In Table-1, Relevant Revenue data for Google Play in India for three years were provided. Paragraph-17 contains Table-1, which is as follows:

> *"17. Table 1 includes revenue related to Google Play's service fee. This includes Google's revenue from app purchases, in-app purchases, and subscription purchases made by Indian users.*
>
> *(i) The date is provided for the period Apri 1, 2018 – March 31, 2021.*
>
> *(ii) The date excludes (A) accounting adjustments and will not tie to financial statements, (B) refunds that were issued to users are netted out of all figures, and (C) GST/VAT and other taxes directly related to sales.*
>
> *(iii) The data has been provided by user location, determined by the country of the user's billing address.*
>
> *Table 1: 'Relevant' Revenue data for Google Play in India*

Year		*Revenue related to service Fee*
2020-21	*USD*	*157,389,385*
	INR	*11,68,14,40,155*
2019-20	*USD*	*75,148,644*
	INR	*5,32,80,38,860*
2018-19	*USD*	*37,059,762*
	INR	*2,59,12,18,559"*

98. Table-2 contains revenue from Developer Registration fee and Revenue related to sale of digital content. Table-2 has been captured in paragraph 21, is as follows:

> *"21. Given the different definitions of geography and finance data sources, the data given below are not comparable and therefore should not be summed up. The sun of the data in Table 2 will also not be representative of how Google considers revenue from Play internally and will not tie to financial statements.*
>
> *Table 2: Additional revenue data as per paragraph 3 of the Order.*

Year		*Revenue From Developer Registration fee (A)*	*Revenue related to Sale of digital content (B).*
2020-21	*USD*	*1,934,600*	*1,601,909*
	INR	*14,35,86,012*	*11,88,93,686*
2019-20	*USD*	*1,312,225*	*1,883,362*
	INR	*9,30,36,753*	*13,35,30,366*
2018-19	*USD*	*1,469,675*	*1,429,350*
	INR	*10,27,59,676*	*9,99,40,152"*

99. Table 3 and 4 capture Revenue From Advertisements on Google Play and In-App Advertisement. Paragraph 24 capture Table 3 and 4, which is as follows:

"24. Given the different definitions of geography and finance data sources, the data provided in Tables 3 and 4 are not comparable and therefore should not be summed up

Table 3 : Revenue from Advertisements on Google Play

Year		*Revenue From Advertisements on Google Play*
2020-21	*USD*	*263,610,222*
	INR	*19,56,51,50,677*
2019-20	*USD*	*114,882,149*
	INR	*8,14,51,44,364*
2018-19	*USD*	*Not available*
	INR	*Not available*

Table 4: Revenue From In-App Advertisement

Year		*Revenue From In-App Advertisements*
2020-21	*USD*	*256,925,690*
	INR	*19,06,90,24,712*
2019-20	*USD*	*186,309,325*
	INR	*13,20,93,31,143*
2018-19	*USD*	*180,014,233*
	INR	*12,58,65,95,171*

100. Table-5 contains the 'Revenue data of Google and its affiliates' entire business operations in India. Table-5 has been captured in paragraph 26(d), which is to the following effect:

> *"26(d). Google does not in its ordinary course of business produce regular reports as regards the turnover arising or accruing from its entire business operations in India. As a consequence, the data set out in Table 5 has been provided specifically to respond to the Hon'ble Commission's request, and has been prepared to the best of Google's knowledge and on a good faith basis.*
>
> *Table 5: Revenue Data of Google and its affiliates' entire business operations in India*

Year		*Revenue From In-App Advertisements*
2020-21	*USD*	*2,255,796,729*
	INR	*1,67,42,52,33,226*
2019-20	*USD*	*1,837,109,695*
	INR	*1,30,25,10,77,352*
2018-19	*USD*	*1,482,454,798*
	INR	*1,03,65,32,39,480*

101. When we look into paragraph 416, where last three preceding Financial Years' turnover has been captured. The turnover captured is from

Table-5 of entire business operation in India. Judgment of **Excel Corp Care Ltd.** (supra) had occasion to consider 'relevant turnover' in the context of imposition of penalty under Section 27(b). The Hon'ble Supreme Court in the above case has framed the questions for consideration. One of the question, i.e. Question No.(iv) has been captured in paragraph 10, which is as follows:

> *"10(iv) Whether penalty under Section 27(b) of the Act has to be on total/entire turnover of the offending company or it can be only on "relevant turnover", i.e., relating to the product in question?*

102. The above Question No.(iv) was elaborately considered by the Hon'ble Supreme Court in paragraphs 60 to 96. In paragraphs 83 and 84, following was laid down:

> *"83. In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of "relevant turnover" for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. For arriving at this conclusion, we are influenced by the following reasons.*
>
> *84. Under Section 27(b) of the Act, penalty can be imposed under two contingencies, namely, where an agreement referred to in Section 3 is anti-competitive or where an enterprise which*

enjoys a dominant position misuses the said dominant position thereby contravening the provisions of Section 4. In case where the violation or contravention is of Section 3 of the Act it has to be pursuant to an "agreement". Such an agreement may relate to a particular product between persons or enterprises even when such persons or enterprises are having production in more than one product. There may be a situation, which is precisely in the instant case, that some of such enterprises may be multi-product companies and some may be single product in respect of which the agreement is arrived at. If the concept of total turnover is introduced it may bring out very inequitable results. This precisely happened in this case when CCI imposed the penalty of 9% on the total turnover which has already been demonstrated above."

103. The facts of the case as has been noticed in paragraphs 7-8 of the judgment are as follows:

"7. For indulging in anti-competitive practices in violation of the provisions of Section 3 of the Act, CCI imposed penalties upon all the three appellants at 9% of average 3 years' turnover of these appellants under Section 27(b) of the Act. Quantifying the same, penalty to the tune of Rs 63.90 crores was imposed upon M/s Excel Crop Care Ltd., Rs 1.57 crores upon M/s Sandhya Organics Chemicals (P) Ltd., and UPL was fastened with the penalty of Rs 252.44 crores.

> *8. The appellants filed three separate appeals before Compat. The legal and factual arguments remained the same before Compat as well. In addition, argument was raised on the quantum of penalty. Compat has, vide common judgment dated 29-10-2013 [Excel Crop Care Ltd. v. CCI, 2013 SCC OnLine Comp AT 149] , rejected all the contentions, except qua penalty, of the appellants. Insofar as imposition of penalty is concerned, Compat has held that though penalty @ 9% of three years' average turnover was not unreasonable, the penalty cannot be on the "total turnover" of these establishments, and has to be restricted to 9% of the "relevant turnover" i.e. the turnover in respect of the quantum of supplies made qua the product for which cartel was formed and supplies made. In other words, it had to relate to the goods in question, namely, APT and turnover of other products manufactured and sold by the establishments, which were without blemish, could not be included for calculating the penalty."*

104. The Commission in the above case has imposed penalty under Section 27(b) of the Act on the average three years' turnover of the Appellant. The COMPAT has rejected all contentions, except *qua* penalty. The COMPAT though held that penalty @9% of three years' average turnover was not unreasonable, the penalty cannot be on the 'total turnover' of these establishment and has to be restricted to 9% of the 'relevant turnover'. The Hon'ble Supreme Court affirmed the view taken by the COMPAT, which is noticed in paragraph 97 of the judgment, which is to the following effect:

> *"**97.** Thus, we do not find any error in the approach of the order of Compat interpreting Section 27(b)."*

105. Following the above judgment of the Hon'ble Supreme Court, which has also been noticed by the Commission, but has not been applied while imposing penalty, we hold that penalty under Section 27(b), could have been imposed on the Appellant on proof of violation of Section 4(2) on relevant turnover. Learned Counsel for the Appellant has contended that at best, the revenue as reflected in Table-1, 2, 3 and 4, which was revenue from advertisement, could have been added for imposing penalty under Section 27(b). We, thus, are of the view that penalty imposed by the Commission in paragraphs 416 and 417, need to be modified. We having held that Appellant has abused its dominant position and has violated Section 4(2)(a)(i) and 4(2)(e), the Commission could have very well imposed the penalty. Although, we have held that violations under Section 4(2)(a)(ii), 4(2)(b), and 4(2)(c) not proved, but penalty was still leviable on proof of violation under Section 4(2)(a)(i) and 4(2)(e). We, thus, modify the penalty imposed by the Commission and substitute it by the relevant turnover as reflected in Table-1, 2, 3 and 4, as submitted by the Appellant vide its letter dated 06.10.2022. By adding all relevant revenue as reflected in Table 1, 2, 3 and 4, following are the composite relevant revenue turnover of three years and the average:

	Turnover for FY 2018-19	**Turnover for FY 2019-20**	**Turnover for FY 2020-21**	**Average turnover for three preceding**

				financial years
USD	21,99,73,020	37,95,35,705	68,14,61,806	42,69,90,177
INR	15,38,05,13,558	26,90,90,81,486	50,57,80,95,242	30,95,58,96,762

106. We, thus, impose penalty @ 7% of the relevant turnover, as per the turnover of last three preceding Financial Year i.e. 2018-19, 2019-20 and 2020-21. Penalty @ 7% of the average turnover comes in INR 2,16,69,12,773 (USD: 2,98,89,312.39). The order passed by the Commission imposing penalty under paragraph 460-470 is modified and substituted accordingly.

Question No.(13)

(13) To what relief, if any, the Appellant is entitled?"

107. In view of the foregoing discussions and conclusions, the Appeal is partly allowed in following manner:

(i) The decision of the Commission holding contravention of provision of Section 4(2)(a)(i) and 4(2)(e) are upheld.

(ii) The finding and decision of the Commission of contravention of Section 4(2)(a)(ii), 4(2)(b(ii) and 4(2)(c) are not upheld.

(iii) The directions issued in paragraphs 395.1, 395.2, 395.3 and 395.8 are upheld. Directions issued in paragraphs 395.4, 395.5, 395.6 and 395.7 are set aside.

(iv) The penalty imposed on the Google is modified as per computation contained in paragraph 105 of this order. Thus, the penalty imposed on the Google for relevant turnover of last three preceding year of Rs.936.44 crores, is modified to the amount of INR 2,16,69,12,773 (USD : 2,98,89,312.39). The Appellant having deposited 10% of the penalty in the present Appeal, rest of the amount of penalty shall be deposited by the Appellant within 30 days from today.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi

Anjali/ Ashwani