December, 2022

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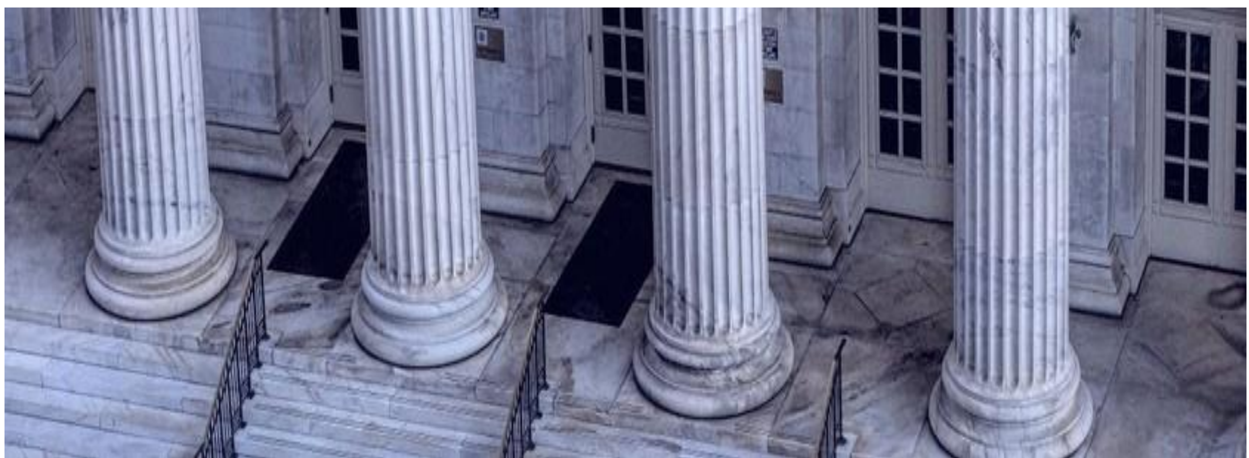
Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST



KEY HIGHLIGHTS

* **NCLAT**: Adjudicating authority has no jurisdiction to evaluate the decision of the committee of creditors to enquire into the justness of the rejection of a resolution plan.
* **NCLAT**: Advance paid towards service is operational debt.
* **NCLAT**: Provident fund dues are not assets of the Corporate Debtor; they have to be paid in full.
* **CCI**: Google's Play Store Payment Policies are anticompetitive and discriminatory.

I. NCLAT: Adjudicating authority has no jurisdiction to evaluate the decision of the committee of creditors to enquire into the justness of the rejection of a resolution plan.

The National Company Law Appellate Tribunal, Chennai ("**NCLAT**") has, in the case of ***Dr. C. Bharath Chandran v. M/s. Sabine Hospital and Research Centre and Others [Company Appeal (AT) (CH) (Ins) No. 320 of 2022 and IA Nos. 677 and 710/2022]***, held that the adjudicating authority has no jurisdiction to evaluate the decision of the committee of creditors ("**CoC**") to enquire into the justness of the rejection of a resolution plan.

Facts

The present appeal is filed against the order dated June 2, 2022 ("**Impugned Order**") passed by the adjudicating authority ("**NCLT**"), whereby, the NCLT dismissed the petition filed under the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

The Trivandrum International Health Services Limited ("**Corporate Debtor**") was admitted into the corporate insolvency resolution process ("**CIRP**") by order dated February 7, 2020 under Section 7 (*Initiation of CIRP by financial creditor*) of the IBC, passed by the NCLT. Raju Palanikkunathil Kesavan ("**Second Respondent**") was appointed as resolution professional by the NCLT and later as the liquidator of the Corporate Debtor on the recommendation of the CoC. M/s. Sabine Hospital and Research Centre Private Limited ("**First Respondent**") made an application to the NCLT for being permitted to submit a resolution plan after the due date to submit an expression of interest ("**EoI**"). The First Respondent's name was not included in the provisional list or in the final list of the prospective resolution applicants. The Second Respondent published a public announcement in newspapers and verified the claims received and also formed the CoC. Kerala State Financial Corporation, State Bank of India & Dhanlaxmi Bank Limited were, respectively, the third, fourth and fifth respondents in the present appeal who together constituted the CoC of the Corporate Debtor.

Dr. C. Bharath Chandran ("**Appellant**"), the promoter and erstwhile director of the Corporate Debtor, who along with two other co-applicants, had submitted a resolution plan which was approved by the CoC at its meeting held on October 7, 2021 and a letter of intent was issued to the Appellant and his co-applicants.

The Appellant stated that as per the understanding between him and his co-applicants, the co-applicants were required to make arrangements for depositing a performance bank guarantee with the CoC. However, they failed to make the required arrangements. In view of their failure to submit the performance bank guarantee, the same being a pre-requisite to file a resolution plan, the CoC in its meeting held on October 21, 2021, authorised the Second Respondent to file for liquidation of the Corporate Debtor. The Appellant stated that he sought permission to replace two original co-applicants with two new applicants and except for replacement of the co-applicants, the resolution plan was retained exactly as approved by the CoC.

At the subsequent meeting of the CoC held on October 30, 2021, two of the financial creditors holding 64.13% stake in the CoC expressed their no-objection, which was still short of required minimum 66% voting rights required to approve a resolution plan.

Three interlocutory applications were filed before the NCLT. First interlocutory application was filed by the Second Respondent, praying for an order of liquidation of the Corporate Debtor. Second interlocutory application was filed by the Appellant, *inter alia*, praying that the CoC be directed to consider and accept the amendment to the resolution plan in terms of replacement of the existing co-applicants with new co-applicants. Third interlocutory application was filed by the First Respondent, praying that the First Respondent be permitted to file an EoI and to submit a resolution plan for the Corporate Debtor. They were heard together by the NCLT and an order was passed, whereby it was held that the time for CIRP was to come to an end on February 25, 2022 by excluding the period of time taken in deciding the aforesaid interlocutory applications. It was pointed out that such time was insufficient to call for a fresh EoI. Further, the Appellant along with the new co-applicants as well as First Respondent were directed to submit their EoI to the Second Respondent forthwith and were also permitted to submit their resolution plan, before the CoC, for its consideration.

The Appellant assailed the order of the NCLT for allowing the First Respondent at a late stage which according to the Appellant was not advisable and permissible under the IBC.

It was brought to the notice of the NCLAT that CoC evaluated the resolution plans of both the parties at their meeting held on February 19, 2022 and were divided on the vote and neither plan received the required minimum votes of 66%. CoC passed the resolution rejecting both the resolution plans. The NCLT passed an interim order, in the interlocutory application filed by the Second Respondent, directing the CoC to re-vote only on the resolution plan which received the highest percentage of votes and extended the time for CIRP by another 20 days for the said purpose and directed the Second Respondent to file a report on the outcome. The CoC in their meeting held on April 11, 2022, voted in divergent manner and none of the resolution plans received the requisite 66% of the votes.

In the interim, the Appellant had filed an intervention application, seeking to be heard before the matter was finally adjudicated upon. In the next hearing, the NCLT gave the Appellant one last chance to submit his resolution plan in co-operation with First Respondent in order to save the Corporate Debtor from liquidation. However, due to failure of negotiation, no joint resolution plan could be submitted by the Appellant and the First Respondent. The NCLT disposed of the matter by admitting the Corporate Debtor into liquidation.

The Appellant contended that if he would have been allowed to replace original two co-applicants with new two co-applicants rather than allowing First Respondent also to submit a resolution plan, the matter would have been resolved long back. The Appellant had also made a case that provisions of the IBC had not been complied with fully because the initial decision/ commercial wisdom of the CoC was by-passed by the NCLT.

Observations of the NCLAT

The NCLAT noted that it was quite evident from the Impugned Order that the NCLT did everything under its command within the purview of the IBC to avoid liquidation of the Corporate Debtor. The NCLT gave fair and equal chances to both the resolution applicants to the extent that a resolution plan of both the parties could be submitted in tandem, however the parties could not do so.

Towards the end of the CIRP, a resolution applicant proposes a resolution plan which is placed before the CoC by the resolution professional and upon several deliberations by the CoC, the crucial decision pertaining to the approval or rejection of a resolution plan is taken. Thereafter, if a rejected plan is

placed before the adjudicating authority, the adjudicating authority is expected to do nothing more, but to initiate the liquidation process under the IBC. Only if the plan is approved by at least 66% voting share of the CoC and is placed before the adjudicating authority for its approval, the adjudicating authority has to look into two basic check boxes. Firstly, whether or not the plan meets the requisite voting share by the CoC and secondly, whether or not the requirements stated under Section 30(2) (*Submission of resolution plan*) of the IBC are being complied with. However, there are no provisions under the IBC which authorizes the adjudicating authority to modify or interfere with the merits of the resolution plan.

Similarly in the present case, since the CoC did not approve the resolution plan by a minimum vote of 66% as required under the IBC, hence, it was considered that the resolution plan has failed. Therefore, in such a situation if a rejected plan was placed before the NCLT, the NCLT was expected to do nothing more but to initiate liquidation process under the IBC.

The NCLAT also observed that the Appellant was given all possible opportunities to submit the resolution plan, including extension of time, replacement of co-applicant and opportunity to submit joint resolution plan with the First Respondent. Unfortunately, the Appellant was not able to come up with a resolution plan acceptable to the CoC. The NCLAT also noted that there was clear divergent view among the members of the CoC and on last two occasions, the CoC could not muster minimum stipulated voting right to approve the resolution plan. However, the CoC unanimously recommended for liquidation of the Corporate Debtor.

Not only has the legislature been clear with primacy of CoC over the adjudicating authority for approval of the resolution plan, but even the judiciary through several judgments has stated that no adjudicating authority or appellate authority has been empowered to question the decision makers of the resolution plan. Hence, the NCLT/NCLAT have to abide by the commercial wisdom of the CoC and do generally nothing else, except approve or reject the resolution plan, after ensuring that the plan fulfils the criteria under Section 30(2) of the IBC.

In the present case, the NCLT had taken all the precautions and actions to ensure that the Corporate Debtor was kept as a going concern. However, as the last resort, NCLT had to issue an order for liquidation.

Decision of the NCLAT

Basis the aforesaid observations, the NCLAT held that the NCLT was right in ordering liquidation of the Corporate Debtor. Accordingly, the present appeal was dismissed.

VA View:

It is clear from the above discussion that the adjudicating authority has no jurisdiction and/or authority to analyse or evaluate the decision of the CoC to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.

As held by the landmark judgment, ***K. Sashidhar v. Indian Overseas Bank [Civil Appeal No. 10673 of 2018]***, "*the legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority.*" The NCLAT has reinforced the said principle by re-iterating that the commercial wisdom of the CoC is supreme and there should be minimum judicial intervention by the adjudicating and appellate authorities under the IBC.

II. NCLAT: Advance paid towards service is operational debt.

The National Company Law Appellate Tribunal, New Delhi ("**NCLAT**") has in its judgment dated November 10, 2022 in the matter of ***Chipsan Aviation Private Limited v. Punj Lloyd Aviation Limited [Company Appeal (AT) (Ins) No. 261 of 2022]*** held that an advance paid towards availing of service falls within the definition of operational debt in terms of Section 5(21) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), even if there was no privity of contract between the parties.

Facts

Chipsan Aviation Private Limited ("**Appellant**") was engaged in business with Punj Lloyd Aviation Limited ("**Corporate Debtor/Respondent**") for charter services of aeroplanes and helicopter, hired on long term basis from non-scheduled operators/ owners from the Corporate Debtor. On receiving the assurance for delivery of services from the Corporate Debtor, the Appellant made an advance payment of INR 60 Lakhs ("**Advance**") on March 28, 2016.

The concerned aviation related services were not provided by the Corporate Debtor nor was the Advance refunded by the Corporate Debtor. However, the Advance was reflected in the balance sheets of the Corporate Debtor for the financial years 2015-16, 2016-17 and 2017-18 under the head current liabilities. In view of the aforesaid, the Appellant addressed a written correspondence to the Corporate Debtor on November 8, 2017, demanding refund of the Advance at the earliest.

On March 26, 2019, the Appellant filed a complaint against the Corporate Debtor with the Registrar of Companies Delhi and Haryana in respect of the Advance, thereby seeking appropriate action against the director, agents and officials of the Corporate Debtor.

Subsequently, on September 19, 2019, the Appellant issued a Demand Notice upon the Corporate Debtor under Section 8 (*Insolvency resolution by operational creditor*) of the IBC, which was delivered to the Corporate Debtor on September 21, 2019. Thereafter, the Appellant filed an application against the Corporate Debtor before the Hon'ble National Company Law Tribunal, New Delhi ("**NCLT**") under Section 9 (*Application for initiation of corporate insolvency resolution process by operational creditor*) of the IBC ("**Application**"), thereby demanding an amount of INR 97,40,055/-, inclusive of the interest being claimed on the Advance. Subsequently, the Corporate Debtor filed a reply, contending that there was no privity of contract between the Appellant and the Corporate Debtor since the contract in question was between the Appellant and M/s Buildarch Aviation and that there was no operational debt in existence in terms of Section 5(21) of the IBC. It was further contended that the Application was barred by limitation since it was filed after expiry of 3 years from the date of making the Advance. In view of the aforesaid submissions made by both the parties, the NCLT dismissed the Application holding that advance payment made by operational creditor to corporate debtor does not fall within the purview of operational debt.

Aggrieved by the NCLT order dated January 6, 2022 ("**Impugned Order**"), the Appellant filed the present appeal before the NCLAT ("**Appeal**").

Issue:

Whether an advance amount paid by the operational creditor to the corporate debtor, towards goods and/or service which has not been availed and wherein there was no privity of contract between them, amounts to operational debt under Section 5(21) of the IBC.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that the Advance was paid by the Appellant towards obtaining goods and services, and therefore it falls within the purview of operational debt in terms of Section 5(21) of the IBC. It further submitted that in the balance sheets of the Corporate Debtor, the Advance reflects as "advance received from customs", which is an acknowledgement of the Advance.

The Appellant relied on the judgment of the Hon'ble Supreme Court in the matter of ***Construction Consortium Limited v. Hitro Energy Solutions Private Limited [(2022) SCC OnLine SC 142]*** ("**Construction Consortium Judgment**") whereby it has been held that advance payment for goods and services is an operational debt.

Contentions raised by the Respondent:

The Respondent submitted that there is no evidence on record to indicate that there is any contract between the Appellant and Respondent. Hence, it was contended that there was no privity of contract between them. The Respondent further submitted that the Application was barred by limitation.

Observations of the NCLAT

NCLAT observed that basis the materials made available on record, there is no contract between the Appellant and the Corporate Debtor. However, it is evident that the Advance was made on March 28, 2016, which is reflected in the balance sheets of the Corporate Debtor from the financial year 2015-16 onwards. It was further observed that there have been several correspondences and various requests from the Appellant to the Corporate Debtor with regard to goods and services. However, neither goods and services could be provided, nor any agreement could be entered between the Appellant and the Corporate Debtor.

NCLAT also analyzed the definition of operational debt under Section 5(21) of the IBC which defines it as a claim *in respect of the provision of goods and services*. The NCLAT noted that the expression "*goods and services*" are preceded with the words "*in respect of*". Relying upon the Construction Consortium Judgment wherein it was held that advance payment is covered within the definition of operational debt in the IBC, the NCLAT observed that a wide interpretation to the words "*in respect of*" in the definition of operational debt as stipulated under Section 5(21) of the IBC was adopted.

In view of the above-stated observations, the NCLAT arrived at a conclusion that in the present case, the Advance amounts to operational debt and that the NCLT committed an error in dismissing the Application.

However, as regards the issue of limitation, the NCLAT observed that the NCLT has not dealt with

the issue in the Impugned Order.

Decision of the NCLAT

The NCLAT directed the revival of proceeding before the NCLT under Section 9 of IBC and the matter be decided at an early date after hearing both parties afresh. The NCLAT further noted that it shall always be open for the parties to enter into settlement in accordance with law.

VA View:

The NCLAT has provided a much-needed clarity which will help the adjudicating authorities across the country to adjudicate such cases wherein there was no privity of contract between the operational creditor and the corporate debtor and/or wherein the operational creditor had paid an advance amount, however the goods or services in question were actually not availed.

Further, in majority of the cases pertaining to operational debts, it is often the operational creditor who supplies goods or services and corporate debtor who avails of those goods or services but fails to pay for the same. However, notably, in this case, the NCLAT has pronounced this judgment in a factual scenario wherein the operational creditor had made an advance payment intending to avail certain goods and services from the corporate debtor.

III. NCLAT: Provident fund dues are not assets of the Corporate Debtor; they have to be paid in full.

The National Company Law Appellate Tribunal, Principal Bench ("**NCLAT**") in its judgement dated November 2, 2022 ("**Judgement**"), in the matter of ***Assam Tea Employees Provident Fund Organization v. Mr. Madhur Agarwal and Another [Company Appeal (AT) (Insolvency) No. 262 of 2022]*** held that provident fund ("**PF**") dues are not the assets of the corporate debtor and they have to be paid in full.

Facts

HAIL Tea Limited ("**Corporate Debtor**") was admitted into Corporate Insolvency Resolution Process ("**CIRP**") by an order dated January 21, 2020, passed by the National Company Law Tribunal, Kolkata Bench ("**Adjudicating Authority**").

In pursuance of the public announcement, the Assam Tea Employees Provident Fund Organization ("**Appellant**") submitted its claim in Form B (*Proof of claim by operational creditors except workmen and employees*) under Regulation 16 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulation, 2017 for an amount of INR 2,10,13,797.92/- ("**Claim**"), on account of default on part of the Corporate Debtor to deposit its PF contribution, administrative cost, interest for delay of the PF dues deposit, interest for delay of deposit linked insurance dues accruable from March 28, 2019 till September 26, 2019.

The Resolution Professional of the Corporate Debtor, Mr. Madhur Agarwal ("**Resolution Professional**") admitted the entire Claim of the Appellant. The resolution plan was submitted by

the successful resolution applicant of the Corporate Debtor ("**Resolution Plan**") which earmarked INR 1,07,21,592/- against the Appellant's Claim. The said Resolution Plan was approved by the Adjudicating Authority by an order dated January 3, 2022 ("**Impugned Order**"). However, the Resolution Professional only made a part payment of INR 64,30,222/- to the said Appellant.

Aggrieved by the Impugned Order, the Appellant filed an appeal before the NCLAT ("**Appeal**").

Issue

Whether PF dues of the Corporate Debtor are to be paid in full.

Arguments

Contentions raised by the Appellant:

The Appellant contended that PF dues of the Corporate Debtor were entitled to be paid in full. The Appellant submitted that the Resolution Professional had admitted its Claim, and therefore, the Corporate Debtor was under the obligation to discharge the said Claim, in full. Moreover, non-payment of the PF dues in full, is in violation of Section 30(2)(e) (*Resolution plan to not contravene any other laws*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

The Appellant also referred to Section 11(2) (*Priority of payment of contributions over other debts*) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**") and submitted that PF dues are not dues of any other operational creditor of the Corporate Debtor and are required to be paid in full.

Contentions raised by the Corporate Debtor and the Resolution Professional ("**Respondents**"):

The Respondents opposed the Appeal filed by the Appellant on the ground that the limitation for filing an Appeal under Section 61 (*Appeals and Appellate authority*) of the IBC is only 30 days and that in the instant case, the Appellant has filed the Appeal after a delay of 25 days. Thus, the Appeal being barred by limitation, ought to be rejected.

The Respondents also submitted that the approval of the Resolution Plan is within the commercial wisdom of the committee of creditors. Moreover, the Resolution Professional contended that the Appellant was an operational creditor and haircut was given to all financial creditors and operational creditors.

Observations of the NCLAT

The NCLAT observed that the Appellant's Claim admitted by the Resolution Professional was not disputed between the Appellant and the Respondents.

The NCLAT placed reliance on its recent judgment in ***Regional Provident Fund Commissioner v. Ashish Chhawchharia, Resolution Professional for Jet Airways (India) Limited and Another [Company Appeal (AT) Ins. No. 987/2022]*** ("**Jet Airways Case**") wherein the appellant had challenged the resolution plan on the ground that Section 11 of the EPF Act requires priority over all other dues and Section 36(4)(a)(iii) (*Liquidation estate*) of the IBC excludes PF dues from the

liquidation estate of the corporate debtor. In that regard, the NCLAT had, while relying on the judgment of the Hon'ble Supreme Court ("**SC**") in the case of ***Maharashtra State Cooperative Bank Limited v. Assistant Provident Fund Commissioner and Others [(2009) 10 SCC 123]*** held that priority for payment of debt under Section 11 of the EPF Act had to be made in the way specifically provided under Section 53(1) (*Distribution of assets*) of the IBC and PF dues are not subject to it. In the Jet Airways Case, the NCLAT also clarified that the corporate debtor's non-payment of PF dues, in full, would result in breach of Section 30(2)(e) of the IBC.

With regard to the contention of the Respondents that the Appeal was barred by time, the NCLAT observed that the Appeal was fully covered by the judgement of the SC in Re: Cognizance of Extension of Limitation [***Suo Moto Writ Petition No. 03/2022]***, wherein the SC extended the period of limitation for all appeals to additional 90 days. Therefore, the objection of the Respondents was not accepted by the NCLAT.

The NCLAT also observed that the Resolution Professional's contention that the Appellant was an operational creditor and both operational creditors and financial creditors had taken haircuts, could not be accepted.

Decision of the NCLAT

The NCLAT opined that its decision in the Jet Airways Case would be squarely applicable to the instant case and held that PF dues are not assets of the Corporate Debtor and they have to be paid in full.

Therefore, the NCLAT directed the successful resolution applicant of the Corporate Debtor to discharge the payment of PF dues amounting to INR 2,10,13,798/-, in full.

VA View:

The dictum of law in the Jet Airways Case is explicit that the priority for payment of debt under Section 11 of the EPF Act has to be looked into alongside the mechanism which is specifically provided under Section 53(1) of the IBC, thereby making it clear that PF dues are not subject to distribution under Section 53(1) of the IBC.

Sections 30, 36(4)(a)(iii) and 53(1) of the IBC, read in conjunction with Section 11(2) of the EPF Act, echo the priority of PF dues in relation to a company undergoing CIRP.

The NCLAT has correctly observed that PF dues are not the assets of the corporate debtor and they have to be paid in full. While it may be a well settled position of law that the commercial wisdom of the committee of creditors cannot be interfered with, compliance with the law is a must.

IV. CCI: Google's Play Store Payment Policies are anticompetitive and discriminatory.

Background

Digital marketplaces, their users and sectoral regulators are moving towards a new market paradigm of the cyber-economy. Information technology ("**IT**") is constantly evolving in magnitude and regulators frequently have to react and catch up with market practices.

Data driven business models have propelled digital platforms to an unprecedented scale. Platforms like Meta, Google and Amazon are reducing transaction costs and are increasing their influence by facilitating multi-sided interactions and providing businesses with instant access to global markets. However, low marginal costs, network effects and strong economies of scope becomes a deterrent for new entrants in all markets where they may face a competitive threat.

Exclusionary and unilateral conduct has prompted market intervention by competition regulators to prevent dominant platforms from stifling competitors in similar services. The European Commission ("**EC**") was one of the first to take a note of this. Discontent with letting market failure persist, the EC passed the Digital Markets Act. Through it, the EC hopes to steer the gatekeepers of digital services towards interoperable standards and prohibit practices like pre-installations that affect user-choice and competition.

Worldwide, regulators are also quickly catching up to a changing market reality to address patterns of unilateral conduct and calls to action to address these online platform's economic dominance.

Competition regulators in Netherlands, EC and Australia have taken note of the evidence that major technology platforms cannot self-correct; and found that competition law is uniquely placed to address issues before them.

In India, the Competition Commission of India ("**CCI**") on October 25, 2022 passed an antitrust enforcement decision against *inter alia* Google, fining them INR 936.44 Crores ("**Order**") for contravening various provisions of the Competition Act, 2002 ("**Competition Act**") by way of their policies governing use of their platform ("**Play Store**"), and specifically, its proprietary payment service, Google Play Billing System ("**GPBS**") which operates on the Android Operating System ("**OS**").

The observations and remedies recorded in the CCI's order raise important questions into the role of competition law in the new millennium as the CCI attempts to maintain platform neutrality whilst upholding "fair competition for the greater good."

Director-General's ("DG") Investigation into GPBS and Google Pay and Observations of the CCI

The CCI considered various factors like switching costs, barriers to entry in the market for licensable OS, indirect costs, lack of countervailing buyer power and access to data in coming to its conclusions.

Android Operating System

App stores are a two-sided marketplace, with app developers on one hand and users on the other. Clocking 17 billion app downloads in India from January 1 to August 31, 2022 and a 95% market share, the Play Store serves as a digital storefront and is a "critical gateway between app developers and users". App stores have become a necessary medium for app developers to distribute their creations and its availability is inextricably linked to the OS installed on the smart device.

Google holds undisputed influence and control over the development of OS and its updates, even though it is an open-source project. The DG found Google to be dominant in the markets for licensable OS for smart mobile devices and app store for OS in India and concluded that Google leveraged its dominance when it made the use of GPBS mandatory and exclusive for payment processing and in-app payments in the Play Store for all apps except Youtube. This practice is considered as an unfair and discriminatory condition under Section 4(2)(a)(ii) (*Abuse of dominant position*) of the Competition Act. The CCI took exception to the original equipment manufacturers ("**OEMs**") having to sign a mobile application distribution agreement to install the google mobile services ("**GMS**") suite of apps which restricts what applications can be pre-installed on their devices, achieving "total exclusion" of downstream competitors through revenue sharing agreements ("**RSA**"). Thus, the CCI concluded that Google had discriminated between similarly situated apps and transactions in Google Pay and rival unified payment interface ("**UPI**") apps.

This means that Google's release of OS is a misnomer of open source. Such conduct by Google from a position of dominance, backed by its reputation as a hyperscaler helps it create a de-facto industry standard while exclusively retaining some parts that add value on top to create an attractive commercial proposition for itself.

Denial of Access to Payment Markets

Selling in-app digital goods is an important way for app developers to monetize their creations. To distribute through the Play Store, app developers had to agree to a developer distributor agreement ("**DDA**") and developer program policies ("**DPP**"). Use of GMS requires a certificate from an authorized testing facility and written approval from Google. Play Payments is included in this suite of agreements, so Google can tie the use of GMS to GPBS. The imposed tying of apps with GPBS amounts to a vertical integration in digital market that exists for ancillary purchases after the main transaction.

Google owns the intellectual property rights ("**IPR**") to the OS and "as the sponsor of the Android platform enforces rules through a combination of compatibility provisions, contracts, and trademark licenses" and to safeguard its dominant position and preserve value of the IPR, imposed anti-steering provisions. These prevent developers from redirecting customers to other payment processors or informing them of their choice to pay through third party websites.

The DG reported that Google has entered into non-exclusive agreements with OEMs to pre-install Google Pay by offering financial incentives through RSA and placement bonus agreements but the DG found no evidence to conclude abuse of dominant position and did not investigate the aspect of default payment status of Google Pay. Nevertheless, Google excluded other UPI apps as 'effective' payment options on the Play Store, discouraging users from using other UPI apps. This has a wide ranging market implications in the highly competitive online payments industry in India. Google becomes a gateway to android smartphones due to dominance in markets for licensable OS and app stores for OS, uniquely placing it in a position to leverage its dominance in favor of the Google Pay UPI app.

The CCI ruled that this amounted to denial of market access and unfair conduct for two reasons:

1. Google charged developers a considerable premium of 12-14% over other payment aggregators coupled with a longer settlement period, which was deemed to be an unfair benefit to the detriment of app developers.

2. Google had seamlessly integrated its own UPI payment system using the 'intent flow' methodology to facilitate payments under the GPBS, whereas other competing payment systems could only be used by adopting the 'collect flow' methodology, involving a broken chain of steps which requires a customer to actively engage with various applications to manually complete a purchase. This resulted in users preferring the GPBS and prevented other UPI apps and app developers from collecting necessary consumer preference data to keep their apps updated. Such conduct was deemed to have indirectly affected competition in the wider UPI segment.

Another important point that the CCI noted is that the number of people affected by such policies is immaterial if conduct is deemed to be anticompetitive and Google, being a dominant entity, had an obligation under Section 4 of the Competition Act to not engage in conduct that affects competition on its merits.

The Form and Function of Data Collection

The policy was interpreted by the CCI to give Google access to "critical and competitively relevant consumer/ transaction data of all its rival apps." Since data can be used and reused, without incurring significant extra costs for each subsequent use, it can be used by one person without preventing others from using it. This means that data is non-rivalrous, it can be viewed as a shareable input for firms to achieve economies of scope in product development.

The CCI concluded that providing truncated access to data while mandating use of GPBS discourages app developers from developing captive in-app payment processors. Such conduct falls afoul of Section 4(2)(b)(ii) of CA because it distorts competition by stifling innovation incentives and limiting technical development in the market for in-app payment processing services.

The volume of data harvested from users and a firm's marginal costs of innovation are inversely related, giving impetus for data-driven network effects to incentivize incumbent's diversification into connected markets. Two markets may be connected because they share the same data although they may be weakly related by product market definition. Once the CCI establishes the proposed digital markets and data unit, this market delineation may become increasingly important for companies as data analysis by regulators becomes more sophisticated.

Directions of CCI

In addition to an unequivocal direction to cease and desist from anticompetitive practices, the CCI also ordered Google to modify its conduct by stipulating certain behavioral remedies:

1. It should allow, and not restrict app developers from using any third-party payment processing services for in-app purchases and for app sales. It should also not, in any manner, discriminate or otherwise take any adverse measures against such practice.

2. It should not impose anti-steering provisions on app developers and restrict them from communicating with their users to promote their apps and offerings. It should not restrict end users to access and use the features and services offered by app developers within apps.

3. It should set out a clear and transparent policy on data collection, usage and the potential and

actual sharing of such data with app developers or other entities, including related entities. The competitively relevant transaction/ consumer data of apps generated and acquired through GPBS, should not be leveraged by Google to further its competitive advantage. It should also provide access to the app developer of the data that has been generated through the concerned app, subject to data protection safeguards.

4. It should 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.

5. It should ensure complete transparency in communicating to app developers, services provided, and corresponding fee charged by publishing, in an unambiguous manner, the payment policy and criteria for fees applicability.

6. It should not discriminate against other apps facilitating payment through UPI in India vis-à-vis its own UPI app, in any manner.

CCI's direction to provide data access to app developers over user and transaction details, which in this case, will allow greater transparency and data driven decision-making at all levels of the value chain. However, it is important to keep in mind that mandating data access and calling it interoperability is not a blanket remedy because Google's rivals may lack the technological and operational abilities to effectively analyze and process the data. Remedies, to be effective to the letter and spirit of competition law, warrant ongoing surveillance and fine-tuning to be value-accretive for society and stakeholders in the long run.

VA View:

Competition law, in its endeavor to increase consumer welfare, is concerned with preserving the competitive process rather than competition itself, as the latter approach may have the unintended effect of supporting inefficient market players. This reasoning is why a dominant entity *per se* is not anticompetitive unless it abuses its market power, substantially lessening competition through exclusionary conduct. This Order has implications on competition in digital marketplace, amongst app developers in the technology sector; between payment aggregators and UPI apps in the finance sector; and for the ways in which users' data may be utilized.

A dominant entity has a special obligation to preserve competition and cannot impose tying requirements that may raise competitors' costs. Non-exclusive revenue sharing or placement bonus agreements may be permissible.

In markets for search services, operating systems, app stores, online retail and other digital markets, low marginal costs, network effects and strong economies of scope enabled dominance are construed by regulators as triggers for the market tipping in favor of a single entity. Aggressive conduct by dominant platforms is likely to prompt regulatory scrutiny.

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