

# **COMPETING AGAINST ANTI-COMPETITIVE ALLEGATIONS: GOOGLE PLAY BILLING POLICY**

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## ***Abstract***

*Intermediaries like Google and Amazon play a dual role in the market as both operators of a platform that host third parties and as participants in the competition. Thus, the promotion of their own products easily accrues allegations of anti-competitive measures. This paper focuses on the recent furore over Google Play's Billing System termed as being unfair and discriminative. In analysing the Competition Commission of India's recent order, its failings in shaping the correct relevant market have been highlighted. Baring the gaps in the order, a case in favour of Google's policy has been made by establishing that it does not dominate or abuse its position. In this lieu, the paper endeavours to explore a balance between the free development of markets and the protection of the rights of present market players.*

## **I. INTRODUCTION**

Alphabet Inc's Google is a multinational technology company that is present in every nook and corner of the world. In the context of its omnipresence in the technological domain, it has come under survey for allegedly exploiting its dominant position in the tech market.<sup>1</sup> Google mandated integration with the Google Play Billing System (GPBS) for developers in India.<sup>2</sup> Particularly, for those selling digital goods and services.<sup>3</sup> This requirement excluded alternative forms of in-app billing systems.<sup>4</sup> Developers seeking Play Store inclusion must adhere to Google Play's Payments Policy strictly.<sup>5</sup> This policy is an integral part of its Developer Distribution Agreement (DDA).<sup>6</sup>

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<sup>1</sup> Aditya Kalra and Munsif Vengattil, 'Google pauses enforcing proprietary billing system in India after antitrust order' (*Reuters*, 2 November 2022) <<https://www.reuters.com/technology/google-pauses-enforcement-in-house-billing-system-india-antitrust-directive-2022-11-01/>> accessed 13 May 2023.

<sup>2</sup> Live Law News Network, 'CCI Imposes ₹936.44 Crore Cost On Google, Says Google Play's Mandatory Billing System For Paid Apps & In-App Purchases Unfair' (*LiveLaw*, 25 October 2022) <<https://www.livelaw.in/news-updates/cci-imposes-93644-crore-cost-on-google-says-google-plays-mandatory-billing-system-for-paid-apps-and-in-app-purchases-unfair-212461?infinitemscroll=1>> accessed 13 May, 2023.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> Google Play, 'Google Play Developer Distribution Agreement' (*Google*, 3 October 2022) <<https://play.google.com/about/developer-distribution-agreement.html>> accessed 13 May, 2023.

<sup>6</sup> *ibid.*

Google's reason behind this compulsion was to ensure a safe, reliable payment mechanism that can manage a centrally located system for the users.<sup>7</sup> Subsequently, the Competition Commission of India (CCI) found this practice unfair and discriminatory.<sup>8</sup> The practice violated §4 of the Competition Act 2002 ('the Act').<sup>9</sup> Although Google acquiesced to updating the GPBS in light of CCI's regulations and allowed the use of third-party billing systems,<sup>10</sup> questions of the policy's anti-competitive nature remain abundant.

This paper attempts to make a case for Google Play's Payment policy in its present form and clear the allegations over its anti-competitiveness. Part II establishes the 'relevant market' for the analysis of the dominance of Google. Demonstrating the substitutability of the UPI regime with other forms of online and digital payment systems expands the scope of the relevant market. Part III analyses whether Google is a dominant player in this newly defined relevant market. This paper concludes with the understanding that Google does not violate §4(2) of the Act.

## II. A NEW DEMARCATION OF 'RELEVANT MARKET'

According to the Supreme Court, a crucial instrument for determining the limits of rivalry between businesses is the definition of "market."<sup>11</sup> Delineating the market involves identifying competitive constraints faced by involved enterprises systematically.

The CCI found the market for UPI payment apps to be distinct.<sup>12</sup> It was separate from the market for apps facilitating online payments.<sup>13</sup> The former being a niche and specific form of payment system was found to be the relevant market.<sup>14</sup> However, this part establishes and constitutes a new, wider relevant market including not only UPI systems but also e-wallets, net-banking and such digital payment systems. This demarcation is necessary to identify whether Google is a dominant player capable of constraining other undertakings' behaviour.

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<sup>7</sup> Play Console Help, 'Understanding Google Play's Payments Policy' (*Google Play*)

<<https://support.google.com/googleplay/android-developer/answer/10281818?hl=en>> accessed 13 May, 2023.

<sup>8</sup> Tarush Bhalla, 'CCI probe finds Google's Play Store billing guidelines 'unfair and 'discriminatory' (Economic Times, 31 March 2022) <<https://economictimes.indiatimes.com/tech/technology/cci-probe-finds-googles-play-store-billing-guidelines-unfair-and-discriminatory/articleshow/90550596.cms>> accessed May 13, 2023.

<sup>9</sup> *ibid*; The Competition Act, 2002, §4.

<sup>10</sup> Pranav Dixit, 'Google vs CCI: Android App Developers Offered Third-Party Billing in India' (*Business Today*, 24 February 2023) <<https://www.businesstoday.in/technology/news/story/google-vs-cci-android-app-developers-offered-third-party-billing-in-india-371313-2023-02-24>> accessed May 13, 2023.

<sup>11</sup> *Competition Commission of India v. Coordination Committee of Artists and Technicians of W.B. Film and Television*, (2017) 5 SCC 17, 34.

<sup>12</sup> *XYZ v. Alphabet Inc and Others with Match Group Inc v. Alphabet Inc and Others with Alliance of Digital India Foundation and Others v. Alphabet Inc and Others*, Case No. 07/2020 with 14/2021 with 35/2021, 233.

<sup>13</sup> *ibid*.

<sup>14</sup> *ibid* 234.

To undertake this demarcation, a two-tiered analysis is conducted. Firstly, the similarities between UPI and other digital payment systems that justify the substitutability of the former with the latter are set out. Secondly, the doctrine of *asymmetric substitution* is used to lend support to the formation of a new ‘inclusive’ relevant market.

### A. Substitutability of the UPI Regime

The determination of the relevant market involves referencing either the product market, geographic market, or both. According to §2(t) of the Act, a relevant product market encompasses goods and services.<sup>15</sup> Consumers must see them as comparable in price, features, and intended functionality.<sup>16</sup>

The product’s physical attributes or intended usage, its pricing, customer preferences, and other variables are critical while deciding on the appropriate product market.<sup>17</sup> Noting the differences and technological advances gained by the UPI systems over other modes of digital payment it was held that the latter cannot substitute the former and the two form distinct product markets.<sup>18</sup>

These advantages include the facilitation of seamless instant payments, zero merchant convenience fee, the permission of multiple bank account linkages and additional services along with rewards.<sup>19</sup>

A separate market was delineated by individually analysing the differences between UPI and each form of digital payment system such as e-wallets, card payments, net banking etc.<sup>20</sup> However, when the qualities of all of these digital payment systems including UPI are analysed together as a whole, each individual system has some form of advantage over the other. Thus, a cumulative and not separative characteristic analysis is warranted.

For instance, other digital payment systems such as mobile wallets also facilitate instant payment,<sup>21</sup> there exists a payment limit on UPI transactions that is more constrictive than net banking facilities such as NEFT,<sup>22</sup> and registration requires the divulgence of critical information not only for card

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<sup>15</sup> The Competition Act, 2002, §2(t).

<sup>16</sup> *ibid.*

<sup>17</sup> The Competition Act, 2002, §19(7).

<sup>18</sup> *XYZ v. Alphabet* (n 12), 228.

<sup>19</sup> Rahul Gochhwal, ‘*Unified Payment Interface—An Advancement in Payment Systems*’, (2017) *American Journal of Industrial and Business Management* 7, 1174-1191.

<sup>20</sup> *supra* note, 13.

<sup>21</sup> Reuters, ‘RBI lays out rules to make mobile wallet payments seamless’ (*Reuters*, 16 October 2018) <<https://www.reuters.com/article/india-cenbank-payments-idINKCN1MQ25V>> accessed May 13, 2023.

<sup>22</sup> RBI ‘National Electronic Funds Transfer (NEFT) System’ (*Reserve Bank of India*, 31 October 2022) <<https://rbi.org.in/Scripts/FAQView.aspx?Id=60>> accessed 15 May, 2023

payments but also for UPI.<sup>23</sup> It has been argued previously that such slight individualistic technological advances do not lead to the creation of a separate product market in itself.<sup>24</sup>

Further, as per the rules of interpretation, the interpretation of the term ‘substitutability’ requires a holistic understanding, tying in the text as well as the context.<sup>25</sup> Thus, owing to the similarity of these payment systems and their common intended use of facilitating ease in online transactions, ‘substitutable’ in §2(t) ought to denote a lower threshold of mere ‘potentiality’ of such competing products to substitute the focus product.<sup>26</sup>

In this lieu, the relevant market consumes all major forms of digital payments along with the UPIs and each of the systems becomes an alternative to the other.

## **B. Asymmetric Substitution**

A parallel understanding of substitutability that has been developed recently is that of asymmetric substitution.<sup>27</sup> In this skewed form of substitution, customers display a propensity to ‘trade up’ but show a reluctance to ‘trade down’.<sup>28</sup> Even when a product is technologically at a higher position than its substitutes, it nevertheless becomes a part of the relevant market of such inferiors in the initial competitive stages.<sup>29</sup>

Therefore, even if the UPI mechanism sports certain advantages over other forms of payment systems, it constitutes their asymmetric substitute, forming a homogenous market. There is a dearth of authority in the treatment of such asymmetries in the Indian antitrust law, however, foreign jurisprudence lends support here. It has been held by the European Commission that when

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<sup>23</sup> Radhika Basavaraj Kakade and Nupur A. Veshne, ‘Unified Payment Interface (UPI) – A Way Towards Cashless Economy’, 4 IRJET 11 (2017).

<sup>24</sup> Competition Commission of India, *Prachi Agarwal and Another v. Sniggy Bundl Technologies Private Limited through its M.D./Director*, Case No. 39/2019, 19.

<sup>25</sup> Richard H. Fallon Jr., ‘The Statutory Interpretation Muddle’, 2019) 114(2) Nw. U. L. Rev. 269.

<sup>26</sup> The Competition Act, 2002, §2(t).

<sup>27</sup> Yatin Gaur and Priyal Jain, ‘Asymmetric Substitution vis-a-vis Relevant Market: A Conundrum Unresolved’ (*IndiaCorpLaw*, 7 April 2022) <<https://indiacorplaw.in/2022/04/asymmetric-substitution-vis-a-vis-relevant-market-a-conundrum-unresolved.html>> accessed 13 May, 2023.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

two services command similar or comparable consumer migration patterns from one service to another, they are substitutes of one another notwithstanding a technological gap.<sup>30</sup>

The CCI has taken an ambiguous approach in this matter. Based on factors such as cost, infrastructure needs, adaptability, and technology, it was first determined that direct-to-home (DTH) broadcasting services cannot be replaced by over-the-top (OTT) services or multi-system operators.<sup>31</sup> However, it later reversed its decision.<sup>32</sup>

Digital payment systems impose competitive constraints on UPI currently.<sup>33</sup> Thus, they're comparable in end-use and service quality.<sup>34</sup> Customers frequently move from one digital payment service to another and therefore a homogenous, inclusive market of digital payment services is formed.<sup>35</sup>

CCI must avoid defining markets too narrowly.<sup>36</sup> This is crucial, especially in fast-evolving tech markets. Enterprises constantly develop and integrate services.<sup>37</sup>

This issue can be tackled by formulating a *Small but Significant Non – Transitory Increase in Price Test* that simulates the impact of a five to ten percent price increase on the main product. This modulation is the key used to determine whether the price rise will be financially viable.<sup>38</sup> If price rise isn't profitable, consumer demand shifts to alternatives.<sup>39</sup> This suggests a wider relevant market.<sup>40</sup> Otherwise, the product lacks valid substitutes.<sup>41</sup> In this lieu, it is apparent that due to the service parity among payment systems, such a surcharge will lead to a consumer shift.

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<sup>30</sup> *France Telecom SA v. Commission of the European Communities* (T-340/03), [2007] E.C.R. II-107, 88.

<sup>31</sup> Competition Commission of India, Notice under sub-section (2) of Section 6 of the Competition Act, 2002 jointly given by Dish TV India Limited & Videocon D2h Limited, Combination Registration No. C-2016/12/463, 12.

<sup>32</sup> AZB & Partners, 'India: Substitutability In Relevant Market Definitions – A Two Way Street?' (*Mondaq*, 30 October 2019)

<<https://www.mondaq.com/india/antitrust-eu-competition-/858314/substitutability-in-relevant-market-definitions--a-two-way-street>> accessed 15 May, 2023.

<sup>33</sup> ETBFSI, 'UPI making inroads globally, faces challenge from other payment systems' (*Economic Times*, 14 October, 2022)

<<https://bfsi.economicstimes.indiatimes.com/news/financial-services/upi-making-inroads-globally-faces-challenge-from-other-payment-systems/94844413>> accessed 15 May, 2023.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> LexisNexis Competition Expert, 'Glossary – Small but Significant non-transitory increase in price definition' (*Lexis Nexis*, 2023)

<<https://www.lexisnexis.co.uk/legal/glossary/small-but-significant-non-transitory-increase-in-price>> accessed 17 December, 2023.

<sup>39</sup> Øystein Daljord, Lars Sorgard and Øyvind Thomassen, 'The SSNIP Test and Market Definition with the Aggregate Diversion Ratio: A Reply to Katz and Shapiro', *Journal of Competition Law & Economics* 4(2) (2008).

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

### III. ABUSE OF DOMINANT POSITION?

In this analysis, the first part establishes that Google does not exert dominance in the newly defined market. The second part establishes that Google does not violate subsection (a), the third part does the same for (c) and the fourth part for (e) of §4 of the Act.

#### A. Non-Dominant Nature

The question of Google's dominance in the market of apps facilitating UPI payments was left open by the CCI.<sup>42</sup> However, the dominance must be established in the expanded definition of the market as per Part II.

Dominance indicates a position of strength enjoyed by an enterprise in a market which allows autonomous operation independent of competitive market forces and enables the enterprise to favourably affect consumers and/or competitors.<sup>43</sup>

Even though the market share of an enterprise is an important indicator of the lack of competitive constraints, a high market share is not a conclusive indicator of dominance as it has to be coupled with significant and dynamic competition.<sup>44</sup> Reports show that G-Pay does not even have the highest market share in the UPI market let alone the digital payment market.<sup>45</sup> It has a mere share of thirty-four percent in the UPI market second to PhonePe's forty-six percent share.<sup>46</sup> Since UPI itself accounts for only about eighteen percent of all digital transactions,<sup>47</sup> G-Pay's share further dwindles in this newly defined relevant market.

In relation to competition, several payment options are available to the user to choose from while purchasing apps on Google Play or making IAPs like credit or debit cards, direct carrier billing, net banking, codes or vouchers, and UPI. Furthermore, choosing the UPI mode of payment does not compel the users to use G-Pay, they are free to use rival payment apps.

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<sup>42</sup> XYZ v. *Alphabet Inc* (n 12) 32.

<sup>43</sup> The Competition Act, 2002, §4, Explanation (a).

<sup>44</sup> *Meru Travels Solutions Private Ltd and Another v. Competition Commission of India and Others*, Case No. 96/2015, 16.

<sup>45</sup> Ajay Ramanathan, 'Google Pay ramps up tech infra to stem loss in market share' (*Financial Express*, 17 February 2023) <<https://www.financialexpress.com/life/technology-google-pay-ramps-up-tech-infra-to-stem-loss-in-market-share-2984050/>> accessed 15 May, 2023.

<sup>46</sup> *ibid*.

<sup>47</sup> Basudha Das, 'UPI dominated digital transactions in 2022, payments worth Rs 126 lakh crore recorded, says report' (*Business Today*, 19 April 2023) <<https://www.businesstoday.in/industry/banks/story/upi-dominated-digital-transactions-in-2022-payments-worth-rs-126-lakh-crore-recorded-says-report-377991-2023-04-19>> accessed 15 May, 2023.

Notwithstanding the unfulfillment of the dominant position condition of §4, the following Part nevertheless discusses how Google does not fall foul of the section.

### **B. Imposition of Unfair or Discriminatory Conditions**

Allegations of Google's violation of §4(2)(a) are based upon its exclusivity and preferential treatment towards G-Pay over other UPIs like BHIM, Paytm, PhonePe etc. Unfair conditions are those that give rise to unfair trade practices which cause loss or injury to the consumer.<sup>48</sup> Due to the 'take-it-or-leave-it' condition of integration of GPBS in the transaction system of apps, the developers claim that they are precluded from opting for its competitors that provide similar if not better services and prices.

Standard forms of contracts like that of the DDA, are not violative of antitrust policies unless combined with a diminution in service quality.<sup>49</sup> Even in Contract Law, only in cases where the conditions lack reasonableness, have the courts held standard forms of contracts to be unconscionable.<sup>50</sup> The condition imposed by GPBS is not unreasonable as it promotes a safe payment mechanism,<sup>51</sup> or unfair as it pertains to meet the existing extensive competition in the digital payment domain as per the explanation of §4(a).<sup>52</sup>

The availability of a clear choice and the volition of the consumers are important considerations in determining against an unfair condition.<sup>53</sup> It has been held that in the presence of *opt-out mechanisms*, the conditions imposed cannot be termed as 'take-it-or-leave-it'.<sup>54</sup> Unless there is an explicit or implicit imposition that takes away the discretion of users, §4(2)(a) is not contravened.<sup>55</sup>

Play's Payment Policy offers users plenty of opt-out options in this regard in the form of alternative modes of digital payment.<sup>56</sup> App developers benefit from UPI, enabling interoperability among different apps. Individuals can use Paytm or PhonePe ID to pay through G-Pay on the Play Store.

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<sup>48</sup> *HMM Ltd v. Director General, Monopolies and Restrictive Trade Practices Commission*, (1998) 6 SCC 485, 9-11.

<sup>49</sup> *Ross v. Bank of Am.*, N.A., 524 F.3d 217(2d Cir. 2008), 223-224.

<sup>50</sup> *Central Inland Water Transport Corporation v. Brojo Nath Ganguly and Another*, 1986 AIR 1571.

<sup>51</sup> *XYZ v. Alphabet Inc* (n 12) 300.

<sup>52</sup> The Competition Act, 2002, §4(2)(a), Explanation.

<sup>53</sup> *Shri Vinod Kumar Gupta v. Whatsapp Inc.*, Case No. 99/2016, 6.

<sup>54</sup> *In Re: Updated Terms of Service and Privacy Policy for Whats.App Users v. Whatsapp Llc*, Case No. 01/2021, 29.

<sup>55</sup> *Harshita Chavla v. Whatsapp Inc. and Others*, Case No. 15/2020, 91.

<sup>56</sup> Google Play Help, 'Accepted Payment Methods on Google Play' (*Google Play*)

<<https://support.google.com/googleplay/answer/2651410?hl=en-GB&co=GENIE.CountryCode%3DIN>>  
accessed 15 May, 2023.

However, using these alternative billing systems incur only a small reduction from the existing GPBS fee.<sup>57</sup> The validity of this fee is discussed in the following Part.

### **C. Denial of Market Access**

The service fee charged for alternative billing systems has been claimed to be excessive and in violation of §4(2)(c) as the developers are impliedly mandated to use G-Pay services for processing payments and other UPIs are denied entry to provide such services.<sup>58</sup> However, this service fee does not amount to the foreclosure of competitors as the developers can easily switch from one service to another.<sup>59</sup>

This fee not only helps Google protect its users and their trust in online payment systems, but also is *minimal* in nature when the features offered by Google Play are kept in mind. Since Google's functions include a basket of services such as creating, distributing, ranking and marketing apps, its fee structure cannot be compared to payment processors that charge a very negligible fee and provide only transaction services.<sup>60</sup>

Further, the fee is graded and charged in proportion to the revenue capitalised by the developer to ensure equity and non-discrimination.<sup>61</sup> Thus, Google does not deny market access to competitors.

### **D. Leveraging the Dominant Position in Another Market**

Since Part A established Google to be a non-dominant player in this market, the only tenable argument left to claim abuse of dominance is that Google leverages its dominant position in one market to enter or protect other relevant markets of digital payments.<sup>62</sup>

Google has been alleged to exert its dominance in Mobile OS and app store markets to enter into *tie-in agreements* that favour G-Pay over its competitors. Such agreements obligate the purchasers of

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<sup>57</sup> Play Console Help, 'Service Fees' (*Google Play*)

<<https://support.google.com/googleplay/android-developer/answer/112622?hl=en>> accessed 15 May, 2023.

<sup>58</sup> Sourabh Lele, 'Indian start-ups may take legal route against Google in-app billing' (*FirstPost*, 10 April, 2023)

<<https://www.firstpost.com/explainers/explained-why-has-google-stopped-its-billing-policy-in-india-what-does-this-mean-for-you-11550201.html>> accessed May 15, 2023.

<sup>59</sup> *Shri Vinod Kumar Gupta v. Whatsapp Inc.*, Case No. 99/2016, 57.

<sup>60</sup> *ibid* 319, 320.

<sup>61</sup> LexisNexis Competition Expert (n 46).

<sup>62</sup> The Competition Act, 2002, §4(2)(e).

a specific product to buy another, less popular product as a necessary condition for the initial purchase.<sup>63</sup>

However, there is a caveat that protects reasonable conditions imposed through the rights conferred by specialised legislations such as patent, copyright, and intellectual property law.<sup>64</sup> Maintenance of Intellectual Property Rights gives the proprietor the sole right to promote and benefit from its goods.<sup>65</sup> The aim of IPR is to encourage innovation, which can also be found in the objectives of competition law.<sup>66</sup>

A *weighing and balancing* of both laws is thus required, making reasonable restrictions imposed on competition to promote IPR justifiable. Google engages in tie-in agreements to improve the user experience and quality of its service which has been accepted as a reasonable condition.<sup>67</sup> By striving to improve quality, tie-in agreements not only protect the company's goodwill but also become pro-competitive policies.

#### IV. CONCLUSION

Through this paper, the CCI order holding GPBS accountable for contravening the Competition Act is revealed to be incompetent in granting the present market players their due credit. Even though inadvertently, in the garb of promoting technological and competitive development, the order stifles such players from protecting and enhancing their own technologies. This paper bares such lacunae in the law through a cross-jurisprudential approach *tying in* contractual and IP law with anti-competition guidelines. Through the intriguing case of GPBS, the failings of a wrongly defined market are spotlighted. In this light, a balanced approach limiting a wide reading of the Act is warranted to ensure the seeds of today are not lost in lieu of the fruits of tomorrow.

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<sup>63</sup> The Competition Act, 2002, §3(4), Explanation (a); *Shri Sonam Sharma v. Apple Inc. USA and Others*, Case No. 24/2011, 66.

<sup>64</sup> The Competition Act, 2002, §3(5)(i).

<sup>65</sup> *FICCI Multiplex Association of India v. United Producers/Distribution Forum*, Case No. 01/2009, 4.2.

<sup>66</sup> The Competition Act, 2002, §4(2)(b)(ii).

<sup>67</sup> *In re: IELTS Australia Pty Ltd.*, Case No. 60/2010, 12.