

# HOW GOOGLE’S ANDROID BUNDLES COULD COST THEM BILLIONS IN THE EU & INDIA

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*With the advent of technological advances, many companies who formerly were not subject to government scrutiny now find themselves being prosecuted for their business practices. Google is one such company, whose bundling of applications on Android phones has brought scrutiny from countries such as Russia, the United States, and India, as well as the European Union. Investigations are pending in the European Union and India, currently, and the application of law in those cases could yield not only large monetary damages, but also signal a shift in the way that technology companies, such as Amazon, Facebook, and Apple, think about their legal exposure in these countries and those countries that will follow. This Note considers the laws governing an abuse of dominance in both the European Union and India and evaluates whether Google’s actions regarding the bundling of applications on Android software fit within the purview of those laws. This Note argues that Google’s actions in that regard will be found anti-competitive under the governing European Union law as well as the governing Indian law and estimates the damages that Google could face in the European Union to be equivalent to the percentage faced in recent precedential cases.*

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## INTRODUCTION

When Larry Page and Sergey Brin started Google in the mid-1990's, they had no way of knowing how big it would become.<sup>1</sup> Today, Google has grown from a fledgling company housed inside of a garage<sup>2</sup> to a behemoth conglomerate with interests in cell phones, tablets,<sup>3</sup> self-driving cars,<sup>4</sup> internet service,<sup>5</sup> and even medical research.<sup>6</sup> However, this takeover has led Google to pre-load applications, such as G-Mail and Google Maps,<sup>7</sup> on Android phones in a manner that is coming under fire in many countries.<sup>8</sup> This practice, called "bundling," has caused Google to be scrutinized for violations of competition laws in the United States,<sup>9</sup> Russia,<sup>10</sup> the European Union (EU),<sup>11</sup> and India.<sup>12</sup> In fact, a Russian

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1. *Our History in Depth*, GOOGLE, <https://www.google.com/about/company/history/> (last visited Mar. 11, 2016).

2. *Id.* at Sept. 1998.

3. *Id.* at Jan. 2010.

4. *Google Antsy as California Slow on Self-Driving Car Rules*, CBS NEWS (Nov. 16, 2015, 7:53 AM), <http://www.cbsnews.com/news/google-antsy-as-california-slow-on-self-driving-car-rules/>.

5. J.D. Sartain, *What's up with Google Fiber?*, CIO (Nov. 11, 2015, 5:32 AM), <http://www.cio.com/article/3004433/internet-service-providers/whats-up-with-google-fiber.html>.

6. Davey Alba, *Google Aims a \$50 Million Moonshot at Curing Heart Disease*, WIRED (Nov. 16, 2015, 9:00 AM), <http://www.wired.com/2015/11/google-aims-a-50-million-moonshot-at-curing-heart-disease/>.

7. Alistair Barr, *Google Eases Up on Phone Makers, Drops 4 Apps from Pre-Install List*, WALL ST. J.: BLOG (Aug. 21, 2015, 4:11 PM), <http://blogs.wsj.com/digits/2015/08/21/google-eases-up-on-phone-makers-drops-4-apps-from-pre-install-list/>.

8. Conor Dougherty & Mark Scott, *Google Antitrust Inquiries Spread over Globe, with India the Latest Problem*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/technology/google-antitrust-investigations-spread-across-the-globe.html>.

9. Brody Mullins, Rolfe Winkler & Brent Kendall, *Inside the U.S. Antitrust Probe of Google*, WALL ST. J. (Mar. 19, 2015, 7:38 PM), <http://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274>.

10. Ilya Khrennikov, *Russia Says Google Broke Antitrust Laws*, BLOOMBERG (Sept. 14, 2015, 11:51 AM), <http://www.bloomberg.com/news/articles/2015-09-14/russia-says-google-broke-antitrust-laws-sending-yandex-soaring>.

antitrust authority has already determined that Google was guilty of violations of Russian antitrust law through its bundling of Google apps onto Android devices.<sup>13</sup> After the favorable finding of the Federal Antimonopoly Service of Russia, Yandex (Google's biggest Russian competitor, holding around 60% of the Russian search engine market<sup>14</sup>) requested that the European Commission investigate Google under the same theories.<sup>15</sup> The Russian court ordered Google to draft new agreements that allow previously prohibited third-party apps to be installed onto smart phones.<sup>16</sup> Yandex stated publicly that it "think[s] that the Russian finding of abuse of dominance is instructive, and is a conclusion that can readily be adopted in other jurisdictions, including the EU."<sup>17</sup> Google appealed the Russian verdict,<sup>18</sup> but was denied relief by the Moscow Arbitration Court on March 14, 2016.<sup>19</sup> If Google does not successfully appeal this new ruling, they will need to restructure their contracts with device manufacturers and pay up to 15% of the revenue

11. James Kanter & Mark Scott, *Europe Challenges Google, Seeing Violations of Its Antitrust Law*, N.Y. TIMES (Apr. 15, 2015), [http://www.nytimes.com/2015/04/16/business/international/european-union-google-antitrust-case.html?\\_r=1](http://www.nytimes.com/2015/04/16/business/international/european-union-google-antitrust-case.html?_r=1).

12. Dougherty & Scott, *supra* note 8.

13. Khrennikov, *supra* note 10.

14. Joseph Nordqvist, *Yandex Extends Google Antitrust Battle to the EU*, MKT. BUS. NEWS (Nov. 15, 2015, 9:08AM), <http://marketbusinessnews.com/yandex-extends-google-antitrust-battle-to-the-eu/111585>.

15. *Id.*

16. RESHENIE I PREDPISANIE PO DEPU NO. 1-14-21/00-11-15 [Decision and Determination of Case No. 1-14-21/00-11-15, Federal Antimonopoly Service], Sept. 18, 2015, <http://solutions.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologii/ad-54066-15> (Russ.).

17. Nordqvist, *supra* note 14.

18. Kishalaya Kundu, *Google to Appeal Against Russian Antitrust Ruling*, ANDROID HEADLINES (Nov. 17, 2015), <http://www.androidheadlines.com/2015/11/google-appeal-russian-antitrust-ruling.html>.

19. See Press Release, Federal Antimonopoly Service of the Russian Federation, The Court: Google Violated Antimonopoly Legislation (March 14, 2016, 1:06 PM), <http://en.fas.gov.ru/press-center/news/detail.html?id=44968>; Patrick Boyle, *Russian Court Upholds Google Phone App Antitrust Verdict*, LAW 360 (March 14, 2016, 7:42 PM), <http://www.law360.com/articles/771023/russian-court-upholds-google-phone-app-antitrust-verdict>.

gained from preloading the applications in 2014.<sup>20</sup> Bigger problems still lie ahead, though, as European Union Antitrust Chief Margarethe Vestager has shown no shyness in going after companies whom she thinks are violating EU competition laws.<sup>21</sup> Vestager places a high priority on investigating Google's abuses of market dominance, demonstrated by the fact that her first act as commissioner was to instigate this case against Google for bundling its proprietary apps onto Android operating systems.<sup>22</sup> Recently Vestager even hinted that there might be new charges looming for Google (or Alphabet, as its parent company is now known) during an interview with the Wall Street Journal.<sup>23</sup> Similarly, charges are also pending in India,<sup>24</sup> where the relatively young Competition Commission of India may seek to prove that itself by aggressively pursuing companies who have potentially violated Indian competition laws.

This Note first explains what exactly bundling is, how Google is engaging in it, and why this conduct is leading to investigations. Next, it explores Article 102 of the Treaty on the Functioning of the European Union as well as the Indian Competition Act of 2002, which govern what an abuse of dominance is in their respective jurisdictions. Finally, it analyzes this conduct under the laws and suggests that Google's conduct is an abuse of dominance as explained in both legal systems and further estimates what the damages accompanying unfavorable findings might be.

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20. Olga Razumovskaya, *Google Fails to Overturn Antitrust Ruling in Russia*, WALL ST. J. (Mar. 14, 2016, 8:40 AM), <http://www.wsj.com/articles/google-fails-to-overturn-antitrust-ruling-in-russia-1457959212>.

21. Foo Yun Chee, *EU Antitrust Chief Says Apple, Google Cases Show No U.S. Bias*, REUTERS (Oct. 1, 2015, 11:16 PM), <http://uk.reuters.com/article/2015/10/01/uk-eu-antitrust-apple-google-idUKKCN0RV5UT20151001>.

22. Tom Fairless & Stephen Fidler, *EU Antitrust Chief Vestager Speaks About Google and Other Key Cases*, WALL ST. J.: BLOG (Oct. 26, 2015, 3:17AM), <http://blogs.wsj.com/brussels/2015/10/26/eu-antitrust-chief-vestager-speaks-about-google-and-other-key-cases/>.

23. Tom Fairless & Stephen Fidler, *EU to Pursue Google Parent Alphabet on Multiple Fronts, Vestager Says*, WALL ST. J. (Oct. 26, 2015, 6:37 AM), <http://www.wsj.com/articles/eu-to-pursue-google-parent-alphabet-on-multiple-fronts-vestager-says-1445817842>.

24. Dougherty & Scott, *supra* note 8.

## WHAT IS BUNDLING?

“Bundling” is exactly what internet service providers<sup>25</sup> and insurance companies<sup>26</sup> have told you: a grouping of items together from a single provider. In terms of smart phones, this manifests itself as multiple applications from the same service provider pre-loaded onto your phone; specifically, Google requires manufacturers to pre-install eleven applications if the manufacturers want to pre-install Google’s most popular applications (i.e. Gmail, Maps, or Google Play).<sup>27</sup> Ewan Spence explained that “[bundles] help differentiate brands running a similar operating system, they help focus users on the abilities of specific models from a single manufacturer, and arguably the inclusion of an application in the distribution can be a revenue stream with ‘pay for placement’ or the leveraging of in-app purchasing.”<sup>28</sup> However, Spence also notes that these pre-loaded, bundled apps can be impossible to remove from phones, providing examples such as Newsstand on Apple devices, Office and OneNote from Windows Phone, and most pre-loaded apps on Android devices.<sup>29</sup> Of course, therein lies the problem for Google’s presence on Android devices.

## BUNDLING AND ANTITRUST LAW

This seemingly innocuous practice has run afoul of antitrust and competition laws in countries around the globe for a few very important reasons: the ease of use, the inability to uninstall the apps, and the so-

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25. *Save A Bundle: How to Piece Together a Great Deal for TV, Phone, and Internet Service*, CONSUMER REPORTS MAG. (Feb. 2010), <http://www.consumerreports.org/cro/magazine-archive/2010/february/electronics-and-computers/bundling/overview/bundling-ov.htm>.

26. Rick Mikolasek, *Progressive Bundling Review*, THE TRUTH ABOUT INSURANCE (Apr. 25, 2011), <http://www.thetruthaboutinsurance.com/progressive-bundling-review/>.

27. Barr, *supra* note 7.

28. Ewan Spence, *Bundled Applications Are Here to Stay on Your Smartphone*, FORBES (Jan. 27, 2014, 6:50 AM), <http://www.forbes.com/sites/ewanspence/2014/01/27/bundled-applications-are-here-to-stay-on-your-smartphone/#30ef39a73b8b>.

29. *Id.*

called adoption factor.<sup>30</sup> As Spence states, “[i]f a user is looking to share a picture online they will generally look to the built-in and bundled apps first of all before heading to the app store. If they want an [app]... the bundled apps will get the first bite of the cherry.”<sup>31</sup> Furthermore, Spence states that Androids come with pre-bundled apps aimed at the general public who cannot remove them from within the software, which furthers the “adoption factor.”<sup>32</sup>

The verdicts of the pending cases against Google (particularly the EU case)<sup>33</sup> will shape the way that other tech companies, such as Amazon, Apple, and Facebook,<sup>34</sup> do business around the world. EU verdicts have led to a domino effect of similar verdicts in the past, which could continue to spell trouble for Google and these other companies in the future.<sup>35</sup>

#### EUROPEAN UNION COMPETITION LAWS

The EU has not hesitated to make and enforce competition laws that many have deemed “protectionist.”<sup>36</sup> Antitrust Chief Margrethe Vestager has expressed her distaste for settling antitrust claims, in contrast to her predecessor, who encouraged settling to deal with claims more quickly.<sup>37</sup> While settlement is still possible for Google, Kanter & Scott note that it would have been a less impactful settlement if Google had chosen to settle with former Antitrust Chief Joaquín Almunia during his three previous attempts to settle.<sup>38</sup> Vestager has aggressively pursued cases for mergers, tax deals, and cartels against companies such as Amazon,

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30. *Id.*

31. *Id.*

32. *Id.*

33. Dougherty & Scott, *supra* note 8 (“While not explicitly related to Google’s continuing antitrust problems in Europe, India’s accusations . . . are similar.”).

34. Shepard Goldfein & James Keyte, *EU and Google: Study in Divergence for Antitrust Enforcement*, 253 N.Y. L.J. 1, 2 (May 12, 2015), <https://www.skadden.com/sites/default/files/publications/070051516Skadden.pdf>.

35. Dougherty & Scott, *supra* note 8.

36. Goldfein & Keyte, *supra* note 34.

37. Christian Barker & Alex Oliver, *Europe Antitrust Chief Not Afraid of Starting a Fight*, FINANCIAL TIMES (Mar. 8, 2015, 5:23 PM), <http://www.ft.com/cms/s/0/aa6d25b4-c3ff-11e4-a02e-00144feab7de.html#axzz3ncVgOU00>.

38. Kanter & Scott, *supra* note 11.

Starbucks, and Apple, as well as Japanese car companies in her year-long tenure.<sup>39</sup> However, the case against Google (as well as the potential for actions against Facebook) has brought new political pressure from outside of Europe by American President Barack Obama.<sup>40</sup> This pressure will probably not affect Vestager's decision about whether to push forward, though, if her formal accusations against Russian oil company OAO Gazprom (despite the political implications) can be taken as dispositive.<sup>41</sup>

To proceed with this case, Vestager and the European Commission will need to look to the source of the competition law in the European Union. Article 102 of the Treaty on the Functioning of the European Union addresses the charge of abuse of dominance that Google is currently facing.<sup>42</sup> Specifically, Article 102 states that

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or

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39. Chee, *supra* note 21.

40. Kanter & Scott, *supra* note 11 (explaining that Facebook's protection of online data is under scrutiny by the EU's privacy watchdog).

41. Fairless & Fidler, *supra* note 23.

42. *Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases)*, EUROPEAN COMM'N, [http://ec.europa.eu/competition/antitrust/procedures\\_102\\_en.html](http://ec.europa.eu/competition/antitrust/procedures_102_en.html) (last updated July 2013) [hereinafter *Article 102 TFEU Cases*].

according to commercial usage, have no connection with the subject of such contracts.<sup>43</sup>

The Commission will first determine whether the company is actually dominant in the relevant market, which will either be a geographic or a product market.<sup>44</sup> A relevant geographic market is defined as “an area in which the conditions of competition for a given product are homogenous,” and the relevant product market is determined to be all similar items at similar prices that could be considered substitutes for the product in question.<sup>45</sup> Next, the European Commission will look at the market share of the company within the relevant market as compared to the market shares of the company’s competitors.<sup>46</sup> The market share and the period of time over which the company has held that market share are important in determining dominance, but the Commission notes that “[i]f a company has a market share of less than 40%, it is unlikely to be dominant.”<sup>47</sup> Other factors will be considered by the Commission, such as barriers to market entry, countervailing buyer power, the overall strength and size of the company, and whether the company is vertically integrated.<sup>48</sup>

If a company is ultimately found to be in a dominant position within the relevant market, the Commission will then be tasked with determining whether an abuse has occurred.<sup>49</sup> Potential examples of such abuses are: “requiring that buyers purchase all units of a particular product only from the dominant company (exclusive purchasing); setting prices at a loss-making level (predation); refusing to supply input indispensable for competition in an ancillary market; [and] charging excessive prices.”<sup>50</sup> The Commission can also choose to start an investigation and, at the close of the investigation, the Commission can

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43. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, May 9, 2008, 2008 O.J. (C 115) 47, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>.

44. *Article 102 TFEU Cases*, *supra* note 42.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

choose to issue a Statement of Objections listing the objections against the company.<sup>51</sup>

If a company receives a Statement of Objections, the company can invoke its rights of defense.<sup>52</sup> These rights include being able to see the non-confidential findings of the investigation against them and a chance to request an oral hearing before an independent Hearing Officer.<sup>53</sup> However, if the Commission is still concerned after the exercise of these rights of defense, the Commission will draft a decision that will then be given to the Advisory Committee for approval before the College of Commissioners adopts the decision.<sup>54</sup> After adoption, the Commission may use fines as a punishment and a deterrent, where the maximum level is 10% of the overall annual turnover of the company.<sup>55</sup>

In regards to damages, the European Commission has created a private cause of action for businesses affected by the alleged abuses: the Commission explicitly states that “[a]ny citizen or business which suffers harm as a result of a breach of the EU competition rules should be entitled to claim compensation from the party who caused it” and that victims are entitled to bring claims in national courts.<sup>56</sup> The Commission’s goal in levying fines against companies who violate competition laws is to prevent future violations.<sup>57</sup> The basic fine is a percentage of whatever the relevant sales of the offending product are, usually measured during the last year of the infringement.<sup>58</sup> The fine can be up to 30% of the company’s relevant sales and will fluctuate depending on the severity of the infringement.<sup>59</sup> The fine will then be multiplied to reflect the amount of time during which the abuse was occurring, so as to properly punish “damage to the economy caused by the infringement over time” by relating the value of the fine to the value

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51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Fines for Breaking EU Competition Law*, EUROPEAN COMM’N, (Nov. 2011), [http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf) [hereinafter *Fines*].

58. *Id.*

59. *Id.*

gained through sales during the infringement.<sup>60</sup> This amount is subject to be either increased or decreased, depending on factors such as recidivism or legislative justifications, respectively.<sup>61</sup> The limit for the total penalty is 10% of the company's (or group's, if the violations are restricted to a single group within a larger parent company) annual turnover.<sup>62</sup>

The parties are allowed to appeal the Commission's decision to the General Court, at which point the General Court may "cancel, increase[,] or reduce the fine imposed by the Commission."<sup>63</sup> However, the Commission's record on appeal shows that, while the courts have the ability to change the amount of the fines that have been leveled, over 90% of the value of the fines is upheld.<sup>64</sup> The unsuccessful party in a General Court decision may appeal to the Court of Justice, as long as such an appeal concerns a question of law and not a question of fact.<sup>65</sup>

#### Microsoft Corp. v. Commission

The European Commission pursued a case against Microsoft in 2003<sup>66</sup> for anti-competitive practices related to its bundling of applications onto Windows operating systems.<sup>67</sup> Specifically, the European Commission took exception to the fact that Microsoft had been bundling Windows Media Player on all computers running Windows operating system.<sup>68</sup> Beginning in 2000 with a Statement of Objections concerning the interoperability of Windows with "third-party server operating systems," the Commission continued its investigation into Microsoft by issuing a

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Article 102 TFEU Cases*, *supra* note 42.

64. *Fines*, *supra* note 57.

65. *Article 102 TFEU Cases*, *supra* note 42.

66. *Timeline of European Commission Case Against Microsoft*, MICROSOFT NEWS CENTER, <http://www.microsoft.com/presspass/legal/european/04-24-06eccasetimeline.mspx> (last updated Sept. 2007).

67. Nicholas Economides & Ioannis Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases*, 76 ANTITRUST L.J. 483, 485 (2009).

68. *Id.* at 483, 485.

second Statement of Objections in 2001, this time regarding Windows Media Player being tied to Windows operating systems.<sup>69</sup>

A third Statement of Objections was published against Microsoft in August of 2003 that reaffirmed the Commission's two prior Statements of Objections, preliminarily concluded that the alleged abuses were ongoing, and provisionally recommended a remedy, along with two alternative remedies, to even the competitive playing field.<sup>70</sup> In October 2003, Microsoft responded to the Commission's allegations with a rebuke, stating that the Commission's evidence did not support its conclusion about Microsoft's alleged abuses; however, Microsoft still continued the settlement negotiations that they had begun in 2002, following the second Statement of Objections.<sup>71</sup>

Competition Commissioner Mario Monti ended the settlement discussions on March 18, 2004 and on March 24, 2004 the European Commission found against Microsoft and ordered them to offer a version of their operating system with no pre-loaded Windows Media Player.<sup>72</sup> Microsoft was also forbidden to incentivize people to purchase the version of Windows that included Windows Media Player.<sup>73</sup> The Commission voluntarily suspended these obligations while Microsoft appealed the decision, but the obligations were reinstated on December 22, 2004 following the European Court of First Instance's rejection of the appeal.<sup>74</sup> During that appeal, Microsoft tried to argue that its inclusion of the Windows Media Player on its operating systems was no different than Apple's inclusion of iTunes on Mac OS and iOS; however, this argument was still not persuasive enough to convince the Commission to forgo punishing Microsoft as the dominant player.<sup>75</sup>

69. MICROSOFT NEWS CENTER, *supra* note 66.

70. *Microsoft Case*, EUROPEAN COMM'N, <http://ec.europa.eu/competition/sectors/ICT/microsoft/investigation.html> (last updated Apr. 16, 2012) [hereinafter *Microsoft Case*].

71. MICROSOFT NEWS CENTER, *supra* note 66.

72. *Id.*

73. Economides & Lianos, *supra* note 67, at 484.

74. *Implementation of the Decision*, EUROPEAN COMM'N, <http://ec.europa.eu/competition/sectors/ICT/microsoft/implementation.html> (last updated June 27, 2012).

75. *A Bittersweet Win over Microsoft*, ECONOMIST (Sept. 17, 2007), <http://www.economist.com/node/9823880>.

Microsoft released Windows XP N in June 2005, which was intended to comply with these measures.<sup>76</sup> However, despite the Commission being “happy” with Microsoft’s progress in June 2005,<sup>77</sup> the Commission adopted further sanctions against Microsoft for non-compliance with the 2004 order under Article 24(1) of Regulation 1/2003.<sup>78</sup> On September 17, 2007, the Court of First Instance upheld the Commission’s abuse of dominance finding, but criticized the Commission’s imposition of a separate trustee to oversee all of Microsoft’s required disclosures.<sup>79</sup> Microsoft was ordered to pay 80% of the Commission’s legal costs for the appeal, and the Commission had to pay for a specified part of Microsoft’s costs, as well.<sup>80</sup>

Building on the reasoning and the Court of First Instance’s 2007 verdict regarding Windows Media Player, the European Commission sent a Statement of Objections to Microsoft regarding the bundling of Internet Explorer on computers running Windows on January 15, 2009.<sup>81</sup> The Statement of Objections outlined the Commission’s concerns that by including Internet Explorer on Windows, Internet Explorer had access to 90% of the world’s PC users, while other browsers lacked the opportunity to reach a similar percentage of the market.<sup>82</sup> In December 2009, Microsoft committed to allowing its European users the ability to install any browser onto their Windows computers, as well as providing a browser choice screen for those users for whom Internet Explorer was the default browser.<sup>83</sup> This was to be instituted on new computers, as well as previously purchased versions of Windows XP, Windows Vista,

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76. MICROSOFT NEWS CENTER, *supra* note 66.

77. *Id.*

78. EUROPEAN COMM’N, *supra* note 74.

79. *Microsoft Loses Anti-Trust Appeal*, BBC NEWS (Sept. 17, 2007, 10:45 AM), <http://news.bbc.co.uk/2/hi/business/6998272.stm>.

80. *Id.*

81. *Antitrust: Commission Confirms Sending a Statement of Objections to Microsoft on the Tying of Internet Explorer to Windows*, EUROPEAN COMM’N (Jan. 17, 2009), [http://europa.eu/rapid/press-release\\_MEMO-09-15\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-09-15_en.htm?locale=en) [hereinafter *Statement of Objections*].

82. *Id.*

83. *Microsoft Statement on European Commission Decision*, MICROSOFT CORP. (Dec. 16, 2009), <http://news.microsoft.com/2009/12/16/microsoft-statement-on-european-commission-decision/>.

and Windows 7 in Europe.<sup>84</sup> Microsoft also committed to ensuring that their products and services were interoperable with third-party products and services at the same time as they announced their commitment to allowing web browser choices.<sup>85</sup>

While these promises seemed to provide an amicable end to an almost decade-long battle, Microsoft came under fire once more in 2013 for failing to uphold the 2009 commitments that it had made.<sup>86</sup> The European Commission fined Microsoft €561 million (equivalent to \$731 million at the time) after an investigation revealed that Microsoft had failed to provide the promised browser choice to users during the period of May 2011 to July 2012.<sup>87</sup> Microsoft apologized, cut CEO Steve Ballmer's bonus, and blamed both a "technical error" and an executive who had recently left the company for the failure.<sup>88</sup> While the sanction represented 11% of Microsoft's profits for the quarter, it didn't rise to the allowable 10% of annual global revenue; however, it was the first sanction to be levied on the basis of a failure to meet obligations and communicated a renewed vigor towards compliance by the Commission.<sup>89</sup> Competition Commissioner Joaquín Almunia intended the sanction to be a warning to companies to keep their legally-binding commitments and noted that the commission had been "naïve" in 2009 to not provide more oversight through an external trustee.<sup>90</sup>

Though the Microsoft case was one of the most significant cases in recent memory due to its impact and the longevity of the proceedings,<sup>91</sup> Microsoft was not the only large enterprise against whom the European Commission pursued a case for abuse of dominance in the past decade.

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84. *Id.*

85. *Id.*

86. Foo Yun Chee, *EU Fines Microsoft \$731 Million for Broken Promise, Warns Others*, REUTERS (Mar. 6, 2013, 7:45 PM), <http://www.reuters.com/article/us-eu-microsoft-idUSBRE92500520130307>.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See James Kanter, *European Regulators Fine Microsoft, Then Promise to Do Better*, N.Y. TIMES (Mar. 6, 2013), <http://www.nytimes.com/2013/03/07/technology/eu-fines-microsoft-over-browser.html> (stating that Microsoft was a "special case," a "milestone," and the first company to garner such penalties over the decade of the case).

## Intel Corp. v. Commission

Another important European Commission decision to consider is *Intel v. Commission*.<sup>92</sup> This case stemmed from Advanced Micro Devices' complaint about Intel's unfair use of rebates in the United States and in the European Union.<sup>93</sup> During an eight-year long investigation by the European Union, Intel was found to have offered rebates to computer manufacturers who purchased at least 95% of their chips from Intel from 2002-2005.<sup>94</sup> Dell, Hewlett-Packard, NEC, and Lenovo all received rebates to purchase Intel chips, and the German retail store Media Saturn Holding received rebates for only stocking computers that contained Intel chips.<sup>95</sup> These alleged offenses amounted to an abuse of dominance under the competition laws of the European Union according to Article 82 (now Article 102 in the Consolidated Treaty on the Functioning of the European Union<sup>96</sup>) and precedential cases.<sup>97</sup>

Intel received an unfavorable verdict from the European Commission in 2009, which was upheld by the General Court in 2014.<sup>98</sup> The General Court quoted precedent stating that any agreement, whether voluntary or coerced, in which a dominant player incentivizes or otherwise entices a company to buy all or most of what they need from the dominant player

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92. Case T-286/09, *Intel Corp. v. Comm'n*, 2014 E.C.L.I. 547, ¶ 20, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153576&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=385422>.

93. Aoife White & Stephanie Bodoni, *Intel Says EU Withheld Evidence in Antitrust Case*, BLOOMBERG TECH. (July 3, 2012, 7:36 AM), <http://www.bloomberg.com/news/articles/2012-07-02/intel-to-say-eu-withheld-evidence-mitigating-1-34-billion-fine>.

94. *Id.*

95. Foo Yun Chee, *Intel Loses Court Challenge Against \$1.4 Billion EU Fine*, REUTERS (June 12, 2014, 6:00 AM), <http://www.reuters.com/article/us-intel-court-eu-idUSKBN0EN0M120140612>.

96. With the passage of the Treaty of Lisbon, the Rome Treaty (officially, the "Treaty Establishing the European Community") and the Maastricht Treaty (officially, the "Treaty on the European Union") were consolidated and their articles were renumbered. The case being discussed for its precedential value was decided prior to the entry into force of the Treaty of Lisbon, and therefore, refers to Article 82, which has since been renumbered as Article 102. Presidency Conclusions, Brussels European Council (July 20, 2007), [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/94932.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf).

97. *Intel Corp.*, 2014 E.C.L.I. 547, ¶ 20.

98. Chee, *supra* note 95.

is a violation of Article 82.<sup>99</sup> The precedential case, *Hoffmann-La Roche*, classified rebates as being in one of three categories: quantity rebates, fidelity/exclusivity rebates, or “rebates falling within the third category.”<sup>100</sup> Quantity rebates are given based on the quantity ordered from the company and they are not an abuse of dominance because they impose no requirement in exchange for the rebate.<sup>101</sup> The second category of rebates, known as exclusivity rebates or fidelity rebates, are given only if a buyer purchases most or all of what they need from the seller offering the rebate; when the seller offering the rebates is already holding a dominant position in the market, this practice will violate competition laws due to the fact that they are “designed to remove or restrict the purchaser’s freedom to choose his sources of supply and to deny other producers access to the market.”<sup>102</sup> Finally, the third category includes rebates that, for example, are offered once a sales objective is met and, so long as that objective does not constitute an exclusivity agreement, these rebates will not typically violate competition laws.<sup>103</sup> The Commission had accused Intel of enticing Dell, Lenovo, HP, and others to purchase its products through the second type of rebates, exclusivity/fidelity rebates.<sup>104</sup> The General Court agreed with the Commission that Intel’s rebates fell under the second category,<sup>105</sup> a lethal verdict considering that the Commission had found that Intel held “in excess of or around 70%” of the relevant CPU market.<sup>106</sup> Furthermore, the General Court stated that “[t]he Commission demonstrated to the requisite legal standard that Intel attempted to conceal the anti-competitive nature of its practices and implemented a long term comprehensive strategy to foreclose AMD from the strategically most important sales channels.”<sup>107</sup> The General Court also supported the amount of the fine despite it being the largest fine ever levied in such a case because the amount of the fine (€1.06 billion, or the equivalent of

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99. *Intel Corp.*, 2014 E.C.L.I. 547, ¶ 72.

100. *Id.* ¶¶ 75–78.

101. *Id.* ¶ 75.

102. *Id.* ¶¶ 76–77.

103. *Id.* ¶ 78.

104. *Id.* ¶¶ 28–29.

105. *Id.* ¶ 79.

106. *Id.* ¶¶ 21, 25.

107. Chee, *supra* note 95 (citing Case T-286/09, *Intel Corp. v. Comm’n*, 2014 E.C.L.I. 547, ¶¶ 273, 1551).

\$1.44 billion, at the time) only rose to about 4.15% of Intel's 2008 turnover instead of the up-to 10% of turnover that the Commission could have enacted.<sup>108</sup> Intel faced a large amount of scrutiny in many different countries during this time in an analogous situation to the one in which Google currently finds itself. Intel settled their U.S. cases by paying AMD \$1.25 billion and an undisclosed amount to the U.S. Federal Trade Commission in 2009.<sup>109</sup> The Competition Commission of India also launched an inquiry into Intel in 2014, resulting in a favorable verdict towards Intel and exemplifying the differences between Indian competition law and other countries.<sup>110</sup> Looking forward, it will be extremely important for Google to understand these differences as their case proceeds in India.

#### INDIAN COMPETITION LAW

There have been two acts that have controlled India's competition laws: the Monopolies and Restrictive Trade Practices Act (MRTPA) of 1969<sup>111</sup> and its successor the Indian Competition Act of 2002.<sup>112</sup> The former prohibited "restrictive trade practices" and activities that did not "genuinely benefit the ultimate consumer."<sup>113</sup> Other than that, the MRTPA lacked many prohibitions that were later incorporated in the Competition Act: "abuse of dominance" was not specifically barred or defined, although it was somewhat included under the general

108. *Id.*

109. White & Bodoni, *supra* note 93.

110. Amit Kapur, Farhad Sorabjee & Amitabh Kumar, *India*, J. SAGAR ASSOCS. 1, 7 (2014), <http://www.jsalaw.com/wp-content/uploads/2015/09/VA2014-India-final2.pdf>.

111. Monopolies and Restrictive Trade Practices Act, 1969, No. 54, Acts of Parliament, 1969 (India), [http://www.mca.gov.in/Ministry/annual\\_reports/annualreport2006/CHAPTER4.pdf](http://www.mca.gov.in/Ministry/annual_reports/annualreport2006/CHAPTER4.pdf).

112. Competition Act, 2002, No. 12, § 27, Acts of Parliament, 2003 (India), [www.cci.gov.in/sites/default/files/cci\\_pdf/competitionact2012.pdf](http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf) [hereinafter Competition Act] [http://www.jsalaw.com/Admin/uplodedfiles/PublicationFiles/Indian%20Competition%20Law\\_The%20Corporate%20International%20Magazine.PDF](http://www.jsalaw.com/Admin/uplodedfiles/PublicationFiles/Indian%20Competition%20Law_The%20Corporate%20International%20Magazine.PDF).

113. Samir R. Gandhi & Rahul Rai, *Lessons from Intel's \$1.45 Billion Fine*, BUS. TODAY (Sept. 2, 2009), [http://www.businesstoday.in/magazine/columns/lessons-from-intels-\\$1.45-billion-fine/story/4599.html](http://www.businesstoday.in/magazine/columns/lessons-from-intels-$1.45-billion-fine/story/4599.html) (citing Monopolies and Restrictive Trade Practices Act, 1969, No. 54, Acts of Parliament, 1969 (India), [http://www.mca.gov.in/Ministry/annual\\_reports/annualreport2006/CHAPTER4.pdf](http://www.mca.gov.in/Ministry/annual_reports/annualreport2006/CHAPTER4.pdf)).

prohibition of “monopolistic trade practices” that was included in Chapter IV of the MRTPA.<sup>114</sup> The Competition Act established the Competition Commission of India (CCI) and “entrusted [the CCI] with the duty to regulate and eliminate practices having an adverse effect on competition in India.”<sup>115</sup> The Competition Act is based off of similar legislation in the European Union, and it “prohibits the abuse of a dominant position by any ‘enterprise’ or ‘group’, and defines dominant position as a position of strength enjoyed by an enterprise in the relevant market in India,” which allows the business/enterprise “to operate independently of the competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour.”<sup>116</sup> This is a departure from the previously “toothless” Monopolies Restrictive and Trade Practices Act of 1969.<sup>117</sup>

According to a presentation by former Additional Director General of the CCI, G.R. Bhatia, abuse of dominance is prohibited when there is

[i]mposition of unfair or discriminatory condition in the purchase or sale of goods or services or their prices, [l]imiting or restricting production or technical development, [d]enial of market access, [s]upplementary obligations, [or] [u]se of dominant position in one market to protect or enter into another.<sup>118</sup>

The specific sanctions at the CCI’s disposal are detailed in Section 27 of the Competition Act and include, but are not limited to, imposing fines, ordering the enterprise to cease and desist the abusive behavior,<sup>119</sup>

114. PRASHANT PRAKHAR ET AL., NISHITH DESAI ASSOCIATES, COMPETITION LAW IN INDIA: A REPORT ON JURISPRUDENTIAL TRENDS 11 (June 2015), [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/Competition\\_Law\\_in\\_India.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition_Law_in_India.pdf).

115. Cyril Shroff & Nisha Kaur Uberoi, *India: Abuse of Dominance*, ASIA-PACIFIC ANTITRUST REV. 1, 1 (2015), <http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2749/>.

116. *Id.*

117. Kumkum Sen, *‘Toothless’ MRTP is Laid to Rest*, BUS. STANDARD (Sept. 14, 2009), [http://www.business-standard.com/article/economy-policy/-toothless-mrtp-is-laid-to-rest-109091400054\\_1.html](http://www.business-standard.com/article/economy-policy/-toothless-mrtp-is-laid-to-rest-109091400054_1.html).

118. G.R. Bhatia, Add’l. Dir. Gen., Competition Comm’n of India, Presentation: Abuse of Dominance in Fact and in Law, [http://www.competition-commission-india.nic.in/competition\\_forum/ABUSE%20OF%20DOMINANCE.pdf](http://www.competition-commission-india.nic.in/competition_forum/ABUSE%20OF%20DOMINANCE.pdf).

119. Competition Act § 27.

and even directing the division of the enterprise, as provided for in Section 28.<sup>120</sup>

When the CCI decides to impose monetary sanctions or penalties, they are allowed to impose up to 10% of the offending company's average turnover for the prior three years.<sup>121</sup> These penalties, the highest allowed in India, are completely at the discretion of the CCI, and no guidelines or clear reasoning from prior cases are provided.<sup>122</sup> The CCI is not alone in this practice, though – the Competition Appellate Tribunal (COMPAT) has also failed to consistently enforce and apply its decisions.<sup>123</sup> Specifically, COMPAT has said that the turnover that is subject to the penalty should be the relevant turnover that can be attributed to the infraction; however, the CCI has disregarded this restriction and imposed penalties based on the entire turnover of the business in its decisions.<sup>124</sup> One such decision where the CCI assessed damages based on overall turnover, *M/s DLF Limited v. Competition Commission of India & Ors (COMPAT DLF)*, was upheld by the COMPAT, despite the supposed overreach of the CCI in calculating the turnover upon which the damages should be based.<sup>125</sup> The only thing that the CCI is potentially prohibited from doing is completely changing the language of an agreement, as it also tried to do in *COMPAT DLF*.<sup>126</sup> *COMPAT DLF* has been appealed to the Supreme Court of India by the CCI on whether or not the CCI is allowed to order a complete transformation of the language of an agreement.<sup>127</sup> The case is pending, following an order for DLF to keep 630 crore rupees (roughly \$94.7 million USD at the time of this writing) in an interest-bearing account during the proceedings.<sup>128</sup> There are also factors that the CCI can accept

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120. *Id.* § 28.

121. Shroff & Uberoi, *supra* note 115, at 5.

122. *Id.*

123. *Id.* at 6.

124. *Id.*

125. *Id.*

126. *Id.* at 6–7.

127. *Id.* at 7.

128. *Supreme Court Tells DLF to Pay Rs 630 cr Fine*, BUS. STANDARD (Aug. 28, 2014, 12:59 AM), [http://www.business-standard.com/article/companies/sc-rejects-dlf-plea-directs-company-to-pay-rs-630-cr-114082700468\\_1.html](http://www.business-standard.com/article/companies/sc-rejects-dlf-plea-directs-company-to-pay-rs-630-cr-114082700468_1.html).

as mitigating the harm, but they are not specifically codified as such and are rarely applied.<sup>129</sup>

## RELEVANT MARKET

The first step toward determining whether there has been an abuse of dominance in India is to define the relevant market.<sup>130</sup> The Competition Act defines a relevant market as “the market which may be determined by the [Competition] Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.”<sup>131</sup> The CCI has determined areas as small as single suburbs to be relevant markets and has also determined the relevant market to be the entire country of India in cases without substantial differences.<sup>132</sup> Although there are no specific guidelines for how the CCI should determine the relevant market, a major factor in the decisions appears to be whether the other products that are in the relevant market could be demanded as substitutes for the offending enterprise’s goods or services.<sup>133</sup> This standard is subjective, however, because certain products that could be considered substitutes for each other have been held to be in different markets by the CCI for the purposes of competition complaints. In *In re Mr. Ashish Ahuja v. Snapdeal.com and Ors*, the CCI determined that the online market and the brick and mortar market for the same product were different distribution channels within the same market.<sup>134</sup> However, in the recent *Shri Shamsher Kataria v. Honda Siel Cars India Ltd & Ors*, the CCI held that after-market and spare car parts were not part of the same market as new cars or car repair services.<sup>135</sup> Not only was the market broken into those three categories, but it was also classified by the specific maker of the car/car part, in which area each original equipment manufacturer was determined to

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129. Shroff & Uberoi, *supra* note 115, at 4.
  130. PRAKHAR ET AL., *supra* note 114, at 35.
  131. Competition Act § 2(r).
  132. Shroff & Uberoi, *supra* note 115, at 2.
  133. *Id.*
  134. *Id.*
  135. *Id.* at 2–3.

have a 100% market share (i.e. Honda has a 100% share of the Honda spare parts market).<sup>136</sup>

While the CCI has a tendency to use the substitution factor and has held that a global market cannot be considered a relevant market, there is no commitment to consistency in the CCI's decision that would lend itself to predictions of how the market will be defined in the future.<sup>137</sup> As one report from practitioners in the Indian market stated,

[u]nfortunately, it [is] hard to predict any form of trend in identifying [the] relevant market and it is hard to evolve a set of principles that can be applied in future cases. This difficulty can also be attributed to the nature of [the] exercise that is to be adopted for ascertaining [the] relevant market and it is undoubtedly fraught with some uncertainty.<sup>138</sup>

#### ASSESSMENT OF THE ENTERPRISE'S DOMINANCE

The second determination that needs to be made is of the enterprise's dominance in the relevant market.<sup>139</sup> The Competition Act defines "dominant position" in Section 4 as meaning "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."<sup>140</sup> The CCI is required by Section 19(4) of the Competition Act to consider various factors related to both the accused party and its competition/market environment when making a determination on anti-competitive practices.<sup>141</sup> The CCI must consider the following factors in relation to the accused party: "market share; size and resources of the enterprise... economic power of the enterprise, including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; legal monopoly or dominant position."<sup>142</sup> The CCI is also required to consider the following factors

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136. *Id.* at 3.

137. *Id.* at 2.

138. PRAKHAR ET AL., *supra* note 114, at 36.

139. Shroff & Uberoi, *supra* note 115, at 1.

140. Competition Act § 4.

141. Shroff & Uberoi, *supra* note 115, at 1.

142. *Id.*

relating to the competitors and the market environment in which the competition is occurring: “size and importance of competitors . . . entry barriers. . . countervailing buyer power; market structure and size of the market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the dominant enterprise; or any other [relevant factors].”<sup>143</sup> The CCI specifically considered factors such as market share, customer brand loyalty, barriers to market entry, and intellectual property rights when assessing dominance in a case brought against Intel in India (*In Re M/s ESYS Information Technologies Pvt Ltd and Intel Corporation (Intel Inc) & Ors*).<sup>144</sup>

#### ASSESSMENT OF ABUSIVE BEHAVIOR

The final step in an abuse of dominance case is to assess the allegedly abusive behavior.<sup>145</sup> Section 4(2) of the Competition Act provides a seemingly exhaustive list of what can be considered an abuse of a dominant position by an enterprise.<sup>146</sup> Section 4(2) can be summarized into four categories of offenses:

- i. anti-competitive practices of imposing unfair or discriminatory trading conditions or prices or predatory prices,*
- ii. limiting the supply of goods or services, or a market or technical or scientific development, denying market access,*
- iii. imposing supplementary obligations having no connection with the subject of the contract, or*

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143. *Id.* at 1–2.

144. *Id.* at 3.

145. *Id.* at 1.

146. PRAKHAR ET AL., *supra* note 114, at 26.

*iv. using dominance in one market to enter into or protect another relevant market.*<sup>147</sup>

There is, however, an exception where these practices will not be considered abuses of a dominant position if they are taken in response to the market and needed for the enterprise to meet its competition.<sup>148</sup> The list of abuses is very similar to, and possibly inspired by, those enumerated in Article 102 of the Treaty on the Functioning of the European Union.<sup>149</sup> If this list is truly exhaustive,<sup>150</sup> Google and all companies currently operating in or wishing to operate in India in the future will be safe from unfavorable verdicts if they can show that they have not committed one of the listed abuses or that they had to commit the abuses to meet competition.<sup>151</sup>

#### ANALYSIS

The verdicts of these upcoming decisions will be important, not only for Google, but also for technology companies in the future. In an area dominated by companies who can innovate and create a market for a product never before seen, it can be both beneficial and dangerous to capture the market fully. India and the European Union's filing of cases against Google show that no company will be safe if it becomes too big and engages in practices that can be seen as anticompetitive.

The European Parliament resolved, in a non-binding vote, to break Google up in November 2014 because of Google's 90% or more market share in the European Union search market.<sup>152</sup> Furthermore, the New York Times reported that 81% of the phones in the world market use an Android operating system, while 15% use Apple's iOS, and less than 3% use Microsoft's operating system.<sup>153</sup> Pre-installing software and

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Competition Act § 4(2).

152. Maya Kosoff, *Europe is About to Drop the Boom on Google*, BUS. INSIDER (Mar. 21, 2015, 9:44 AM), <http://www.businessinsider.com/google-expected-to-face-antitrust-charges-in-europe-next-month-2015-3>.

153. Kanter & Scott, *supra* note 11.

applications is relatively normal; however, Google's large market share (as well as Android's market dominance) is what brings it under scrutiny at this time.<sup>154</sup>

Of the two cases presented, Microsoft's facts are more similar to the case at hand: both companies were and are accused of preloading software onto devices running a dominant operating system.<sup>155</sup> Furthermore, Android's 81% market share<sup>156</sup> is just shy of being at the same level as Microsoft's market share at the time that Microsoft was accused of abusing its dominance by bundling Internet Explorer onto PCs.<sup>157</sup> Considering the gap between the two market shares (9%) is fairly marginal once a company attains the type of dominance that Microsoft and Google have respectively reached, it would be hard to imagine that this discrepancy would lead the European Commission to distinguish the situations when considering how to rule. Looking to the European Commission's recent history of deciding cases,<sup>158</sup> the issue appears to be not if Google will be found to be abusing its market dominance, but rather what the damages will be when Google is ultimately found in violation of competition law in the European Union.

The European Commission officially launched an investigation into Google's bundling practices of its apps on Android phones in April 2015<sup>159</sup> and issued a Statement of Objections laying out the specific abuses alleged on April 20, 2016.<sup>160</sup> Specifically, the Competition Commission alleged that Google had violated EU competition laws by obligating device manufacturers to preload Google Search and Google

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154. *Id.*

155. *Id.*; Robert Wielaard, *Microsoft Loses E.U. Antitrust Case*, WASH. POST (Jan. 17, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/16/AR2009011604570.html> (noting Microsoft's bundling trouble regarding both Windows Media Player and Internet Explorer).

156. Kanter & Scott, *supra* note 11.

157. *Statement of Objections*, *supra* note 81.

158. *See, e.g.*, Case T-286/09, *Intel Corp. v. Comm'n*, 2014 E.C.L.I. 547; *see also Microsoft Case*, *supra* note 70.

159. *Antitrust: Commission Opens Formal Investigation Against Google in Relation to Android Mobile Operating System*, EUROPEAN COMM'N (Apr. 15, 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-4782\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4782_en.htm).

160. *Antitrust: Commission Sends Statement of Objections to Google on Android Operating System and Applications*, EUROPEAN COMM'N (Apr. 20, 2016), [http://europa.eu/rapid/press-release\\_IP-16-1492\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1492_en.htm).

Chrome as a prerequisite to being able to install other Google applications.<sup>161</sup> In addition, the Commission also alleged that Google incentivized manufacturers to exclusively install their applications and precluded manufacturers from selling rival software that was derived from Android's open source code.<sup>162</sup> The Commission further delineated its grievances by explaining that the licensing agreements between Google and the manufacturers require the installation of Google Search (which must be the default search engine) in exchange for being able to install the Google Play Store on phones.<sup>163</sup> Furthermore, Google has been requiring its partners to sign "anti-fragmentation agreements" that prohibit the "forking" of Android software to create a modified operating system, even though the Android code is open source.<sup>164</sup> The Commission alleges that behavior such as this stifles innovation and denies the consumer the chance to have a superior version of the software.<sup>165</sup> Finally, Google has allegedly provided "significant financial incentives" for companies that are willing to exclusively install Google's products on their smartphones and tablets, thereby reducing any incentive that a manufacturer could gain from installing any competing products.<sup>166</sup>

If the European Commission levies the maximum amount of damages against Google, it would be the largest verdict in the history of European Union competition law – the current holder of that title is Intel for its €1.06 billion (\$1.44 billion, in 2014) fine.<sup>167</sup> However, even though Intel's is the largest fine thus far, it only rose to 4.15% of annual turnover for the computer chip maker.<sup>168</sup> Instead of assuming that the European Commission will levy the maximum 10% penalty (costing Google around €6 billion<sup>169</sup>), it could conservatively be estimated that the European Commission would levy a fine of a similar percentage as in the

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Chee, *supra* note 95.

168. *Id.*

169. Kanter & Scott, *supra* note 11.

Intel case. In that scenario, Google would still be paying roughly €2.5 billion, or the equivalent of over \$2.7 billion at the time of writing.<sup>170</sup>

As illustrated by the Microsoft case in the European Union, the decision is only the start: compliance and oversight, or lack thereof, can result in many more penalties in the years to come.<sup>171</sup> The Financial Times reported that Google, along with Opera, was responsible for reporting Microsoft to the European Commission for non-compliance with the verdict requiring a “browser ballot,” from which both Google and Opera benefited.<sup>172</sup> That tip resulted in an additional €561 million fine being added to the €1.6 billion that Microsoft had paid to the European Commission at that time.<sup>173</sup> As Microsoft has been instigating an investigation into Google for years,<sup>174</sup> it is safe to assume that this penalty will guarantee that other companies, especially Microsoft, have added ammunition to watch Google and ensure that Google complies with any penalty that may be given. This has already been seen somewhat in Microsoft’s funding of European lobbying group, ICOMP, which publicly ridiculed Google’s failure to ask for an oral hearing regarding charges earlier this year.<sup>175</sup>

As already alluded to, India’s competition laws—while very much inspired by European competition law<sup>176</sup>—are applied in a very different manner from their inspiration. India’s legal system is based on common law, with personal codes that differ based on whether the individual is Muslim, Christian, or Hindu.<sup>177</sup> However, competition cases are adjudicated by the Competition Commission of India, an administrative

170. This calculation was done by dividing the €6 billion figure (provided by Kanter & Scott, *supra* note 11) by 10 and multiplying the resultant number by 4.15.

171. Kanter, *supra* note 91.

172. Alex Barker & Richard Waters, *Google Tip-Off Leads to Microsoft E.U. Penalty*, FIN. TIMES (Mar. 6, 2013, 6:56 PM), <http://www.ft.com/intl/cms/s/0/e748bfc8-8682-11e2-b907-00144feabdc0.html?siteedition=intl#axzz3w7neK2gq>.

173. *Id.*

174. Kanter, *supra* note 91.

175. Liam Tung, ‘Google is in Denial’: Rivals Throw Down Oral Hearing Challenge Over Antitrust Case, ZDNET (Aug. 28, 2015, 9:32 AM), <http://www.zdnet.com/article/google-is-in-denial-rivals-throw-down-oral-hearing-challenge-over-antitrust-case/>.

176. Shroff & Uberoi, *supra* note 115, at 1.

177. Central Intelligence Agency, *Legal System*, THE WORLD FACTBOOK (last visited Jan. 2, 2016), <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>.

body, instead of the court system,<sup>178</sup> which is an important distinction. The CCI is allowed to impose the highest fines in the entire country and it is further allowed to disregard its own prior precedent at its discretion.<sup>179</sup>

The Competition Commission is probably going to pursue this case, as they have already assessed a 1 crore rupees penalty (roughly \$150,000 USD at the time of writing) on Google for failing to comply with an investigation into Google's search practices.<sup>180</sup> However, this might mean that the Competition Commission is not as willing to assess high value fines on Google in the event of an unfavorable outcome for the tech giant. As stated, the first thing that the Competition Commission will consider is what the relevant market should be.<sup>181</sup> Due to the lack of guidelines<sup>182</sup> and inconsistency displayed by the Competition Commission,<sup>183</sup> this could be the most unpredictable part of the entire case for Google.<sup>184</sup> However, using the substitution principle upon which the Competition Commission has relied in the past,<sup>185</sup> it would be safe to assume that the relevant market could include all cell phones and possibly tablets (since Android operating systems can be found on both types of devices) in the country of India.

The next step would be to determine the extent of the enterprise's dominance in the relevant market.<sup>186</sup> Similar to the European Commission predicating Microsoft's dominance on the prevalence of Windows,<sup>187</sup> the assessment of dominance will probably be based on Android's mobile market share. In December 2015, Android reportedly held 64.32% of India's mobile market share.<sup>188</sup> This was the largest

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178. Shroff & Uberoi, *supra* note 115, at 1.

179. *Id.* at 5.

180. Pranav Mehra, *Is CCI Targeting at Technology Companies?*, INDIAN COMPETITION REV. (Apr. 5, 2014), <http://www.indianantitrust.com/2014/04/05/ci-targeting-technology-companies/>.

181. PRAKHAR ET AL., *supra* note 114, at 35.

182. Shroff & Uberoi, *supra* note 115, at 5.

183. *Id.* at 3.

184. *Id.*

185. *Id.*

186. *Id.* at 2.

187. *Statement of Objections*, *supra* note 81.

188. *Market Share Held by Mobile Operating Systems in India from January 2012 to June 2016*, STATISTA (last visited Jan. 15, 2016),

market share of all companies, with second place (among known responses) going to “Nokia Unknown,” at 8.21%.<sup>189</sup> Apple’s iOS came in 7<sup>th</sup> place, with only 1.82% of the market.<sup>190</sup> While market share is not the only consideration,<sup>191</sup> such a display of dominance, along with the intellectual property owned by the enterprise, may push the opinion of the Competition Commission towards a finding of dominance in the market.<sup>192</sup>

Finally, the Competition Commission will assess the allegedly abusive behavior.<sup>193</sup> As the list of offenses in the Competition Act appears to be exhaustive, the act of bundling/pre-loading Google’s applications onto Android software would have to fit one of the categories for the Competition Commission to determine that the behavior was abusive.<sup>194</sup> The bundling might fall under section 4(c) or 4(d) of India’s Competition Act of 2002.<sup>195</sup> Those categories state that an abuse of dominance can be found if a dominant enterprise “(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.”<sup>196</sup> As explained by the Wall Street Journal “[a]ny phone maker can use Android. But if a phone maker wants to use popular Google services like Gmail or Maps, or wants access to Google’s Play app store—with millions of apps that make phones more useful—it must preinstall a package of these Google apps,” which can impose unwanted apps on cell phone makers and users.<sup>197</sup> Such restrictive contracts could

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<http://www.statista.com/statistics/262157/market-share-held-by-mobile-operating-systems-in-india/>.

189. *Id.*

190. *Id.*

191. Shroff & Uberoi, *supra* note 115, at 4.

192. *See supra* discussion surrounding note 141.

193. *Id.* at 2.

194. PRAKHAR ET AL., *supra* note 114, at 26.

195. Competition Act §§ 4(c)–(d).

196. *Id.*

197. Olga Razumovskaya & Alistair Barr, *Google Found Guilty of ‘Abusing Dominant Market Position’ in Russia*, WALL ST. J. (Sept. 14, 2015, 3:40 PM), <http://www.wsj.com/articles/google-found-guilty-of-abusing-dominant-market-position-in-russia-1442250025>.

very well fall under section 4(d) of the Competition Act,<sup>198</sup> even though Google maintains that “device makers ‘are free to install the apps they choose, and consumers always have complete control over the apps on their devices.’”<sup>199</sup> Moreover, these actions do not fall under the exception for actions taken by a company in response to competitors in the market.<sup>200</sup>

If the Competition Commission does determine that these actions constitute an abuse of dominance by Google, as it seems they would be justified in doing from the foregoing analysis, the Competition Commission could levy a fine up to 10% of Google’s average turnover from the past three years.<sup>201</sup> However, estimating how much this could add up to would be difficult, considering that COMPAT has said that the turnover for calculation purposes must be relevant to the infractions, yet at the same time upheld a CCI decision assessing damages based on a turnover calculated from overall turnover.<sup>202</sup>

## CONCLUSION

The final decision in the case against Google will be incredibly important for future market leaders. Though other companies have not yet reached the same levels of market share as Google, Microsoft, and Intel, these giants did invoke arguments against competitors during their own investigations. Microsoft’s argument to the Court of First Instance analogizing their inclusion of Windows Media Player with Apple’s inclusion of iTunes fell on deaf ears, due to their dominance.<sup>203</sup> Competition Commissioner Neelie Kroes said in 2007 that she hoped to see a “significant drop in [Microsoft’s 95% global computer market] share” as a result of the Court of First Instance’s verdict.<sup>204</sup> Her statements, along with the reasoning and communications from the Commission and the Courts, appear to make the fact that a dominant enterprise is engaging in this behavior the key factor in finding an abuse

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198. Competition Act § 4(d).

199. Razumovskaya & Barr, *supra* note 197.

200. Competition Act § 4.

201. Shroff & Uberoi, *supra* note 115, at 5.

202. *Id.* at 6.

203. ECONOMIST, *supra* note 75.

204. *Id.*

of dominance. If this assumption is true, large technology companies will not have much to fear, so long as they are not considered the dominant player within the specified geographic market.<sup>205</sup>

In India, the key factor appears to be that the actions by the dominant company fall under one of the expressly prohibited provisions of the Competition Act. Given that Microsoft and Apple's minimal market share<sup>206</sup> will factor against them being declared dominant at the current time, their main concern should be identifying which specific provision of the Competition Act Google will be charged under, so that they can avoid the specific behavior that makes Google's bundling of products illegal under the Competition Act.

In conclusion, these acts provide the legal basis for what could be a costly and damaging ordeal for Google and other technology companies moving forward. The odds do not look good: not only is Google's case similar to negative precedent in the European Union, but the European Commission has not lost an abuse of dominance case since the 1970's.<sup>207</sup> However, despite the Commission's history of success, the Commission will have to consider that a lengthy legal battle may allow Google to "maximize [its] monopoly profits" from the allegedly abusive practices.<sup>208</sup> This adverse consequence should incentivize the Commission to act swiftly when they think an abuse is occurring, especially if the monopoly profits are being earned at the expense of the very consumers that laws such as these strive to protect.<sup>209</sup>

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205. This assumption may be tested soon: Microsoft has signed deals with Acer, Asus, Dell, LG, Samsung, and Sony to have Microsoft Office pre-loaded onto Android phones beginning in the second half of 2016. Ian Paul, *Acer Will Preload Microsoft's Apps on its Android Phones*, PCWORLD (Feb. 11, 2016, 8:18 AM), <http://www.pcworld.com/article/3031280/android/acer-will-preload-microsofts-apps-on-its-android-phones.html>. Although both product markets and geographic markets can be considered, I am assuming that the large technology companies in danger of litigation would be somewhat dominant in the relevant product market.

206. STATISTA, *supra* note 188.

207. Nicholas Hirst, *Google is Microsoft, After All*, POLITICO (Jan. 6, 2016, 4:47 PM), <http://www.politico.eu/article/google-confronts-microsofts-legacy/>.

208. *Id.*

209. *What is Competition Policy?*, EUROPEAN COMM'N (last updated Apr. 16, 2012), [http://ec.europa.eu/competition/consumers/what\\_en.html](http://ec.europa.eu/competition/consumers/what_en.html).

In fact, critics of the Microsoft case allege that this verdict hurt consumers instead of protecting them.<sup>210</sup> The United States' Assistant Attorney General for Antitrust, Thomas Barnett, issued a statement criticizing the 2007 Microsoft decision, saying that he was "concerned that the standard applied to unilateral conduct by the [Court of First Instance], rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition."<sup>211</sup> Critics also allege that the *Microsoft* verdict was all but irrelevant by the time the legal battle was over, considering that the version of Windows including Windows Media Player sold tens of millions of copies, while the version without Windows Media Player, for which the Commission had fought, sold fewer than 2,000 copies.<sup>212</sup> Furthermore, Windows had already been swiftly losing market share to competitors by the conclusion of the case, due to innovation in the market and increased accessibility of substitutes on the internet.<sup>213</sup> Whether this will be Google's fate during or after any case that may ensue is unknown, but it is a possibility that the Commission should consider as they assess their case. Regardless of the veracity and strength of the claims against Google in the EU and India, there are those that say it will be enough that action by the Commission means "[a] very big American giant is fined and they change their policy."<sup>214</sup> Based on this fact alone, Google should prepare itself for a fight.<sup>215</sup>

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210. Press Release, U.S. Dep't of Justice, Assist. Att'y Gen. for Antitrust, Thomas O. Barnett, Issues Statement On European Microsoft Decision (Sept. 17, 2007), [https://www.justice.gov/archive/atr/public/press\\_releases/2007/226070.pdf](https://www.justice.gov/archive/atr/public/press_releases/2007/226070.pdf).

211. *Id.*

212. Hirst, *supra* note 207.

213. *Id.*

214. *Id.*



