

## Digital Antitrust: The Google (Android) Decisions in Russia, Turkey and India

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### SUMMARY

*Digital markets and new business models in multi-sided markets with certain market peculiarities (i.e., network, scale, lock-in effects) have challenged the traditional competition tools. National competition authorities (NCAs), especially younger authorities, across the globe have struggled with the investigations of anticompetitive practices in those markets. Specifically, the paper will use Google (Android) as a case study to explore the approaches taken by three competition authorities, based in Russia, Turkey and India, leading to the prohibition decisions of their national competition laws. Discussions centred on the national Google Android decisions will be placed in a broader context underpinned by recent ongoing developments of competition laws in Russia, Turkey and India.*

### KEYWORDS:

*The Google Android case, digital markets, Turkish competition law, Russian competition law, Indian competition law*

### 1 INTRODUCTION

Rapid technological developments have become sine qua non for undertakings to make the necessary arrangements towards digitalizing their business models,<sup>1</sup> which is a fructuous progress in terms of innovativeness and performance.<sup>2</sup> Digital markets and new business models with competition for the market due to strong ‘winner-takes-all dynamics’ have challenged the traditional competition tools. The European Commission (EC) has recently taken new initiatives, namely, its proposal of the Digital Markets Act, which aims to determine obligations for the so-called gatekeepers (by providing Do’s and Don’ts). . . For instance, some specific elements of the providers of core platform services, such as network effects, extreme economies of scale and scope, a very high market capitalization, a very high ratio of equity value or a very high turnover derived from end-users of a single core platform service can create a threat to competition due to the risk of ‘tipping’, as once a market has ‘tipped’, newcomers can find it difficult to contest. Furthermore, certain market structures (i.e., high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation) do not deliver competitive outcomes (i.e., a structural market failure), even without businesses acting anticompetitively.<sup>3</sup> Indeed, the power of the

so-called GAFAs (Google, Apple, Facebook and Amazon)<sup>4</sup> with a potential threat to competition have been, or still are, under investigation by competition authorities worldwide. For instance, since 2010, the EC has launched different investigations into Google’s products, namely Google Shopping, Google AdSense, and Android, which led to the three subsequent infringement decisions. In the first case, Google was found to have abused its dominant position in general Internet searching market by stifling competition in comparison shopping markets, specifically, by manipulating traffic for comparison shopping services and giving priority to Google’s own comparison shopping service, therefore, depriving consumers of genuine choice and innovation.<sup>5</sup> As a result, a fine of EUR 2.42 billion was imposed on Google in 2017. This was followed by the Google Android case, which is the focus of this article, where Google was again found to have infringed Article 102 of the Treaty on the Functioning of the European Union (TFEU) due to its illegal restrictions on Android device manufacturers and mobile network operators to strengthen its dominant position in general Internet searching through pre-installing Google apps in every smart phone and tablet using Android, therefore, depriving its rivals the chance to innovate and compete on the merits, with subsequent detrimental effects for consumers.<sup>6</sup> This 328-page prohibition decision led to a record-sized fine so far being imposed by the EC – EUR 4.34 billion in 2018. More recently, Google was fined EUR 1.49 billion in March 2019 because of the illegal misuse of its dominance in the market for the brokering of online search adverts, by imposing anticompetitive contractual restrictions on third party websites (known as the AdSense case).<sup>7</sup> This case brought some evidence into the open regarding the use of Google AdSense licence, which forces AdSense users to give a minimum number of advertisements by not engaging with Google’s rivals. With its interventionist approach, the EC has played a global enforcer role in digital antitrust by its detailed Google decisions through extending the special responsibilities of dominant firms.<sup>8</sup>

Apart from the EC prohibition decisions, Google fell under investigations in other jurisdictions across the world.<sup>9</sup> While

contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final (accessed 15 Dec. 2020).

<sup>4</sup> The US Department of Justice, *Justice Department Sues Monopolist Google for Violating Antitrust Laws* (20 Oct. 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> (accessed 3 Mar. 2021); US House of Representatives, *Investigation of Competition in Digital Markets* (2020), [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519) (accessed 3 Mar. 2021); European Commission, *Antitrust: Commission Opens Investigations into Apple’s App Store Rules* (16 June 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1073](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073) (accessed 3 Mar. 2021); European Commission, *Antitrust: Commission Opens Investigations into Possible Anti-competitive Conduct of Amazon* (17 July 2019), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4291](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291) (accessed 3 Mar. 2021).

<sup>5</sup> Case AT.39740 *Google Search (Shopping)* [2018] OJ C 9.

<sup>6</sup> Case AT.40099 *Google Android* [2018] C(2018) 4761 final.

<sup>7</sup> Case AT.40411 *Google AdSense* [2019] C(2019) 2173 final.

<sup>8</sup> P. Siciliani, *On the Law and Economics of the Android Case*, 10(10) J. Eur. Comp. L. & Prac. 638 (2020).

<sup>9</sup> The French competition authority concluded that Google (and Facebook) shall negotiate with publishers to make a payment for the unpermitted use of their contents, which cause revenue loss for publishers around EUR 300 million. See République Française L’Autorité de la concurrence, *Décision n° 20-MC-01 du 9 avril 2020 relative à des demandes*

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<sup>1</sup> M. Rachinger et al., *Digitalization and Its Influence on Business Model Innovation*, 30(8) J. Mfg. Tech. Mgmt. 1143 (2019).

<sup>2</sup> H. Bouwman et al., *The Impact of Digitalization on Business Models*, 20(2) Digital Pol’y Reg. & Governance 105–124 (2018).

<sup>3</sup> European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on

the Google investigations have featured many legal and economic scholarly studies,<sup>10</sup> the infringement decisions of Google, mainly the Android case, in other jurisdictions, such as Russia, Turkey and India have attracted less attention.<sup>11</sup> Reliance on investigations by other competition authorities has its shortcomings, as competition law inquiries focus on adverse effects on competition in local markets in accordance with 'the letter and spirit of the local competition law',<sup>12</sup> without further consideration of the effects on the global market. There is also the issue of wealth distribution, where competition threats arise from businesses with headquarters in developed countries, with anticompetitive effects resulting in developing or less developed countries.<sup>13</sup> Therefore, it is no surprise that further investigations of the Google practices were questioned by other jurisdictions, including Russia, Turkey, and most recently, India. Yet, it must be noted that the EC investigations, and consequently prohibition decisions, have an impact and boost confidence of less experienced competition authorities, such as Turkey and India, where competition law cultures are relatively new in terms of enforcement of modern competition laws, to launch their own inquiries. Therefore, this article will use Google (Android) as a case study to explore the approaches taken by three young national competition authorities (NCAs) in

Russia, Turkey and India, which are the jurisdictions with large market economies in the Eurasian region that challenged Google's behaviour in their national markets.<sup>14</sup> It will investigate the authorities' struggles to apply traditional tools to unknown digital environments; and it will embark upon Google's reluctance to comply with the enforcement decisions. Discussions centred on these national Google Android decisions will be placed in a broader context underpinned by recent ongoing developments in Russia, Turkey and India.

The paper is structured as follows. After this introduction (section 1), section 2 will define Google's business model. The remaining sections will then focus on the separate jurisdictions, such as Russia (section 3), Turkey (section 4), and India (section 5). The comparative analysis will be explored in section 6 with the final remarks being concluded in section 7.

## 2 GOOGLE'S BUSINESS MODEL

Google is a multinational technology company registered in the USA (Google LLC is part of Alphabet Inc, Google's parent company), specializing in internet-related services and products that include online advertising technologies, internet searching, cloud computing, software and hardware.<sup>15</sup>

Google's business model fundamentally is based on increasing its number of users by making its search engine handier than other providers such as Yahoo and AltaVista. The web searching service provided by Google burst into prominence since it is free for grabs but also profitable to place ads by manipulating search results<sup>16</sup> through using the market power stemming from multi-sided network effects.<sup>17</sup> Even though Google has a variety of products, it is well-known for its search service reaching large masses across the world, except for China.<sup>18</sup> Google, accordingly, takes advantage of this 'fame' and network effect by introducing and marketing its products. Algorithms used by Google add value to the service by facilitating consumers to make more effective searches.<sup>19</sup> Consumers are not restricted from using other services to reach other websites due to the nature of the two-sided market for Internet Search,<sup>20</sup> which means that consumers can manually type the uniform resource locator (URL) of websites or use other search engines like *bing.com* and *yahoo.com* without extra cost (zero cost).<sup>21</sup> In terms of the Android

*de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse* (2020), <https://www.autoritedelaconurrence.fr/sites/default/files/attachments/2020-06/20mc01.pdf> (accessed 3 Mar. 2021). The Australian Competition and Consumer Commission (ACCC) in a 600-page report published in Jul. 2019, has called the government to take action on the market dominance of Facebook and Google. ACCC, *Digital Platforms Inquiry* (June 2019), <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report> (accessed 3 Mar. 2021).

<sup>10</sup> I. Kokkoris, *The Google Case in the EU: Is There a Case?*, 62(2) *Antitrust Bull.* 313–333 (2017); M. Patterson, *Google and Search-Engine Market Power* (Harvard Journal of Law and Technology, Occasional Paper Series July 2013), <https://jolt.law.harvard.edu/assets/misc/Patterson.pdf> (accessed 3 Mar. 2021); M. Eben, *Fining Google: A Missed Opportunity for Legal Certainty?*, 14(1) *Eur. Comp. J.* 129–151 (2018); B. Edelman & D. Geradin, *Android and Competition Law: Exploring and Assessing Google's Practices in Mobile*, 12(2–3) *Eur. Comp. J.* 159–194 (2016); R. Bork & G. Sidak, *What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?*, 8(4) *J. Comp. L. & Econo.* 678 (2012); F. Etro & C. Caffàra, *On the Economics of the Android Case*, 13(2–3) *Eur. Comp. J.* 282–313 (2017).

<sup>11</sup> B. Yüksel & M. Salan, *Google Android Decision: Is EU Competition Law Becoming a Tool to Impose the Union's Industrial Policies – Should Turkey Follow the Commission?* (2018), <https://www.actecon.com/en/newsarticles/p/google-android-decision-is-eu-competition-law-becoming-a-tool-to-impose-the-union-s-industrial-policies-should-turkey-follow-the-commission-85?pdf> (accessed 3 Mar. 2021); E. Khokhlov, *The Russian Federal Antimonopoly Service's Case Against Google Related to Bundling and Other Anticompetitive Practices with Respect to Android*, 8(7) *J. Eur. Comp. L. & Prac.* 468–474 (2017); L. Bassett, *How Google's Android Bundles Could Cost Them Billions in the EU and India*, 25(1) *Mich. State Int'l L. Rev.* 120–148 (2017).

<sup>12</sup> M. Dabbah, *Competition Policy, Abusive Dominance and Economic Development: Some Reflections*, in *International Antitrust Law and Policy* 311 (B. Hawk ed., Fordham University School of Law 2010).

<sup>13</sup> D. Crane, *Antitrust and Wealth Inequality*, 101(5) *Cornell L. Rev.* 1171–1228 (2016); H. Qaqaya & G. Lipimile, *The Effects of Anti-competitive Business Practices on Developing Countries and Their Development Prospects* (2008), [https://unctad.org/system/files/official-document/ditcclp20082\\_en.pdf](https://unctad.org/system/files/official-document/ditcclp20082_en.pdf) (accessed 3 Mar. 2021); J. Malinauskaite, *Harmonisation of Competition Law in the Context of Globalisation*, 21(3) *Eur. Bus. L. Rev.* 369–397 (2010).

<sup>14</sup> The Korea Fair Trade Commission (KFTC) and the Japan Fair Trade Commission are currently considering whether to launch investigations against Google's anticompetitive behaviour. The KFTC also proposed legislation directed at ensuring fair transactions on online platforms. KFTC, Press Release (28 Sept. 2020).

<sup>15</sup> *Google Search (shopping)*, *supra* n. 5, para. 2.1.

<sup>16</sup> M. Patterson, *Google and Search-Engine Market Power*, Harvard Journal of Law & Technology Occasional Paper Series 20 (July 2013), <https://jolt.law.harvard.edu/assets/misc/Patterson.pdf> (accessed 3 Mar. 2021).

<sup>17</sup> I. Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* 78–100 (Wolters Kluwer 2016); D. Evans, *The Antitrust Economics of Free*, 7(1) *Comp. Pol'y Int'l* 22–23 (2011).

<sup>18</sup> *Google Android*, *supra* n. 6, para. 402.

<sup>19</sup> Bork & Sidak, *supra* n. 10, at 678.

<sup>20</sup> *Ibid.*, at 667; R. Posner, *The Chicago Law School of Antitrust Analysis*, 127 *U. Pa. L. Rev.* 928 (1979).

<sup>21</sup> There is no switching cost *prima facie* but one may argue that spending time to find a better and to-the-point search result is costly. Also, there is another approach in terms of measuring costs in zero-price markets. There is a way suggested to observe consumers' permissions to the process of their data (attention cost) by looking at terms and

case, switching cost is also one of the concerns, which again seems zero-cost, but allegedly affects behaviours of users towards using what they have (known as consumers' cognitive biases). While some scholars argued that agreements with original equipment manufacturers (OEM) to pre-install Google Search and other Google products in Android devices, built on voluntary transactions between the parties,<sup>22</sup> the EC interpreted this as an abuse of dominance.<sup>23</sup>

Furthermore, in addition to being a search engine server, Google diversified its product range. Due to the increased demand in the mobile Internet market, Google acquired Android Inc. for around USD 50 million to enter the mobile software sector<sup>24</sup> and to commercialize its products in order to maintain the network effect. Google developed its successful Android environment<sup>25</sup> starting with the 'Android Open Source Project', by providing a free distribution model as an open source operating system (OS), and the development of a wide range of applications. Since the project is open sourced, many application developers preferred the Android software system. Google released the Android mobile OS for both customers and developers free of charge,<sup>26</sup> which led to a great number of customers and mobile application developers using Android.<sup>27</sup> Google, accordingly, adopted a strategy to take advantage of having this OS platform where it forces mobile device manufacturers (MDMs) using Android to pre-install its applications. The so-called open-platform assertion remains unfulfilled due to the anti-fragmentation agreement (AFA) imposed by Google to MDMs.

Amidst several open OS alternatives (Tizen, KaiOS, Fuchsia, LiteOS, and PureOS), Android is currently the most attractive open OS system for users and developers due to the network effect and its free applications like Google

conditions agreements. S. Jarman & D. Örsal, *The Regulation of Zero-Price Markets by the Competition Authorities in the USA and the EU*, 21(4) Comp. & Reg. Network Indus. 335 (2020).

<sup>22</sup> Bork & Sidak, *supra* n. 10, at 698. However, it is important to consider consumer behaviours towards using pre-installed applications rather than setting other free alternatives. Therefore, it is hard to claim that there is no switching cost when considered product bundling strategy of Google. Concerning the competitive analysis of OEM agreements to set Google search as default, Bork and Sidak evoked Microsoft–Google competition. Microsoft personal computers used 'Bing.com' as default search engine in 2011, with only Toshiba, Apple and Lenovo (home) personal computers setting Google as default search engine. See *ibid.*, at 697; A. Edlin & R. Harris, *The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google*, 15(2) Yale J. L. & Tech. 170–213 (2013).

<sup>23</sup> Google Android, *supra* n. 6, para. 1.

<sup>24</sup> F. Manjoo, *A Murky Road Ahead for Android, Despite Market Dominance*, The New York Times (27 May 2015), <https://www.nytimes.com/2015/05/28/technology/personaltech/a-murky-road-ahead-for-android-despitemarket-dominance.html> (accessed 3 Mar. 2021).

<sup>25</sup> Etro & Caffarra, *supra* n. 10, at 284.

<sup>26</sup> Google freely introduces Android via 'Apache License' in which all Android software sources are, <https://source.android.com/source/index.html> (accessed 3 Mar. 2021).

<sup>27</sup> Until Jan. 2020, Android had over 2.5 billion active users and around 3 million applications in the Google Play Store for Android users. E. Protalinski, *Android Passes 2.5 Billion Monthly Active Devices* (VB 7 May 2019), <https://venturebeat.com/2020/04/21/whatsapp-is-addressing-group-video-calling-limitations-to-better-compete-with-zoom> (accessed 3 Mar. 2021). For the number of applications see Statista, *Number of Available Applications in the Google Play Store from December 2009 to March 2020*, <https://www.statista.com/statistics/266210/number-of-available-applications-in-the-google-play-store> (accessed 3 Mar. 2021).

Maps and YouTube. However, using Android comes at a price of a pre-installing bundle of applications as default. This places application developers in a vulnerable position since users have a tendency to use pre-installed applications rather than downloading other alternatives.<sup>28</sup> Google's strategy of forcing MDMs and end-users to use Google's bundle applications pays off as over two-thirds of the revenue of Alphabet Inc. comes from Google's advertisements.<sup>29</sup> The Google business model permitted synergistically combined search and advertising services; yet, the extent to which its practices, especially in the context of the Android system, have been anticompetitive will be further discussed in Russian, Indian and Turkish jurisdictions, respectively.

### 3 RUSSIA

#### 3.1 The Russian Competition Law and Digital Markets

While the first Competition Law was introduced in Russia in 1991 after the collapse of the Soviet empire, it has significantly evolved ever since. The current legal framework is based on the Law on Protection of Competition, which replaced two separate laws on financial and commodity markets.<sup>30</sup> This and following amendments have brought the Russian competition legislation closer to EU competition law and different European countries' competition laws, such as Germany. However, there are still significant differences in both substantive and enforcement (including sanctions) contexts.<sup>31</sup> The Russian competition authority is the Federal Antimonopoly Service of the Russian Federation (FAS), which has broad powers<sup>32</sup>: apart from traditional investigatory and enforcement powers of competition law (including merger control), it also has powers to regulate public procurement, unfair competition, advertisements, and natural monopolies' tariffs. Russia is also a member of the Eurasian Economic Union (EAEU), which has supranational

<sup>28</sup> E. Alepis & C. Patsakis, *Persistence vs Service IDs in Android: Session Fingerprinting from Apps*, in *Mobile Networks and Management* 24 (J. Hu et al. eds, Springer 2017).

<sup>29</sup> Alphabet Inc. Annual report pursuant to s. 13 or 15(d) of the Securities Exchange Act of 1934, at 29–30, <https://last10k.com/sec-filings/google> (accessed 3 Mar. 2021).

<sup>30</sup> Federal Law No. 135-FZ and dated 26 July 2006 (Russian competition Law).

<sup>31</sup> While there is no obligation to employ a harmonized approach, nevertheless, the existence of similar competition law can facilitate trade. Malinauskaite, *supra* n. 13, at 369–397; E. Khokhlov, *The Current State of Russian Competition Law in the Context of Its Harmonisation with EU Competition Law*, 5(1) J. Eur. Comp. L. & Prac. 32–38 (2013); A. Abdulmenov, *Antitrust Matters – November 2019: Russian Competition Law and Enforcement Priorities* (Lexology 18 Nov. 2019), <https://www.lexology.com/library/detail.aspx?g=24405a4c-f04b-49d9-8d58-397f2957e14f> (accessed 3 Mar. 2021). Yet, recently the head of FAS has indicated an interest in cross-border cooperation, noting a 'long-standing bilateral cooperation between FAS and the European Commission under the frame of investigating antimonopoly cases and express[ing] hope for a closer interaction and deep studying of the practice of the European Commission on antimonopoly enforcement'. FAS, *Igor Artemiev: Competition Development Policy Means Efficient Deterrence of Negative Trends*, Press Release (24 Dec. 2019), <http://en.fas.gov.ru/press-center/news/detail.html?id=54680> (accessed 3 Mar. 2021).

<sup>32</sup> Abdulmenov, *supra* n. 31.



regulations in competition law and apart from Russia, includes the following countries, such as Armenia, Belarus, Kazakhstan and Kyrgyzstan. Yet, historically, the EAEU competition authority has not been particularly active in enforcing the EAEU competition rules; for instance, in 2018 it conducted only five investigations,<sup>33</sup> whereas the Russian FAS investigated 685 abuse of dominance cases, and 437 cases on anticompetitive agreements and concerted actions in 2018.<sup>34</sup> Russia also has a criminal offence for cartel prohibition, which has a rather successful enforcement record.<sup>35</sup>

The Russian FAS's recent focus is on the digital market sector, investigations on potential violations resulting from the use of artificial intelligence, big data, online platforms, aggregators and pricing algorithms. For instance, in 2018 the FAS investigated the authorized importer of LG smartphones to Russia, which published recommended resale prices on its website, and monitored and enforced the compliance of retailers with those prices using, inter alia, special software containing a price analysis algorithm. In its prohibition decision, the FAS noted that the use of price algorithms is not a violation per se, but that they may be used as a means of violating competition law.<sup>36</sup> There have been other cases involving businesses operating in digital markets, such as merger cases (Uber/Yandex,<sup>37</sup> Bayer/Monsanto<sup>38</sup>), abuse of dominant position by Google, cartels on auctions using 'auction robots'. Most recently, in 2020 the FAS found that Apple abused its dominant position in terms of developers of parental control mobile applications and restricted competition in the market for distribution of applications on mobile devices running the iOS operating system, with its right to reject (or not allow any third-party application from the App Store even if all Apple requirements were met).<sup>39</sup> Pavlova et al., indicate that there could be a political motive behind this active immersion into digital competition issues, as competition threats arose from businesses located outside of Russia with anticompetitive effects felt by Russian firms.<sup>40</sup>

Furthermore, the gaps (i.e., unsuitability of the traditional tools to define relevant markets) revealed during the investigations of digital markets have triggered the most recent amendments in Russian competition law, including the 'Fifth Antimonopoly Package'.<sup>41</sup> The aim of the new package

is to regulate the digital market by introducing different measures on digital giants, such as new approaches of economic concentrations, the determined criteria of platforms (i.e., revenue of over RUB 400,000,000 from the platform's activities etc.), usage of digital algorithms in anticompetitive agreements, as an aggravating circumstance.<sup>42</sup> This will also strengthen the non-binding recommendations on Practices in the sphere of Using Information Technology including those associated with the Use of Pricing Algorithms (Recommendations) published in 2019.<sup>43</sup> These Recommendations clarify issues related to the use of new technologies (including pricing algorithms) by businesses that sell non-food goods (i.e., electronics, household appliances, etc.), noting which practices are admissible (or not) from the perspective of antimonopoly law.

### 3.2 The Russian Google (Android) Case

The FAS was the first authority to find an infringement in Google Android's practices, almost three years before the EC issued a similar decision. Indeed, based on Yandex's (Google's main competitor in Russia) complaint, in 2015, the FAS found that Google bundled its own services with Android software, which resulted in preventing competitors' mobile search engine services competing on the merits.<sup>44</sup> This led to the violation of the Law 'On Protection of Competition' (Part 1 Article 10 on abuse of a dominant position) with a fine being imposed.<sup>45</sup> Google initially was reluctant to abide by the FAS's decision and pay the set fine; after lengthy debates, both sides reached a settlement agreement in court.<sup>46</sup> It was also the first case in Russian competition law enforcement history, testing the suitability of traditional antitrust regulation in the field of the IT-driven economy, simultaneously developing the leveraging theory of harm (the key theory built on the Google investigation).<sup>47</sup> The following sub-sections will provide more in-depth analysis on different aspects of this case, such as relevant market definition and market power, anticompetitive practices analysed by the FAS

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> For the UK, in contrast, see A. Jones & R. Williams, *The UK Response to the Global Effort Against Cartels: Is Criminalisation Really the Solution?*, 2 (1) J. Antitrust Enforcement 100–125 (2014).

<sup>36</sup> The FAS decision of 2 Mar. 2018 No. 1-11-18/00-22-17, <http://solutions.fas.gov.ru/ca/upravlenie-po-borbe-s-kartelyami/ats-14552-18> (accessed 3 Mar. 2021).

<sup>37</sup> FAS, *FAS Cleared Merger Between Yandex.taxi and Uber, Subject to Conditions*, Press release (24 Nov.2017), <http://en.fas.gov.ru/press-center/news/detail.html?id=52562> (accessed 3 Mar. 2021).

<sup>38</sup> FAS, *The FAS Russia Approved the Bayer/Monsanto Deal*, Press Release (24 Apr. 2018), <https://en.fas.gov.ru/press-center/news/detail.html?id=52952> (accessed 3 Mar. 2021).

<sup>39</sup> Case No. 11/01/10-24/2019, *Apple* [2020].

<sup>40</sup> N. Pavlova et al., *The Calling Card of Russian Digital Antitrust*, 6 Russian J. Econ. 258–276 (2020).

<sup>41</sup> Fifth Antimonopoly Package: Federal Law on Amendments to the Federal Law on Protection of Competition and Amendments to the Code on Administrative Offenses (2018), <http://en.fas.gov.ru/documents/documentdetails.html?id=15345> (accessed 3 Mar. 2021). It represents the fifth package of substantial amendments to the competition law; V. Rudomino & G. Zakharov, *Russian Antimonopoly Enforcement:*

*Developments for 2018 and Trends for 2019* (2018), [https://www.alrud.com/upload/newsletters/Russian\\_Antimonopoly\\_Enforcement\\_Developments\\_for\\_2018\\_and\\_Trends\\_for\\_2019.pdf](https://www.alrud.com/upload/newsletters/Russian_Antimonopoly_Enforcement_Developments_for_2018_and_Trends_for_2019.pdf) (accessed 3 Mar. 2021).

<sup>42</sup> Abdulmenov, *supra* n. 31. FAS (Press release 18 Feb. 2021) Head of the FAS Russia on Response Measures of Antimonopoly Control in the Conditions of Modern 'Digital' Markets | Федеральная Антимонопольная Служба - ФАС России (accessed 10 Apr. 2021).

<sup>43</sup> FAS, *Рекомендации О Практиках В Сфере Использования Информационных Технологий В Торговле, В Том Числе Связанных С Использованием Ценовых Алгоритмов* (Recommendation, 2019), <https://fas.gov.ru/documents/1-16fb9764-b5c1-48fe-8088-9f3f02144aea> (accessed 3 Mar. 2021).

<sup>44</sup> Decision No. AD/54066/15 Decision and prescription in case No. 1-14-21/00-11-15 of 5 Oct. 2015 (in Russian), <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ad-54066-15> (accessed 3 Mar. 2021); Edelman & Geradin, *supra* n. 10, at 159–161.

<sup>45</sup> FAS, *FAS Opened a Case Against Google*, Press Release (20 Feb. 2015), <http://en.fas.gov.ru/press-center/news/detail.html?id=39082> (accessed 3 Mar. 2021).

<sup>46</sup> FAS, *FAS Russia Reaches Settlement with Google*, Press Release (17 Apr. 2017), <https://en.fas.gov.ru/press-center/news/detail.html?id=49774> (accessed 3 Mar. 2021).

<sup>47</sup> Khokhlov, *supra* n. 11, at 468.

and finally, the prohibition decision and sanctions imposed on Google.

### 3.2.1 The Relevant Market Definition and Market Power

In terms of the relevant market, the FAS did not have any specific guidelines applicable to digital markets and encountered challenges on how to define the relevant product in 'multi-sided' markets, noting their indirect network effects (i.e., where the value of a product for a customer in one market increases with an increase in the number of customers of the product in one or more adjacent markets).<sup>48</sup> Given that the concept of multi-sided markets was unknown to Russian competition law, it used the traditional tools.<sup>49</sup> Therefore, this led the FAS to determine the market boundaries relating to each separate element of the platform. It concluded the market of pre-installed app-stores 'Google Play App Store' that is available for all smartphones and tablets using Android OS as a single market. The FAS also stressed the language barrier in the Russian software market. Even though there were thirteen different mobile device software options in the market, only three of them (Google Play, Samsung Apps, Yandex.store) offered Russian as an interface language. FAS Russia reached a conclusion that the concerned market was divided between those three providers since only 5% of the population can freely read one of any European languages in addition to Russian.<sup>50</sup> The complications in switching to a different OS were also considered. Therefore, the relevant market was defined as pre-installed app stores for Android devices for apps localized for distribution in the territory of the Russian Federation with Google's dominant position on the market because of owning Google Play.<sup>51</sup> In terms of market power, peculiarities of multi-sided markets, such as network effects as barriers to entry and expansion were also taken into consideration using traditional concepts.<sup>52</sup>

### 3.2.2 Anticompetitive Practices

In terms of anticompetitive concerns, Google with its dominant position for pre-installed app stores for Android, tied Google Play with the GMS (Google Mobile Services) package, comprising of Google Search, Google Chrome, Google Maps etc. Specifically, Google Play was a compulsory application, which could only be pre-installed if device manufacturers signed the MADA – mobile application distribution agreements, requiring those manufacturers to present the bundled GMS as a whole. Furthermore, as per the MADA,

<sup>48</sup> *Ibid.*, at 471.

<sup>49</sup> *Ibid.*

<sup>50</sup> FAS, *FAS Russia's Practice Approaches in the Case Regarding Google Inc., Google Ireland Ltd.* 3 (2016), [http://en.fas.gov.ru/documents/document\\_details.html?id=14677](http://en.fas.gov.ru/documents/document_details.html?id=14677) (accessed 3 Mar. 2021).

<sup>51</sup> Pavlova et al., *supra* n. 40, at 261. One should note that the EC concluded in the Google Android case that the relevant geographic market was worldwide (specifically excluding China in two products), yet, for more detailed product segments, such as (1) the worldwide market (except China) for the licensing of smart mobile OSs; (2) the worldwide market (except China) for Android app stores; (3) national markets for general search services; and (4) the worldwide market for non OS-specific mobile web browsers. *Google Android*, *supra* n. 6, para. 402.

<sup>52</sup> Khokhlov, *supra* n. 11, at 471.

mobile device producers were obliged to place Google Search as the default search option on the device. FAS Russia determined that Google's bundling and tying practices were directed at excluding its rivals from the market, as there was no technological reason to present GMS in a single body. While Article 10 of the Law on Protection of Competition does not expressly identify bundling and tying as a type of abuse, the general definition of abuse allowed the FAS to apply this theory of harm to Google's conduct.<sup>53</sup> Moreover, the pre-installation strategy was regarded as the most efficient channel to promote and distribute software and services for mobile devices. Since Google's products have a large amount of guaranteed presence in devices' main screens, these products gain a high usage frequency with the help of passive user behaviour. This is known as the exploitation of consumer's cognitive biases, a specific trait of digital markets.<sup>54</sup> These biases were also uncovered in the FAS's empirical research, consumer surveys, which demonstrated the reluctance of consumers to change the default search service. Therefore, Google's practices were found to be anticompetitive as such a promotion of its own products via pre-installation of GMS exclusively restricted rivals products' distribution channels. Furthermore, the FAS did not identify any merit on competition for the priority placement of applications on mobile devices' screens, as it noted<sup>55</sup>:

Due to that presence of a pre-installed application on a device per se diminishes incentives for searching and downloading an alternative (regardless of its quality) from other external sources. In particular, such a behaviour of customers explains the existence of the 'knuckle effect' or the 'locking effect' on the market which is in general typical for software and services' markets, and the existence of such effects makes measures aimed at immediate suppression of competition restriction necessary for the further development of innovations.<sup>56</sup>

There were other agreements with device manufacturing discussed below, which disincentivized the pre-installation of apps competing with Google's services, such as Yandex's search app.

### 3.2.3 The Prohibition Decision and Sanctions

The FAS issued a judgment on 18 December 2015 that Google violated the Federal Law on Protection of Competition (Part 1 Article 10).<sup>57</sup> Specifically, the FAS found that Google abused its market power by imposing several agreements, namely the MADA, AFA and Revenue Share Agreements (RSA) because of four reasons:

- (1) Tying the introduction (pre-installment) of Google Play Store with GMS;
- (2) Adjusting Google Search as a default search engine;
- (3) Locating Google apps in the main screen; and
- (4) Prohibiting the pre-installation of rivals' applications.

<sup>53</sup> *Ibid.*, at 472.

<sup>54</sup> Pavlova et al., *supra* n. 40, at 262; OECD, *Challenges to Consumer Policy in the Digital Age*, Background Report – G20 International Conference on Consumer Policy, Tokushima, Japan (5–6 Sept. 2019), <https://www.oecd.org/sti/consumer/challenges-to-consumer-policy-in-the-digital-age.pdf> (accessed 3 Mar. 2021).

<sup>55</sup> FAS, *supra* n. 50, at 9.

<sup>56</sup> *Ibid.*, at 7.

<sup>57</sup> Russian Competition Law, *supra* n. 30.

In addition to the infringement decision, a prescription (cease and desist order) was followed, which is traditionally issued in Russia as a separate act.<sup>58</sup> The FAS requested Google to actualize the following conditions within three months, which was later extended by one month.<sup>59</sup> First and foremost, Google had to terminate its anticompetitive conditions, which were imposed by said contracts. In this respect, Google had to review its contracts to eliminate the conditions of (1) prohibiting to pre-install non-Google service and applications, (2) imposing a pre-installed (default) GMS and Google Search engine by tying the ‘indispensable’ application of Google Play, and (3) locating specified Google applications in the main screen. Furthermore, Google had to inform its customers regarding all these alterations by reminding them that there are other alternative search engines and applications and that customers can design their main screens at will.<sup>60</sup> Violation of Article 10 of the Law on Protection of Competition is a basis for imposing a penalty under Article 14.31 of the Code of the Administrative Offences of the Russian Federation. In contrast to Regulation 1/2003 in the EU,<sup>61</sup> undertakings infringing competition law provisions in Russia can face fines from 1% to 15% of their revenues in Russia. In this case, the fine in the amount of over RUB 438 million<sup>62</sup> (approximately EUR 7 million) was imposed on Google, consisting of 9% of Google’s turnover on the Russian market in 2014 plus inflation.

Even though Google challenged the FAS’s decision, but both the first instance and the appellate court upheld the FAS’s infringement decision.<sup>63</sup> Furthermore, the FAS initiated another case against Google for not fully complying with the prescription, imposing an additional fine (amount RUB 300,000),<sup>64</sup> as the partial fulfilment of the determination is deemed to the failure of the determination.<sup>65</sup> Google in response, filed another complaint against the FAS for the short period to comply with the prescription.<sup>66</sup> In 2017, the FAS reached a settlement with Google in court, where Google agreed to the following terms: to stop the requirements of exclusivity of its applications on Android devices in Russia, to cease practices which restrict the pre-installation of any competing search engines and applications (including on the home screen by default), and finally, to encourage the pre-installation of Google search as the only search engine.<sup>67</sup>

<sup>58</sup> Khokhlov, *supra* n. 11, at 470.

<sup>59</sup> By the petition from Google Inc. and Google Ireland Limited numbered AX/60192/15 on 30 Oct. 2015.

<sup>60</sup> FAS, *supra* n. 50, at 1011.

<sup>61</sup> Article 23 of Regulation 1/2003 provides that the fine imposed on each undertaking shall not exceed 10% of its total turnover in the preceding business year.

<sup>62</sup> FAS, *supra* n. 50, at 11.

<sup>63</sup> Case A40-240628/2015, *Google Ireland Limited* [2017].

<sup>64</sup> Decision of FAS Russia on imposition of a fine in the case of administrative offense No. 4-19.5-1125/00-11-16 (2 Nov. 2016).

<sup>65</sup> Russian Competition Law, *supra* n. 30, Art. 51, para. 4.

<sup>66</sup> Khokhlov, *supra* n. 11.

<sup>67</sup> BRICS, *BRICS in the Digital Economy: Competition Policy in Practice*, 1st Report by the Competition Authorities Working Group on Digital Economy (2019), [http://www.cade.gov.br/acao-a-informacao/publicacao-coesistenciais/brics\\_report.pdf](http://www.cade.gov.br/acao-a-informacao/publicacao-coesistenciais/brics_report.pdf) (accessed 3 Mar. 2021).

## 4 TURKEY

### 4.1 The Turkish Competition Law and Digital Markets

Similar to Russia, the development of competition law in Turkey has a short history. It started when the ‘Law on Protection of Competition’ came into force in December 1994 and an independent Turkish Competition Authority (TCA, Rekabet Kurumu) was established.<sup>68</sup> However, the basic understanding of competition in today’s context has its origins in neoliberal economic policies. Lawmakers, accordingly, covered this economic understanding in the 1982 Constitution Act (still in full force and effect), which set a legal background for the establishment of competition law.<sup>69</sup> In addition, Turkey has been attempting to join the EU since 1987. Throughout this long process, that has taken more than thirty years, the continuum of membership application has become a double-edged sword, which has been used as political material in Turkey. Consequently, from time to time, the criteria asked by the EU has been prioritized or pushed into the background. Despite being a candidate country, Turkey is under obligation to harmonize its legislations with the EU because of its commitment to the EU Customs Union since 1996. This also necessitates the harmonization of European competition policies as an economic criterion of membership.

Due to the increase of digitalization of the economy, Turkey has also been faced with investigations in digital markets, where the *Sahibinden* decisions<sup>70</sup> are instrumental. ‘*Sahibinden.com*’ is one of the most leading online sales channels in Turkey, particularly in real estate and vehicle markets, where people and businesses can make purchases and sales by placing classified ads. The Board of the TCA declared that the implementation of exorbitant commissions to the corporate sellers constituted abuse of a dominant position and imposed an administrative fine of TLR 10.680.425,98 (around EUR 1.25 million) on *Sahibinden.com* in 2018.<sup>71</sup> However, this infringement decision was reversed by the Ankara 6th Administrative Court in 2019.<sup>72</sup> Following this judgment, a wide-ranging debate on online platforms has begun in terms of competition law in Turkey. Most recently, the TCA announced that it will appoint new units to create future policies on digital markets-related issues like big data, algorithms, and multisided platforms.<sup>73</sup> Moreover, the authority also declared that preparatory works regarding competition policies on digitalization are

<sup>68</sup> Law No. 4054 on the Protection of Competition of 1994.

<sup>69</sup> According to Art. 167 of the 1982 Turkish Constitution Act, ‘the State shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets’. Therefore, this Article created the constitutional bases of Turkish competition law.

<sup>70</sup> Decision No. 15-08/109-45, *Sahibinden* [2015]; Decision No. 18-36/584285, *Sahibinden.com* [2018]; Decision No. 2019/2625, *Sahibinden.com* [2019].

<sup>71</sup> Decision No. 18-36/584285, *Sahibinden.com* [2018]. It is important to note, that the TCA seemed to change its approach, as the initial almost identical complaint against *Sahibinden.com* was rejected in 2015.

<sup>72</sup> Decision No. 2019/2625, *Sahibinden.com* [2019].

<sup>73</sup> An announcement made by the competition authority numbered 20-23/307 and dated 7 May 2020.



underway in light of global developments. Investigations over digital markets would likely attest to the active position towards more cases when considering recent decisions in Google Shopping<sup>74</sup> and Google Android.<sup>75</sup> Overall, Turkish competition law is currently evolving in accordance with economic policies and structural reforms towards digitalization of markets. The TCA in its current strategic plan (2019–2023) noted that the emergence of new markets with digitalization requires holistic approaches and therefore, new regulations should be prepared.<sup>76</sup>

## 4.2 The Turkish Google (Android) Case

Concerning the Turkish Google Android case, Google (Google Inc, Google International LLC, Google Reklamcılık ve Pazarlama Limited Şirketi) has a wide range of products in terms of personal computers and mobile devices (web browser, search engine, cloud storage, email, maps etc), and most of its income comes from promotional sales in Turkey. Similar to the Russian case, Yandex also filed a complaint to the TCA in July 2015, alleging that Google violated competition law by forcing MDMs to incorporate specified Google applications in advance (pre-install) through tying more than one application if they want to use the Android software system in their mobile devices.<sup>77</sup> The TCA initially, after its preliminary inquiry, concluded by a majority of votes in December 2015 that a fully fledged investigation was not necessary. The same decision was also reached in June 2016, challenged by competitor Yandex, which was then overturned by the Ankara 5th Administrative Court<sup>78</sup> and upheld by the Ankara Regional Administrative Court, which stated that ‘... [TCA] ought to investigate whether Google’s practices violate Articles 4 and 6 of the Law No 4054 because these practices would likely produce vertical restriction by exclusivity and tying clauses ...’.<sup>79</sup> In compliance with the court’s decision, the the Turkish Competition Authority (TCB) opened its fully fledged investigation in March 2017<sup>80</sup> and subsequently concluded that Google violated Article 6 of the Competition Act by tying Android with its search and WebView services as well as concluding agreements (i.e., RSA) with device manufacturers to incentivize the exclusive usage of the said services.<sup>81</sup> This prohibition decision was followed by the set fine of TLR 93,083,422.30 (approximately, EUR 10 million) and the set obligations conditions, which will be discussed in the following sections.

<sup>74</sup> Decision No. 19-38/575-243, *Google Shopping* [2019].

<sup>75</sup> Decision No. 18-33/555-273, *Google Android* [2018].

<sup>76</sup> Rekabet Kurumu, *Stratejik Plan 2019–2023* (2018), <https://www.rekabet.gov.tr/Dosya/geneldosya/1-rk-stratejik-plani-pdf> (accessed 3 Mar. 2021).

<sup>77</sup> *Ibid.*, para. 2.

<sup>78</sup> Decision No. 2016/2675, *Google Android* [2016].

<sup>79</sup> Decision No. 2016/134, *Google Android* [2016].

<sup>80</sup> Decision No. 17-06/54-M, *Google Android* [2017].

<sup>81</sup> B. Yüksel, F. Eğrilmez & A. Karafil, *The Turkish Competition Authority Imposes a Daily Fine on a Big Tech Company for not Complying with the Previously Imposed Obligations (Google)* (Concurrences 7 Nov. 2019), <https://www.concurrences.com/en/bulletin/news-issues/november-2019/the-turkish-competitionauthority-imposes-a-daily-fine-on-a-big-tech-company> (accessed 3 Mar. 2021).

### 4.2.1 The Relevant Market Definition and Market Power

In terms of the relevant markets, Google’s fields of activity cover many areas that interact with different channels, from the mobile OS, application development, operating an app store to Internet advertisement activities. Considering the competitive effects of Google’s affiliated practices under the Guidelines for Defining the Related Market,<sup>82</sup> a precise market definition has not been made because the TCA saw no merit to make an alternative market definition. The TCA considered that the main revenue source of Google (nearly 90%) is the advertising revenues by using Google products (i.e., search engine, applications etc.) through Google services (i.e., AdWords, AdSense and AdX), which led to the distinction of the ‘mobile online advertising services’ market as an independent relevant product market.<sup>83</sup> The TCA further reasoned that as a result of the widespread use of mobile devices, many device manufacturers needed OSs manufactured by third parties. Therefore, licensed mobile OSs manufactured by third parties are differentiated as a separate market.<sup>84</sup> Given Google did not only force device manufacturers to pre-install Google Chrome in the contract, but also required the pre-installment of its component called Google WebView, which performs functions similar to internet browsers within the application, it has been decided to determine the ‘mobile internet browsers’ market as another related product market.<sup>85</sup>

In brief, six separate relevant product market definitions in the specified geographic market of Turkey were identified:

- Internet search services;
- The presentation of internet search services over mobile devices;
- Online mobile advertising services;
- Licensable mobile OS;
- Mobile Internet browsers;
- Each of the functions performed by each application in the GMS package.<sup>86</sup>

In terms of market power, the TCA avoided referring to specific market shares in all these relevant markets. Instead, it has the established practice that undertakings with a market share of less than 40% are less likely to have a dominant position and further investigation is undertaken on undertakings’ activities with a market share above this level.<sup>87</sup> The TCA further stated that Google is dominant in the licensable mobile OSs market with Android Software System due to its almost monopoly market share, indirect network effects, and its buyer power, where buyer power is described as the weakness of MDMs with worthwhile alternative OS because of the network effect (i.e., even though Windows also offered an OS but it is used by the minority).<sup>88</sup>

### 4.2.2 Anticompetitive Practices

In the Google Android case, the TCA investigated Google’s activities in terms of the following licencing agreements: (1)

<sup>82</sup> Decision No. 18-33/555-273, *Google Android* [2018], para. 20.

<sup>83</sup> *Ibid.*, paras 44–63.

<sup>84</sup> *Ibid.*, para. 64.

<sup>85</sup> *Ibid.*, para. 110.

<sup>86</sup> *Ibid.*, para. 111.

<sup>87</sup> *Ibid.*, para. 118.

<sup>88</sup> *Ibid.*, paras 135–138.

MADA; (2) RSA; (3) Android compatibility program; and (4) AFA. According to the MADA, it is compulsory to make an agreement with Google in terms of pre-installing Google Play Application Store, Google Play Services and GMS Package if MDMs wish to use the Android software system. Consequently, MDMs are obliged to give privilege to Google's products to guarantee Google search service as a default service, and to use Google's location provider. Therefore, there is no other option for MDMs to have services separately, averting pre-installing of Yandex and other Internet search services as a default service.<sup>89</sup> As to RSA, manufacturers can get a part of the revenue from Google's advertisements as long as they perform their contractual obligations. Based on this agreement, Google expressly forewarned manufacturers to not pre-install the Yandex application if they want to get a share from revenue stemming from the advertisements.<sup>90</sup> Google could restrain any practice, which may cause disintegration of the Android software system in light of the AFA mentioned above. This agreement allowed Google to present its services as a bundle even if one can find a way for disintegration. Therefore, the pre-installment of chosen Google applications would likely have the impact of damaging the competitive environment because users tend to use default settings (status quo bias). In addition to that, the Android compatibility program, which is designed to check whether new programs are compatible with the Android software system, produces the same effect such that Google always holds the opportunity to allege as a pretext for rejecting non-Google applications pursuant to this program.<sup>91</sup>

#### 4.2.3 The Prohibition Decision and Sanctions

As discussed above, in September 2018, the TCA concluded that Google violated the competition rules because of the contract terms, which are binding for MDMs to pre-install Google Search and Google WebView in the home screen. Therefore, the TCB unanimously fined Google and ruled that Google must fulfil its obligations by eliminating the above-mentioned contract terms regarding Google Search, Google WebView, and the Google widget.<sup>92</sup>

To stop the violation and to maintain effective competition, the TCA imposed the following obligations on Google regarding contracts with device manufacturers, wishing to merchandize in Turkey and use the 'Android operating system'<sup>93</sup>:

- Eliminate contract terms that directly/indirectly indicate an obligation to give privilege to Google Search by automatically setting it in the home screen, thereby ensuring device manufacturers' rights to freely choose from Google or its competitors;
- Eliminate all obligations imposed by Google regarding the setting as being a default search engine, and ensuring no new obligations for the default assignment of Google Search;
- Eliminate the contract terms, directly/indirectly pointing out to install the Google WebView component as default

and exclusively in-app internet browser, stipulating it as a condition for licensing;

- Offer any financial or other incentives to compensate for the elimination of the three conditions above.

The TCA determined that all these necessary contract changes have to be certified within six months after the issue of a reasoned decision.<sup>94</sup> Google introduced its measures<sup>95</sup> concerning its MADA and RSA. Specifically, Google prepared this addendum to send mobile phone manufacturers, which signed MADA or both MADA and RSA. However, all MADA and RSA were not in monotonous form with different names and different contents. Moreover, it was also determined that the licence for using Commercial Android Software System (CASS) could be granted by other agreements with different names.<sup>96</sup> Therefore, the TCA concluded that Google did not perform its commitments regarding the imposed obligations.<sup>97</sup> In this regard, accordingly, the TCA decided to daily fine Google with 0.05% of its 2018 Turkey turnover as of 7 November 2019 until Google would duly perform the specified measures.<sup>98</sup> The daily penalty covered a forty-day period when Google made its press release. Hence, the total amount of daily penalty was 2% of the turnover, a considerable fine when compared with the lump sum.<sup>99</sup> In brief, both lump sum and daily penalty were applied since the violation did not end until the given term. As a result, the fine was doubled, since the action subject to the decision lasted more than five years.<sup>100</sup>

It is important to note that in response to the TCA's fine on Google, Google informed its business partners not to grant a licence to Android device manufacturers in Turkey in the context of GMS by stating: '... we will not be able to work with [our business partners] on new Android phones to be released for the Turkish Market. This means that Google services will not be offered to new device models in Turkey'.<sup>101</sup> Even though Google later changed its decision, this demonstrates that younger authorities can struggle to convince dominant players on the market to comply with the imposed commitments. Indeed, the TCA even had to remind Google that it had delivered all of its commitments set by the EC, which were more comprehensive than those demanded by the TCA. The Russian FAS decision was also named, as '[...] Google is required to fully fulfil the obligations set out in our Board's decision, as it did in other countries'.<sup>102</sup> This tension can also be seen from the most

<sup>94</sup> *Ibid.*

<sup>95</sup> For instance, Google made a commitment in Turkey while they did not prefer giving a commitment in the EU. That means different legal interpretations from different jurisdictions caused regionally differentiation of Google's commitments to terminate its conduct.

<sup>96</sup> Decision No. 19-38/577-245, *Google Android* [2019], paras 9–10.

<sup>97</sup> *Ibid.*, Art. 37(a).

<sup>98</sup> *Ibid.*, Art. 37(b).

<sup>99</sup> According to Art. 16 of Law No. 4054 and Art. 5/1-a of the affiliated penal regulation, the lump sum can be determined between 0.5% and 3% of the turnover.

<sup>100</sup> Decision No. 18-33/555-273, *Google Android* [2018], para. 512.

<sup>101</sup> Quoted from the letter, which Google sent its business partners. E. Bıktım, *Android cihazları gelecekte neler bekliyor?*, CNN Türk (18 Dec. 2019), <https://www.cnnturk.com/teknoloji/android-cihazlarigelecekte-neler-bekliyor> (accessed 3 Mar. 2021).

<sup>102</sup> TCA, Press Release (17 Dec. 2019), <https://www.rekabet.gov.tr/tr/Guncel/basin-aciklamasi-379f2f76cc20ea11810b00505694b4c6> (accessed 3 Mar. 2021).

<sup>89</sup> *Ibid.*, para. 2.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> TCA, *On the Google Investigation* (2018), para. 2.

<sup>93</sup> *Ibid.*, para. 5.



recent Google announcement in the Google (Shopping) development as well, where the TCA ordered equal treatment of Comparison Shopping Services, to which Google responded by deciding to remove all shopping advertisements from the search tools from August 2020, therefore, consumers in Turkey will not encounter any shopping ads, placed at the top of search pages.<sup>103</sup> However, after an investigation, the TCA found non-compliance regarding the equal treatment to every business using Google's shopping services, and consequently fined Google TLR 296 million due to the adjustment of placing certain ads at the top of search results through directing organic search results.<sup>104</sup>

## 5 INDIA

### 5.1 The Indian Competition Law and Digital Markets

Modern Indian Competition Law started with the Competition Act of 2002, replacing its predecessor – the 1969 Monopolies and Restrictive Trade Practices Act. The enactment of the Act, was characterized by various factors, including the obligations cast on India by the World Trade Organization (WTO) agreements and the entry of large multinational businesses consequent to India's measures liberalizing trade.<sup>105</sup> Yet, the setting up of a competition regime in India has proved to be a much more difficult task than initially envisaged.<sup>106</sup> While the Act came into force in 2003 and the Competition Commission of India (CCI) was established by the Central Government the same year, the provisions relating to anticompetitive practice and abuse of dominance were brought into force only in 2009.<sup>107</sup> Pursuant to the current Act (as amended), the CCI has a duty to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in the markets of India.<sup>108</sup>

The growth of digital markets in India meant that the CCI has faced complexities of the enforcement of competition law in the context of the digital economy, dealing with cases involving e-commerce marketplace platforms, online cab aggregators, big data and online search, simultaneously, testing whether new anticompetitive practices with various issues, such as online and offline markets, two-sided markets, network externalities fit into the traditional competition law framework. The first against Google, the CCI initiated in

2012 for its abuse practices in the market of online web search services, where it recognized the role of big data in the digital economy and observed that the rise of new business models, based on the collection and processing of big data, is currently shaping the world.<sup>109</sup> After nearly seven years of the investigation, considering a number of issues pertaining to technology and procedure, the CCI has found Google to have abused its dominant position in online general web search and web search advertising services in India.<sup>110</sup> It, inter alia, held that Google was creating an uneven playing field by unduly favouring its own services, and by doing so leveraged its strong position in various online search markets to enter into and enhance its position in ancillary markets.<sup>111</sup> This was followed by the Google Android case, which will be further discussed in the following sections.

Most recently, in 2020, the CCI started two new investigations into Google's potential anticompetitive practices. First of all, the likely anticompetitive outcomes in terms of default applications provided by Google Android OS have recently been readdressed by the CCI with the investigation launched against Google in relation to the unfair promotion of Google Pay (Google's digital payment app) via search manipulation. Google Pay, in most cases, comes as a default application with Android-based mobile devices. The CCI, accordingly, in its preliminary examination concluded that the pre-installation of 'Google Pay' could lead to a 'status-quo bias' to the detriment of other unified payment interface applications because such conduct might discourage users from downloading rivals' applications.<sup>112</sup> This could be interpreted as a likely sign that Google will encounter further investigations by the CCI for its other default applications in terms of different markets, as long as narrower market analysis will be adopted. Secondly, the CCI has an ongoing investigation in terms of the allegations against Google's Android for smart TVs in terms of creating barriers to competitors wishing to use or develop modified versions of Android for smart TVs, such as Amazon's Fire OS.<sup>113</sup>

Furthermore, India also changed its direct foreign investment policies in February 2019 and platforms, accordingly, have been banned from selling products that carry their own label. This prohibition also covers the platforms that control more than 25% of the sellers' inventory. Along with these regulations, 'brick-and-mortar' markets, which have suffered greatly from digital platforms, are also expected to grow again.<sup>114</sup> Despite the quick developments in digital markets, the CCI still refers to traditional tools to quantify dominance. Therefore, the CCI is fully aware of the need for redefining

<sup>103</sup> Google, *Google Alışveriş reklamları ile ilgili bir güncelleme*, Declaration from Google's official blog (29 July 2020), <https://turkiye.googleblog.com/2020/07/google-alisveris-reklamlari-ile-ilgili29.html?m=1> (accessed 3 Mar. 2021).

<sup>104</sup> Decision 21-20/248-105, *Google Reklamcılık ve Pazarlama Ltd. Şti., Google International LLC, Google LLC, Google Ireland Limited v. Alphabet Inc.* [2021].

<sup>105</sup> T. Ramappa, *Competition Law in India: Policy, Issues, and Developments* 6 (OUP 2009).

<sup>106</sup> A. Agarwal, *Competition Law in India: Need to Go Slow and Steady*, IIMA Working Paper No. 2005-10-05 (2005), <http://www.iimahd.ernet.in/publications/data/2005-10-05anurag.pdf> (accessed 3 Mar. 2021).

<sup>107</sup> Competition Commission of India, S.O. 1242(E) (2009) notifying §§3, 10, 13, 15, 16, 19, 20, 21, 25, 26, 28, 31, 33, 34, 35, 36, 38, 39, and 43 (53B, 53N, 53O, 53P, 53Q, 53R, 53S, 53T, and 53U of Competition (Amendment) Act of 2007.

<sup>108</sup> About CCI | Competition Commission of India, Government of India (accessed 15 Apr. 2021).

<sup>109</sup> Case Nos 07 and 30 of 2012, *Matrimony.Com Limited v. Google LLC & Ors* [2018].

<sup>110</sup> *Ibid.*

<sup>111</sup> M. Agarwal & A. Bisen, *The Indian Competition Authority Fines a Company for Search Bias and Exclusive Agreements (Google)*, e-Competitions News Issue (Feb. 2018), <https://www.concurrences.com/en/bulletin/news-issues/february-2018/the-competition-commission-of-india-fines-a-company-for-search-bias-and> (accessed 3 Mar. 2021).

<sup>112</sup> Case No. 07 of 2020, *XYZ v. Alphabet Inc., Google LLC, Google Ireland Limited, Google India Private Limited, Google India Digital Services Private Limited* [2020], paras 55–56.

<sup>113</sup> Reuters, *Google May Be Facing 'Smart TV Trouble' in India*, The Times of India (8 Oct. 2020), <https://timesofindia.indiatimes.com/gadgets-news/google-may-be-facing-smart-tv-trouble-in-india/articleshow/78549698.cms> (accessed 3 Mar. 2021).

<sup>114</sup> Case No. 20 of 2018, *Flipkart* [2018], para. 34.

and reconceptualizing its approach towards ever-changing business models in digital markets.<sup>115</sup> For instance, India's Ministry of Corporate Affairs appointed the Competition Law Review Committee to evaluate whether the country's Competition Act of 2002 (as amended by the Competition (Amendment) Act, 2007) was keeping pace with its economy, which culminated in the proposed Competition (Amendment) Bill, 2020. The Amendment proposes several changes, including, inter alia, on how competition law should be updated for the digital economy. It also aims to align the Act with US and EU regulations.<sup>116</sup> Briefly, India is currently in the process of shaping its policies regarding the digitalization of the markets, and consequently the Google Android decision can be regarded as a 'pathfinder' for further decisions and policies.

## 5.2 The Indian Google Android Case

In April 2019, the CCI ordered a probe against Google for abusing its dominant position in violation of section 4 of the Competition Act 2002, where the CCI found that Google was dominant in the market for licensable smart mobile device OSs in India and had abused its dominant position by requiring device manufacturers wishing to pre-install Google's proprietary apps (including Google Play Store) to adhere to a compatibility standard for Android for all devices based on Android.<sup>117</sup> Given that this case is still under investigation, further analysis will be based only on the prima facie opinion, which provided a stance against Google.

### 5.2.1 The Relevant Market Definition and Market Power

The previous cases, such as the Flipkart<sup>118</sup> and Snapdeal decisions,<sup>119</sup> demonstrated that the CCI delineates the relevant market in a narrow manner in digital markets. Indeed, in the *Vinod Kumar Gupta v. WhatsApp Inc* case<sup>120</sup> in defining the relevant market as the market for 'instant messaging services using consumer communication apps through smartphones', based on price, characteristics and end use, the CCI made a distinction between 'instant communication apps' and 'traditional electronic communication services' (such as text messaging and voice calls).<sup>121</sup>

As to lawsuits brought against Google with regard to its online search and related advertising services, the CCI, prima facie, defined the market as 'online search advertising'.<sup>122</sup> It is worth noting that the CCI has a predisposition towards

making qualitative analysis by firstly examining the interchangeability of products rather than making quantitative analysis such as the number of users.<sup>123</sup> Regarding the Android case, both qualitative and quantitative analyses are currently considered to specify the following relevant markets:

- (1) Licensable Smart Mobile Device Operating Systems: Three different options for mobile OS were listed, namely Android, iOS, and Windows Phone. Informants tried to direct the CCI to follow the EC's decision where the dominance of Google was found by reminding that Android is different from other OS since vertically integrated mobile phone producers can only use it. The number of mobile phones using Android OS was around 80% of all smartphones. Finally, the CCI determined the concerned market as licensable smart mobile device OSs market because other known (popular) OSs are not open to use by third party OEMs. The relevant geographic market is considered as the whole of India since the product is homogeneously used in every walk of life.<sup>124</sup>
- (2) App Stores for the Android Mobile OS: Google Play Store is the biggest application market with more than 3.6 million applications and over 90% of Android OS device users download their applications from Google Play Store. There seems to be reliance on the EC's relevant market definition in the Google Android case, where it was declared that Google Play Store is dominant in the worldwide market excluding China.<sup>125</sup>
- (3) Online Video Hosting Platform: This market is distinguished due to the dominance of YouTube owned by Google, holding around 80% of market share.<sup>126</sup>
- (4) Online General Web Search Engine: The dominance of Google in the market for online general web search services has already been found by the CCI's decision in *Matrimony v Google*.<sup>127</sup>

### 5.2.2 Anticompetitive Practices

In the Google Android case, the CCI directs an investigation against Google<sup>128</sup> based on allegations of different kinds of anticompetitive and abusive practices in separate markets in India. In its prima facie probe, the CCI found that a wide range of applications, such as Google Maps, Google Chrome, YouTube were only available through GMS on android phones which had to be pre-installed by the OEMs and obtain rights to these applications, the OEMs had to enter into agreements with Google, namely, MADA and AFA. However, Google does not provide the requested application independently (instead, it proposes applications as a bundle). Furthermore, by signing the MADA, OEMs are obliged to acknowledge the CDD (the Compatibility Definition Document).<sup>129</sup>

<sup>115</sup> J. Kaur, *Competition Law and E-commerce Industry: Predicting the Future for India Inc.*, 4 South Asian L. Rev. J. 272 (2018).

<sup>116</sup> M. Holmes, M. Mantine & J. Driscoll, *A New Modus Operandi in Modi's India: How India's Amendments to Its Competition Law Could Promote Uniform Enforcement Standards* (Reed Smith ed. 23 Mar. 2020), <https://www.reedsmith.com/en/perspectives/2020/03/a-new-modus-operandi-in-modis-india> (accessed 3 Mar. 2021).

<sup>117</sup> Case No. 39 of 2018, *Google* [2019].

<sup>118</sup> Case No. 80 of 2014, *Mr Mohit Manglani v. M/S Flipkart India Private Limited and Ors* [2015], para. 18.

<sup>119</sup> Case No. 17 of 2014, *Ashish Ahuja v Snapdeal and Ors.* [2014].

<sup>120</sup> Case No. 99 of 2016, *WhatsApp Inc.* [2017]; Kaur, *supra* n. 115, at 284.

<sup>121</sup> N. Uberoi, A. Nanda & T. Verma, *Global Competition Around the World: India*, *Global Competition Review* (15 Oct. 2019), <https://www.lexology.com/library/detail.aspx?g=f66ea523-b5df-4c5d-81f2-67f7997bc2b9> (accessed 3 Mar. 2021).

<sup>122</sup> Case No. 46 of 2014, *Albion InfoTel Limited v. Google Inc. and others* [2014].

<sup>123</sup> Kaur, *supra* n. 115, at 286; A. Mohindroo & R. Mohindroo, *Digital Economy and Competition Law: A Conundrum*, 3 Indian Comp. L. Rev. 83–104 (2018).

<sup>124</sup> *Google Android*, *supra* n. 117, paras 7, 14.

<sup>125</sup> *Ibid.*, paras 7, 15. In para. 7, there was a reference to the EC's press release concerning Google's app store accounting to more than 90% of apps downloaded on Android devices.

<sup>126</sup> *Ibid.*, paras 7, 17.

<sup>127</sup> *Ibid.*, paras 7, 16.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, paras 12–9.

Some of the applications of Google, such as 'Play Store' are a prerequisite for the efficient use of Android-based mobile phones, as consumers expect to see those must-have applications as pre-installed. Therefore, OEMs have no other option than pre-installing the 'Play Store' by signing the MADA, which consequently leads to an exclusion of alternative applications.<sup>130</sup> In other words, OEMs seem to provide tied applications, such as Google search widget, Google Chrome, and YouTube alongside the Play Store and therefore, trivialize other alternatives.<sup>131</sup> The CCI, prima facie, found that mandatory pre-installation of GMS amounts to unfair trading conditions in clear violation of section 4(2) of the Competition Act.

### 5.2.3 The Prohibition Decision and Sanctions

In its brief publicly available order, the CCI declared that Google abused its dominant position in India by leveraging its products and services in defiance of section 4(2) of the Competition Act,<sup>132</sup> which aims to prevent any technical advancement restrictions to the prejudice of consumers. The necessity of a wider probe was put forth with this preliminary ruling of the CCI. Google immediately appealed this decision to an Indian tribunal to prevent any irreparable harm to its reputation. This appeal is still under consideration. If Google is found guilty of abusing the market, the fine would be expected to exceed INR 136 crore.<sup>133</sup> The fine of INR of 135.86 was imposed on Google in the first case of *Matrimony.Com Limited v. Google LLC & Ors*,<sup>134</sup> where Google was found to have abused its dominant position in the licensable smart mobile OS market to accrue benefits in the online search service market.<sup>135</sup>

## 6 COMPARATIVE ANALYSIS

Over the past decade, digitalization has been a game changer.<sup>136</sup> Trailblazing competition authorities published digitalization-related reports one after another. Indeed, starting with a joint report by the NCAs in France and Germany on big data,<sup>137</sup> it was followed by the UK,<sup>138</sup> the US,<sup>139</sup>

Germany,<sup>140</sup> and Australia<sup>141</sup> and most recently the EU with a further proposal to introduce new obligations on gatekeepers.<sup>142</sup> While most debates circle around these jurisdictions, other countries, such as Russia, Turkey and India have also made their stand. For instance, the FAS in Russia issued the recommendations on Practices in the sphere of Using Information Technology in 2019 and its current developments are set in the 'Fifth Antimonopoly Package' with a new digital platform and network effects doctrine.<sup>143</sup> Along similar lines, the TCA recently issued a statement regarding the preparatory work for the 'Digitalization and Competition Policy Report' in May 2020 to contribute to the development of public policies.<sup>144</sup> This clearly suggests the need for new competition tools to address new businesses models in digital environments.

These changes have undoubtedly spurred from complex competition cases, including Google, with its multi-sided nature of both application stores and search engines. The FAS in Russia was the first to issue a prohibiting decision and impose the fine on Google. It seems that the FAS had issues in defining the relevant markets in this case, where it questioned whether an object with no price attached to it (i.e., Android app stores are offered for pre-installation free of charge) could be considered a good.<sup>145</sup> It tested that the product can be not only in monetary form but defined by other means, such as compliance with certain requirements of pre-installation and/or the opportunity to receive a share of the revenue from online advertising. Therefore, the product's quality could be considered instead. The FAS also noted network effects as barriers to entry and expansion.<sup>146</sup> The FAS found that an app store is a standalone product defining its relevant product as pre-installed Android app stores without any further segmentation, like in Turkey and India (see Table 1), where the emphasis shifts from default (pre-installed) to suggested applications.

<sup>130</sup> *Ibid.*, para. 21.

<sup>131</sup> *Ibid.*, para. 23.

<sup>132</sup> *Ibid.*, para. 24.

<sup>133</sup> S. Barik, *CCI's Fine on Google Could Exceed Rs 136 Crore If Found Guilty of Abusing Market Dominance Report*, Medianama (16 July 2019), <https://www.medianama.com/2019/07/223-ccis-fine-on-google-could-exceed-rs-136-crore-if-found-guilty-of-abusing-market-dominance-report> (accessed 3 Mar. 2021).

<sup>134</sup> *Matrimony.Com Limited*, *supra* n. 109.

<sup>135</sup> M. Agarwal, *The Indian Competition Authority Orders a Probe Against a Multinational Technology Company for Abusing of Its Dominant Position (Google)*, e-Competitions, Art. No. 91154 (Apr. 2019), <https://www.concurrences.com/en/bulletin/news-issues/april-2019/the-competition-commission-of-india-orders-probe-against-a-multinational> (accessed 3 Mar. 2021).

<sup>136</sup> Rupprecht Podszun, *Politics of Antitrust Law*, 47 IIC – Int'l Rev. Intell. Prop. & Comp. L. 385 (2016).

<sup>137</sup> Autorité de la concurrence and Bundeskartellamt, *Competition Law and Data* (2016), [http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2) (accessed 3 Mar. 2021).

<sup>138</sup> J. Furman et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf) (accessed 3 Mar. 2021).

<sup>139</sup> Stigler Center, *Stigler Committee on Digital Platforms*, Final Report (Sept. 2019), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms-committee-report-stigler-center.pdf> (accessed 3 Mar. 2021).

<sup>140</sup> German Commission Competition Law 4.0, *A New Competition Framework for the Digital Economy?*, Report (Sept. 2019), <https://www.bmwi.de/Redaktion/EN/Downloads/a/a-new-competition-framework.pdf> (accessed 3 Mar. 2021).

<sup>141</sup> ACCC, *Digital Platforms Inquiry – Final Report* (2019), <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> (accessed 3 Mar. 2021).

<sup>142</sup> J. Crémer, Y. Montjoye & H. Schweitzer, *Competition Policy for the Digital Era* (2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> (accessed 3 Mar. 2021). EC, Single Market – new complementary tool to strengthen competition enforcement (europa.eu) (accessed 10 Apr. 2021).

<sup>143</sup> Fifth Antimonopoly Package, *supra* n. 41.

<sup>144</sup> TCA, *Competition Board Puts Digital Economy Under Microscope*, Press Release (11 May 2020), <https://www.rekabet.gov.tr/en/Guncel/competition-board-puts-digital-economy-u-3ea6ef4d5993ea1181a00505694b4c6> (accessed 3 Mar. 2021); In terms of Russia, see World Bank Group, *Competing in the Digital Age: Policy Implications for the Russian Federation*, Russian Digital Economy Report (2018), <https://www.worldbank.org/en/country/russia/publication/competing-in-digital-age> (accessed 3 Mar. 2021).

<sup>145</sup> Khokhlov, *supra* n. 11, at 471.

<sup>146</sup> *Ibid.*, at 470–472.



Table 1 The Relevant Market Definition in Russia, Turkey and India

| Country | Relevant Product Market   |
|---------|---|
| Russia  | <ul style="list-style-type: none"> <li>– Pre-installed app stores</li> <li>– The FAS also mentioned adjacent markets where negative effects of the abuse took place, i.e., markets for specific mobile services, e.g., search, browsers, maps, etc</li> </ul>   |
| Turkey  | <ul style="list-style-type: none"> <li>– Turkey identified these product segments:</li> <li>– Internet search services</li> <li>– The presentation of internet search services over mobile devices</li> <li>– Online mobile advertising services</li> <li>– Licensable mobile OS</li> <li>– Mobile Internet browsers</li> <li>– Each of the functions performed by each application in the GMS package</li> </ul> |
| India   | <ul style="list-style-type: none"> <li>– Licensable Smart Mobile Device Operating Systems</li> <li>– App stores for the Android Mobile OS</li> <li>– Online General Web Search Engine</li> <li>– Online Video Hosting Platform</li> </ul>   |

In relation to the anticompetitive assessments and theory of harm, it seems that the NCAs in Russia, Turkey and India employed slightly different approaches. For instance, the TCA carried out a minute inquiry in order to demonstrate consumer loss as a condition sine qua non. This approach is seemingly deemed to be path breaking even though it has a weakness in terms of counterfactual analysis.<sup>147</sup> Pursuant thereto, the increase in market power acquired by Google would allow more personal data collection where consumers are likely to be exposed to more ads and directed Google search results. In sum, the TCA gave importance to consumer welfare by mounting its own arguments.<sup>148</sup> From a Russian perspective, the issue seemed to bring more national digital strategies to the fore. As a result of this case, the settlement required Google to introduce a search choice screen, so that users could select the default search engine themselves. As to India, technology driven markets enormously contribute to the Indian economy since it

<sup>147</sup> If compared with the EC's Android decision, there was no over-exertion to demonstrate consumer loss. It was concluded that exclusivity has damaged consumers indirectly because it restricts competition in the browser and search market.

<sup>148</sup> It would be also worth considering the extent to which the increased amount of personal data causes a bigger loss for consumers/rivals. For example, in the Bundeskartellamt's *Facebook* decision (B6-22/16), the Bundeskartellamt prohibited Facebook from collecting and using data from its subsidiaries and third companies for its own business activities. While the Düsseldorf Higher Regional Court (Oberlandesgericht) overruled the Bundeskartellamt's decision, the Federal Court of Justice (Bundesgerichtshof) reinstated the prohibition order in 2020, by justifying the abuse merely with the missing possibility of choice for users.

encourages developing new markets and technologies.<sup>149</sup> The Government of India, by taking a proactive role in general, helps the establishment and support of Indian businesses to have a voice in globally competitive markets.<sup>150</sup> The CCI, concordantly, approaches the disruptive technology markets with suspicion due to the lack of comprehensive understanding of technical aspects. Therefore, jumping to conclusions may have a chilling effect on the development of innovation and competition.<sup>151</sup> However, the CCI found Google's alternative Android versions (Android fork) to the prejudice of consumers as per section 4(2)(b) of the Competition Act due to the limitation of technical and scientific developments.<sup>152</sup> All these analysed jurisdictions have taken their own precautions and imposed fines. While the EC imposed a record fine so far on Google in the Google Android case of EUR 4.3 billion,<sup>153</sup> the fines of TLR 93 million (approximately, EUR 10 million) in Turkey and of RUB 438 million (approximately, EUR 7 million) in Russia (*see* Table 2) are modest.<sup>154</sup> Nevertheless, in Russia the fine amounted to 9% of Google's turnover in the relevant Russian market in 2014 plus inflation.<sup>155</sup> There is no public information about the proportion of the fine corresponding to annual turnover rates in Turkey. Interestingly, Turkey imposed a higher fine on Google in the Google Shopping case, which was TLR 98.4 million (around EUR 13 million).<sup>156</sup> This TCA fine has been widely criticized as 'a low penalty'.<sup>157</sup> Given that the Google Android case is still under investigation in India, the official fine has not been announced. Yet, it is expected to be higher (in the region exceeding INR 136 crore, equivalent to approximately EUR 15.46 million) than the previous fine imposed on Google.<sup>158</sup>

<sup>149</sup> A. Arun & A. Hussain, *India: Competition Law Year in Review – Highlights of 2019* (2020), <https://www.mondaq.com/india/cartels-monopolies/888072/competition-law-year-in-review-highlights-of-2019> (accessed 3 Mar. 2021).

<sup>150</sup> R. Basant & S. Morris, *Competition Policy in India: Issues for a Globalising Economy*, 35(31) *Econ. & Pol. Wkly.* 2735 (2000).

<sup>151</sup> Economic Laws Practice Advocates and Solicitors, *Competition Law and Policy Update: Quarter 4 of 2019* 11 (2020), <https://elplaw.in/wp-content/uploads/2020/01/ELP-Quarterly-update-Competition-law-policy-Q4-of-2019.pdf> (accessed 3 Mar. 2021).

<sup>152</sup> *Google Android*, *supra* n. 117, para. 21.

<sup>153</sup> Given that Google is a wholly owned subsidiary of Alphabet, the EC took Alphabet's turnover of 2017 into consideration. Therefore, the calculation was made over the global revenue of Google amounted to USD 110,855 million. *Google Android*, *supra* n. 6, paras 6–9.

<sup>154</sup> The fine on Google has not yet been revealed in India.

<sup>155</sup> In comparison, in the EC's decision there was an additional amount to deter undertakings of a similar size and with similar resources from entering into the same type of infringements as Google and Alphabet, which was set at 11% of the value of sales in 2017 (paras 1467–1471). The total fine set was below 10% of Alphabet's turnover in the business year ending 2017 pursuant to Art. 23 of Regulation (EC) No. 1/2003.

<sup>156</sup> For comparison, the EC fined Google EUR 2.42 billion in the *Google Shopping* case.

<sup>157</sup> A. Bodur, *Google Rekabet Kurumu'nda sözlü savunma yaptı*, *Sputnik News* (5 Feb. 2020), <https://tr.sputniknews.com/turkiye/202002051041336231-google-rekabet-kurumunda-sozlu-savunma-yapti> (accessed 3 Mar. 2021).

<sup>158</sup> *Matrimony.Com Limited*, *supra* n. 109.

Table 2 Fine Comparison<sup>159</sup>

| <i>Fined by</i> | <i>Amounted</i>              | <i>Approximate Number of Android Devices in 2018 (in Million)</i> |
|-----------------|------------------------------|---|
| Russia          | RUB 438 million ≈ €7 million | 58  |
| Turkey          | TLR 93 million ≈ €11 million | 40  |
| India           | Not declared yet             | 480   |

Finally, these analysed countries, save India, had to impose additional fines due to Google's non-compliance (or partial compliance), which demonstrates Google's reluctance to cooperate with younger competition authorities.

Generally speaking, according to Mendoza, the competition authorities have displayed weaknesses in cases against Google because of two general reasons. First, rules and expectations concerning digital platforms were not clear enough in terms of investigations, which have been made so far. Second, ignorance of technical aspects has weakened the analyses put forward against Google.<sup>160</sup> In this respect, it is essential for NCAs to improve instrumental tools to analyse digital markets, as they currently cannot generate an effective solution to the problems posed by digital actors. Rather, competition enforcement in digital markets is more than likely to encounter excessive or inadequate enforcements that could lead to more harm than remedy.<sup>161</sup> This harm stems from false-negative<sup>162</sup> and non-enforcement costs, where the non-enforcement cost is likely to be more than the false negative intervention cost.<sup>163</sup> Therefore, Newman argued in favour of an interventionist approach<sup>164</sup> by stating that a hands-off approach of antitrust enforcement would be misguided and consequently, a ready hand approach is a must in terms of NCAs' position.<sup>165</sup> Russia, Turkey and India, accordingly, applied their competition law provisions by showing their ready hand approaches in terms of digital competition as seen in Google cases.

<sup>159</sup> S. O'Dea, *Smartphone Users in Russia from 2015 to 2025* (2021), <https://www.statista.com/statistics/467166/forecast-of-smartphone-users-in-russia/#statisticContainer>; Statcounter, *Mobile, Tablet & Console Operating System Market Share Russian Federation: April 2019 – April 2020* (2021), <https://gs.statcounter.com/os-market-share/mobile/russian-federation> (accessed 3 Mar. 2021).

<sup>160</sup> D. Mendoza, *Antitrust in the New Economy Case Google Inc. Against Economic Competition on Web*, 8(2) Mexican L. Rev. 26–27 (2016).

<sup>161</sup> F. Toma, *The Challenges of Digital Markets for EU Competition Law: The Case of Android* (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3092823](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3092823) (accessed 3 Mar. 2021); G. Manne & J. Wright, *Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google*, 34(1) Harv. J. L. & Pub. Pol'y 171–244 (2011); D. McGowan, *Between Logic and Experience: Error Costs and United States v. Microsoft Corp.*, 20(2) Berkeley Tech. L.J. 1185–1245 (2005).

<sup>162</sup> A false-negative intervention usually appears under the free view of products by considering so-called free products as prima facie beneficial to consumer benefits. M. Stucke & A. Grunes, *Big Data and Competition Policy* (OUP 2016).

<sup>163</sup> J. Newman, *Antitrust in Digital Markets*, 72(5) Vand. L. Rev. 1561.

<sup>164</sup> *Ibid.*, at 1497.

## 7 CONCLUDING REMARKS

In a rapidly changing economic landscape, the growth and evolution of the digital economy raise new competition enforcement challenges. Economists have consistently argued for acknowledgement of specific forces that arise in two-sided markets and the Google Android case offers a great example of the need to consider the implications of the market's two-sidedness. The Google cases saga seems to continue beyond investigations by the 'old' NCAs across the globe, such as the NCAs in Russia, Turkey and India. This article has noted that younger competition authorities are under increasing pressure to act and adapt to the dynamic markets of the digital world. The traditional tools of competition law, including their applicability to the new business models with atypical features, such as multi-sided platform environments were questioned in all these jurisdictions. While there is a clear look-out and reliance on the EC's decisions by both the Turkish and Indian authorities (save Russia), these authorities had to investigate Google's anti-competitive practices affecting their national markets. It seems that Google's reaction in terms of its compliance with the decisions imposed by the NCAs in these countries was quite different in comparison to the EC's decisions.<sup>166</sup> Frivolous threats, like in the Turkish case scenario, may likely leave less developed countries in a difficult situation, as Google's investments could take preference over competition compliance, especially in smaller less developed countries with lower bargaining power.

Investigations against Google in the aforementioned countries have proved that there is a need for more transparency and new guidelines on the investigatory and enforcement tools in digital markets (i.e., analysis of bundling effects in multi-sided markets), which can facilitate not only the authority's work but also has the potential to improve businesses' compliance. It seems that all the analysed countries in this article are heading in the right direction with their new developments to address peculiarities of digital markets. It should also be noted that apart from antitrust enforcement, policymakers and regulators could take a responsibility to bridge the gap between regulatory pressures and businesses' needs.

<sup>165</sup> *Ibid.*, at 1561.

<sup>166</sup> Google appealed this decision. Case T-604/18, *Google and Alphabet/Commission* (decision pending).