

Competition Law Hotline

April 08, 2014

GOOGLE'S FAILURE TO SHOW CAUSE TO CCI COSTS RS. 10 MILLION

- CCI holds that Google USA and Google India failed to cooperate with Director General in relation to investigations. Adverse inference drawn against Google USA and Google India due to their failure to submit information despite sufficient time.
- Fine of Rs. 10 Million imposed on Google USA and Google India due to non-compliance with directions of Director General.
- Competition Commission however does not set out principles for imposition of fine.

BACKGROUND

On March 26, 2014 the Competition Commission of India ("**CCI/Commission**") passed an order imposing a fine of Rs. 10 Million on Google USA and Google India ("**Google**") as they had failed to cooperate with the Director General ("**DG**") in relation to an investigation ("**CCI Order**").¹ The DG was acting pursuant to information filed by Consim Info Private Limited and Consumer Unity & Trust Society ("**Informants**").

The imposition of penalty arose in the context of collateral proceedings initiated by the DG since Google, allegedly, was not cooperating with the DG. On an examination of the various notices sent by the DG, the replies sent by Google, the information supplied and the conduct of Google, CCI held that Google failed to show cause as to why penalty ought not to be imposed on them.

The present ruling is only confined to imposition of penalty due to a party's failure to comply with directions of the DG under Section 43 of the Competition Act, 2002 ("**Competition Act**"). Google will have to comply with the directions of the DG and submit the relevant information. After completion of investigation, CCI will examine whether there is a violation of Section 3 and Section 4 of the Competition Act.

FACTS

Informants filed cases alleging that Google enjoyed a dominant position and was conducting its business in a manner that was discriminatory, by manipulating algorithms and was causing harm to advertisers and indirectly consumers. It was further alleged that by using a number of vertical services such as Youtube, Google News, Google Maps etc., it mixed many vertical results into generic search results. Informants contended manipulation in search results and that there was also denial of access and creation of entry barriers for competing search engines etc. CCI concluded that *prima facie* Google's had abused its dominant position and that a case had been made within the meaning of Section 26 (1) of the Competition Act. Consequently, DG was directed to carry out investigation in respect of Case No. 7 of 2012 and Case No. 30 of 2012.²

SHOW CAUSE NOTICE

During investigations DG sought information through several notices in respect of which DG contended that Google did not comply.³ Due to Google's failure to comply with the notices, DG reported the matter to CCI. It is important to note that CCI has taken a serious note of the conduct of Google and observed that Google showed an attitude of 'either withholding the information' or 'furnishing only a part of the information sought'. On account of this, CCI inferred that there was a 'wilful disregard' on the part of Google to comply with the information requests of DG. CCI issued a show cause notice to Google as to why measures under Section 43 of the Competition Act should not be taken against Google ("**Show Cause Notice**"). Section 43 of the Competition Act provides that if a person to whom directions have been issued, either by CCI or the DG, fails to comply with such directions, CCI may impose a fine of up to Rs. 1 Lakh per day of continuing non-compliance subject to a maximum of Rs. 10 Million.

CONTENTIONS IN THE SECTION 43 PROCEEDING

The issue before CCI was confined solely to Google's compliance with the Show Cause Notice and not the substantive issues in the cases filed. In its defence, Google contended that Google there wasn't unreasonable delay on its part. Google sought to substantiate its *bona fides* by demonstrating that it had in fact cooperated with the DG. On the substantial queries raised by the DG, Google contended that the queries raised by DG were quite complex, broadly-worded, reaching into several commercial aspects/transactions and hence these required time to obtain information. Google contended that in neither case, a timeline of alleged violations was indicated and consequently, Google was required to obtain information for an undefined period. Google further contended that the investigation was open-ended and that the investigation expanded over time and covered every facet of Google's business. With passage of time, information requests became more frequent and with shorter response times and all of this made the process of collecting information and presenting the same before the DG in a user-friendly manner challenging.

Google provided a timeline setting out the sequence of events to demonstrate that it had been cooperating with DG. While some delay was acknowledged, it was contended that this was unintentional and only for the purpose of ensuring that complete information was submitted. Google also sought to allay CCI's apprehensions that it was

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withholding any information at all and in fact was taking all measures possible to furnish information and cooperate with DG.

Google also addressed CCI on issues of law and submitted that for the purpose of exercising jurisdiction under Section 43 of the Competition Act, there should have been non-compliance and not belated disclosure, relying on *Kingfisher Airlines Limited v. Competition Commission of India & Ors.*⁴ Google also contended that the Supreme Court had recognized the principle that penalty was to be imposed only in cases of deliberate non-compliance. Factually, Google sought to corroborate its contentions with the various submissions and information provided by Google. Google also placed reliance on Section 43 of the Competition Act and contended that the provision itself contemplated 'reasonable cause' and hence CCI ought to determine with the delay in submission by Google was with cause or without cause.

CCI ORDER

CCI identified following broad topics on which DG had requested information:

- **Information related to algorithmic changes** – CCI concluded that as on 15.01.2014, Google had not yet supplied information relating to algorithmic changes;
- **Non-submission of agreements** – CCI concluded that in spite of extensions, Google did not supply the requisite information;
- **Non-submission of documents relating to Octathorpe and AdSense Account** – CCI concluded that Google had not submitted complete documents relating to the query raised by DG;
- **Non-submission of documents relating to termination/suspension of tech-support Adword accounts** – CCI concluded that Google did not submit complete documents, although some documents were indeed filed;
- **Non-furnishing of information pursuant to depositions** – CCI concluded that Google failed to produce documents after making oral depositions. CCI noted that Google neither sought additional time nor made any communication.

In view of the above, CCI concluded that Google failed to comply with directions of DG and that Google had in fact engaged in dilatory tactics to procrastinate the investigation. CCI rejected Google's contentions that the queries were too broad, covered wide-range of subjects and drew an adverse inference against Google merely because Google conceded that there was delay. Ironically, even though Google in a show of *bona fides* acknowledged delay, albeit with cause, Google's acknowledgement of delay has been held against it. CCI concluded that Google had given 'frivolous' and 'vexatious' pleas in an attempt to stall investigation and Google sought to avoid compliance. CCI concluded that Google had failed to demonstrate 'reasonable cause' as per Section 43 of the Competition Act.

However, in view of the submissions already made by Google, CCI imposed a fine of Rs. 10 Million, to be deposited within 60 days from receipt of the CCI Order. CCI further notes that in the event that Google failed to comply with future directions from either the DG or CCI, additional fine would be imposed – CCI held that each and every act of non-compliance of Google would give the DG fresh cause of action against Google.

ANALYSIS

Response to show cause notices requires extreme care. It is imperative for companies to ensure satisfactory compliance while responding to show cause notices (See Nishith Desai Associate's article on responding to show cause notices)⁵ in form and substance. Although from Google's contentions it would seem that Google did all that it could reasonably be expected to, it would seem that CCI has unfairly drawn an adverse inference against the belated submission / non-submission. The rejection of Google's argument that a distinction should be made between wilful default and belated submissions would seem harsh. CCI has also not provided any rationale on the basis of which the maximum amount of Rs. 10 Million has been imposed, particularly, when CCI notes that Google's submission of some information was in fact a mitigating circumstance.

CCI has shown willingness to exercise all powers that it may have to ensure objectives of CCI are fulfilled. Consequently, companies should take notices from CCI (and for that matter, any sectoral regulator) extremely seriously as the consequences of non-compliance can be quite drastic.

Google has the right to appeal under Section 53B of the Competition Act. Given the adverse inferences drawn, Google may be tempted to challenge the CCI Order. For its part, we can expect CCI to get stricter with other companies and not hesitate to impose fine under the Competition Act. Imposition of fines and drawing adverse inferences are harsh measures and it would be reasonable to expect that CCI comes out with guidelines on imposing fines.

– M.S. Ananth & Pratibha Jain

You can direct your queries or comments to the authors

¹ Case No. 7 of 2012, In Re: Consim Info Private Limited v. Google Inc., USA and Google India Private Limited and Case No. 30 of 2012, Consumer Unity & Trust Society (CUTS) v. Google Inc., USA and Google India Private Limited.

² CCI Order dated June 20, 2012.

³ Show Cause Notice references letters dated 12.02.2013, 26.09.2013, 11.10.2013, 13.11.2013, 27.11.2013, 03.12.2013 and 21.12.2013.

⁴ Order of COMPAT in Appeal NO. 15 of 2012, dated 29.08.2012.

⁵ Show Cause for Litigation, Vivek Kathpalia and M.S. Ananth, Nishith Desai Associates, Hindu Business Line, available at <http://www.thehindubusinessline.com/opinion/show-cause-for-litigation/article4891879.ece>.

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