

# Competition Law Hotline

February 21, 2018

## CCI INTERVENTION TO ACHIEVE A LEVEL PLAYING FIELD IN THE DIGITAL SPACE!

- CCI imposes penalty of USD 21 million on Google for abusing its dominant position by favouring Google's own verticals in its search engine results.
- CCI has averred that Google was leveraging its dominance in the market for online general web search, to strengthen its position in the market for online syndicate search services.
- CCI directed Google to not enforce any restrictive clauses on third party websites for hosting Google search bars and ads.
- CCI recognizes the need to encourage digital economy and for '*targeted and proportionate*' public intervention without restraining innovation.

### BACKGROUND

The Competition Commission of India ("CCI") by its Order dated February 8, 2018 ("Order") held that Google enjoys dominant position in specified product market in India and has abused its dominant position in contravention of the provisions of the Competition Act, 2002 ("Act").<sup>1</sup> CCI imposed monetary penalty of USD 21 Million, applying the proportionality principle and calculating penalty based on the relevant turnover from the direct sales operations only in India.

This CCI ruling is a first of its kind in the Indian context in relation to the digital space. Interestingly, the decision is not a unanimous decision, but is 4:2. Even the majority view has not held against Google on all counts of allegations, but only three of them. Minority view has not concurred with the majority view on all the three counts.

CCI took note of adjudication by foreign regulators on similar issues, however, independently came to its conclusion based on the facts of the present case and based on the Indian law.

After carefully examining various allegations, the CCI ruled that Google enjoys dominant position in *Online General Web Search* and *Web Search Advertising Services* in India and has abused its dominant position by three specific actions.

One of the issues was in relation to display of "*Universal Results*"<sup>2</sup> to certain fixed positions and not in order of relevance. This issue was already been remedied by Google post 2010. The dissenting view however held that since the issue was resolved, there was no need of any regulatory intervention.

The other two grounds were as follows:

1. Prominent placement of Google's flight unit displaying flight offers directed users to Google's own specialized flight search options as opposed to third-party websites such as MakeMyTrip.com or Yatra.com, depriving users of additional choices and imposing unfair conditions;
2. Anti-competitive and restrictive conditions imposed in intermediation agreements executed between Google and website owners for incorporating Google's search bar on their websites, denying access to competitors to online search syndication services market.

In this update, we have examined the findings and view of the Director General after investigation, the informants' arguments, Google's argument and findings under both majority and minority view. However, please note that certain critical details pertaining to market share of Google for specific period in general online search as well as online advertising, traffic faced by Google's search services, factual submissions by Microsoft in this regard as well as details on web search syndication agreements have been redacted for confidentiality purposes. The parties have submitted confidential and non-confidential version of their responses to the DG's Investigation Report and prayer for confidentiality to be maintained for the next three years. CCI granted their confidentiality requests, therefore, it is difficult to do a comprehensive analysis of the order without the complete set of figures and statistics.

### FACTS

The Informants viz. Matrimony.com Limited and Consumer Unity and Trust Society alleged that Google runs its core business of search and advertising business in a discriminatory manner causing harm to advertisers and indirectly to consumers. The allegations raised in the present information ("**Information**"), may be outlined under the following two heads:

#### Google's Search Engine Services

Google was alleged to promote its own vertical search services viz. YouTube (videos), Google News (news) and Google Maps (maps) and manipulating its search and quality score algorithm leading to only their own sites appearing prominently on the search results, irrespective of whether they were the most relevant and popular sites to

## Research Papers

### M&A In The Indian Technology Sector

February 19, 2025

### Unlocking Capital

February 11, 2025

### Fintech

January 28, 2025

## Research Articles

### Re-Evaluating Press Note 3 Of 2020: Should India's Land Borders Still Define Foreign Investment Boundaries?

February 04, 2025

### INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals

January 15, 2025

### Key changes to Model Concession Agreements in the Road Sector

January 03, 2025

## Audio

### CCI's Deal Value Test

February 22, 2025

### Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice

December 18, 2024

### Digital Lending - Part 1 - What's New with NBFC P2Ps

November 19, 2024

## NDA Connect

Connect with us at events, conferences and seminars.

## NDA Hotline

Click here to view Hotline archives.

## Video

### Arbitration Amendment Bill 2024: A Few Suggestions | Legally Speaking With Tarun Nangia | NewsX

February 12, 2025

the search. The Informants alleged that such acts lead to denial of access and refusal to license content to competing search engines and creation of entry barriers.

### Google's Advertising Services

Google's dominant position in the search advertising market has allowed it to saddle advertising clients and consumers with unfair and discriminatory conditions.

Both Informants alleged that Google owing to its market share, size, resources and reputation enjoys a position of strength worldwide for online search and online search advertising affecting its competitors, consumers and market in its favour. Given that the allegations raised by both Informants were comparable, the CCI directed both information to be clubbed and investigated together by the DG. Three Google entities viz. Google Inc., Google India and Google Ireland were subject to investigation due to their role and operations in the Indian market. Upon receipt of the information, the CCI by its order dated April 3, 2012 directed investigation to be conducted. Interestingly, two versions of the Investigation Report were filed- confidential and non-confidential version.

### APPLICABLE LAW

Section 4 prohibits any enterprise from abusing its dominant position. The term 'dominant position' has been defined in the Act as '*a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour*'. The basic premise for determination of alleged abuse of dominance is establishing that one party is in a dominant position in the relevant market. The determination of relevant product<sup>3</sup> and geographic market<sup>4</sup> is the starting point of investigation under the Act.

The Act does not prohibit the mere possession of dominance that could have been achieved through superior economic performance, innovation or pure accident but only its abuse. The DG and CCI analyses factors under Section 19(4) of the Act<sup>5</sup> to determine whether an enterprise is abusing its dominant position in the relevant market.

We have dealt with the findings of DG, contentions raised by both parties and the CCI's analysis on all issues separately.

### A. Relevant Market

**Investigation by DG:** The DG determined the relevant market<sup>6</sup> based on analysis of characteristics, intended use and price of the products and services provided by Google. DG identified the relevant markets of "Online General Web Search Service in India" and "Online Search Advertising in India" for the geographic market of India ("**Relevant Markets**"):

- A. Online Web Search Service in India: DG noted that Online General Web Search Services and Specialized / Vertical Search Services or Site Specific Search Services were distinct and non-substitutable.
- B. Online Search Advertising in India: DG noted that online advertising may be differentiated from offline advertising. The DG held that distinct categories exist and advertisers opt for different forms of advertising. Online search advertising was distinct from other forms of advertising such as texts, images, graphics, social network advertising and email based marketing, which are non-search advertising. Search and non-search are not substitutable, and entities opt for both together as they serve different purpose.

DG further held that Online Search and Search Advertising are complementary but not part of the same relevant product market.

**Contentions of Informant:** The determination of the Relevant Markets by DG was supported by the Informants.

Google had contended that the Act requires existence of a trading relationship between a company and its customers as a pre-condition for defining relevant market and establishing domination. Since search is free, there exists no trading relationship with the users of its search services. In relation to this aspect, the Informant submitted that there is no requirement for monetary consideration for services anywhere under the Act and therefore users of search engine are providing data as well as "eyeballs" to search engine as consideration, thus constituting a trading relationship under the Act.

**Contentions of Google:** Google, at the outset found the determination of Relevant Markets to be flawed, and stated that:

- there was no relevant market for '*general search*' rather, users only search for specific things such as people, places, products, etc.
- Google's services to its users are free of cost, thus there is no 'trading relationship' between them and hence, would not constitute a '*relevant market*'.
- With respect to advertising, the DG misapplied the hypothetical monopolist test (SSNIP test) dismissing offline advertising as a constraint based on the low level of internet coverage throughout India.
- Google argued that with respect to advertising, relevant market includes all forms of advertising and not restricted to only online search advertising.
- Google disagreed with the differentiation of online and offline ads and noted that products with price differences can and do compete through adjustments in quality to reflect price differences. Given recent developments in media and ad technology, the older definitions for delineating separate markets in India cannot be relied upon.

### CCI Analysis:

- The CCI agreed with the DG's determination of the Relevant Markets and held that a search engine functioned differently and was distinguishable from a direct search option by typing in the URL which requires users to be aware of the exact websites which offer the relevant information the user is seeking.
- It agreed with the DG's conclusion that online general webs search services were not comparable to specialized online search services as the pool within which the information is sought is limited in the latter and pricing and registration requirements vary between both.
- Online search advertising services form a distinct relevant product market. Online and offline advertising services

are not comparable.

## B. Dominance of Google

*Investigation by DG:* The DG noted the dominant position in the Relevant Markets on the following grounds:

- Undeniable presence of Google in the Relevant Markets using parameters like search queries and page views which was found to be insurmountably higher than its competitors such as Yahoo! and Microsoft Bing.
- The market share maintained by Google compared to all its competitors has been consistently high for several years despite existence of other online web search service providers.
- The DG noted the presence of significant entry barriers in the Relevant Market due to Google's size, resources, economic power, high cost, technology, network effects, minimum scale requirements and contractual restrictions.
- DG acknowledged the competitive advantage enjoyed by Google being a platform for users, publishers and advertisers.
- Given these reasons, Google could operate independently of competitive forces while its competitors failed to create any dent in the Relevant Market or pose any competitive constraints.

*Contentions of Informants:* The Informants agreed with the DG's determination of Google's dominance.

*Contentions of Google:*

- Google is one of the search options among several popular providers and its market share precludes dominance in online search market.
- Google argued that the usage shares of a free service would not be a proxy for market power over quality and innovation as it did not reflect any investment by a consumer who can easily shift to a competing service provider.
- Users can switch to rivals with a single click evidencing that Google cannot act independently of market forces.
- The size and resources of Google do not distinguish it from rivals (Microsoft, Yahoo and Amazon) and search is not subject to direct or indirect network effects.
- Further high-quality search is dependent on technological capabilities and there are no barriers to entry and expansion.
- In the realm of online advertising, Google contended that even if competitors like Facebook were new in the space of online advertising, its presence generally in the digital space disallowed Google to function independent of market forces. Further, multi-homing allowed users to easily shift should Google fail to provide a decent service.
- On both counts, Google argued that it is not a dominant player in the Relevant Markets.

*CCI Analysis:*

- CCI concurred with the DG that Google was dominant in the Relevant Markets based on its market share fueled by presence of high entry barriers and scale advantage which limited ability of users to switch to competitors of Google.
- CCI clarified that the Act does not contemplate a market share threshold beyond which dominance is presumed but is decided based on metric applied to assess market share.
- CCI categorically specified that though high technology services demand continuous innovation, given barriers to entry and Google's scale advantage, it is unlikely a large number of users would switch to competing search engines.
- Google's market share has been consistently high, reflective of other advantages, besides technical advantages which ensure its market position.

CCI in the dissenting view also has agreed to the definition of "relevant market" and assessment of Google's dominance.

## C. Abuse of Dominant Position by Google

Based on detailed analysis and information provided, the DG concluded that Google has been abusing its dominant position in the Relevant Markets on three counts and on other counts, it was held not to be abusing its dominant position. We have dealt with each issue separately below.

### 1. Search Bias

*Investigation by DG:*

- Apart from online general web search services ("**General Web Search Services**"), Google provides specialized services such as: Google News, Google Maps, Google Flights and other products such as Google Reviews, Google+, YouTube, etc. ("**Specialized Services**"). The DG concluded that Google blended these Specialized Services with its General Web Search Services to sway consumers to their Specialized Services by placing them in prominent ranks or positions on the Search Engine Results Page ("**SERP**")<sup>7</sup> through a combination of Universal Results, OneBoxes and Commercial Units. Google being in control of algorithm could intervene in the process of generation of search results and impact the relevance and ranking of the results.
- DG held that ranking of Universal Results may not have been "strictly determined by relevance" as until 2010 and appeared only in fixed positions on the SERP.
- With respect to OneBoxes, while the DG did note that it was user friendly, it also noted that the information shared under OneBoxes was likely to not be the most relevant as the source of such information were merely third parties with whom Google had tie-ups.
- The DG concluded that Commercial Units encompassed features such as Shopping Units, which display ads for product offers of merchants; and Flight Units, which identify flight offers for a given destination and were treated in a "preferential" manner by Google.
- The DG concluded that such acts were detrimental to innovation, deter competition in the market and accordingly in contravention of Section 4(2)(a)(i), Section 4(2)(b)(ii), Section 4(2)(c) and Section 4(2)(e) of the Act<sup>1</sup>.

*Contentions of Informants:* The Informants submitted that Google's Universal Results were being used as a tool to

push down results of competing specialized search services through updates to its algorithm. Given that most vertical search services rely heavily on Google for their survival, Google's search bias has threatened their survival. The Informants supported DG's findings regarding lack of transparency in quality scores given to advertisers by Google. It noted that inadequate information being shared rendered the entire process opaque and susceptible to manipulation in violation of Section 4(2)(a)(i) of the Act.

**Contentions of Google:** Google argued that its specialized search designs are just like free search results but designed to make them more relevant and user friendly. The technology behind Universal Results was determined purely by relevance and appeared on the SERP only when compared with the generic blue link results. It stated that earlier (i.e. pre-2010) the fixed positions of Universal Results was due to lack technological know-how at the time to keep it free floating and the same has been rectified to address the concerns.

With respect to possible bias in OneBoxes, Google contended that OneBoxes provide factual responses for which there would be only one answer and hence, the question of relevance would not arise. The content providers did not pay Google and hence the question of favouring its partners could not have arisen.

In relation to the Commercial Units, Google argued that the same were a result of Google's two-sided business model with free service to users and paid engagement with advertisers. It stated that DG's finding that Google has harmed competition with its specialized result designs, was not supported by any data.

#### CCI Analysis:

##### Universal Results

##### Majority view

The CCI noted that until 2010, the display of universal results was limited to certain '*fixed positions*' and were not displayed in accordance with their relevance. Such practices were unfair as it created misleading notion that such search results were in response to queries determined algorithmically based on relevance. CCI dismissed Google's argument that it lacked the technology to do so at the time in the absence of evidence. Thus, on this point CCI held against Google.

##### Minority View

Google had contended that limiting Universal Results to fixed positions demonstrated its exacting relevance standards. Google having admitted to shifting to universal results at any position on the SERP depending on same relevance screen applicable to other generic results, prior to the information being filed, there is no need for any regulatory intervention with the new regime addressing the concern. Therefore, Google cannot be held liable for imposition of unfair conditions with respect to its historic use of fixed positions for universal results on the SERP.

##### OneBoxes

CCI dismissed the unsubstantiated finding of the DG that OneBoxes<sup>8</sup> show biased data and held that mere possibility that it may not select the most relevant provider, is not a substitute for actual evidence of bias. It disagreed with the DG's finding that Universal Results were more so biased as the '*more results*' option would lead a user to Google's search options and not any other vertical search service.

##### Commercial Units: Google Flights

##### Majority View:

Taking the example of Google Flights, the CCI observed that while the link to Google Flights is qualified by a 'sponsored' label, by integrating the said link prominently with the SERP, Google is able to drive traffic to its own pages and generate higher revenues through advertisements. The CCI held that a user's clicking behavior is influenced by Google's public claim or ranking results based on relevance and "*Google's dominant position in the General Web Search is being leveraged to provide gateway for users to find relevant travel verticals.*"<sup>9</sup> Google through its search design not only placed commercial units at a prominent position on SERP and allowed pushing down of vertical trying to gain market access. *Accordingly, it found this conduct of Google to be anti-competitive as it imposed unfair/ discriminatory condition on purchase of services, in contravention of the Act.*<sup>10</sup>

##### Minority View:

Flight units and the Google Flights Page offer tools for users to compare different offers from different airlines by various parameters including price, duration, schedule but do not offer possibility of booking directly. On the contrary, travel verticals like MakeMyTrip and Cleartrip not only provide search option but also allow for booking of flights. The provisions of the Act necessitate ex post determination of abuse by dominant enterprises with facts and evidence, and not merely relying on hypothetical frameworks built on perceived premises. In the absence of relevant data or analysis of user-click behaviour in India vis-a-vis the Commercial Units or actual traffic flow, diversion of traffic by Google to the extent that it prevents third party verticals to acquire sufficient volume of business, such claims are unsubstantiated. CCI in its concurring view held that investigation failed to reflect any evidence for a reasoned assessment of how "*prominent*" placement of flight units amounted to imposition of unfair conditions on users and liability cannot be affixed on unclear and ambiguous evidence.

## 2. Limited Disclosure of Information and unfair/discriminatory conditions imposed on Advertisers

### Investigation by DG:

- The DG observed that despite technical feasibility, Google does not reveal adequate information around the quality score, bids and historical data on the advertiser's performance.
- The DG concluded that such conduct rendered the process opaque and susceptible to manipulation which amounted to imposition of unfair conditions under Section 4(2)(a)(i) of the Act.
- The DG noted that Google does not charge for its House Ads<sup>2</sup> and has access to quality scores of its competitors.
- Google manipulated its dominance in the Relevant Market to favour its House Ads and imposing discriminatory conditions on third party advertisers.

**Contentions by Informants:** The Informants agreed with DG's finding and stressed on the lack of transparency associated with quality score and manual interventions by Google render the entire process opaque and prone to manipulation.

**Contentions by Google:** Google disagreed with the finding of the DG that it withholds performance data from the advertisers and stated that apart from the quality score, it provides advertisers with extensive data to manage their ad campaigns and provides relevant and useful information. It has argued that:

- 1-10 Quality Score is not "opaque" and provides several other detailed metrics, including average ad-position, conversions, click-through rates and average cost-per-click information to advertisers. This enables advertisers to plan their bidding, improve ad quality.
- There is no discrimination with House Ads and allegations are based on hypothetical possibilities.

**CCI Analysis:**

- CCI held that DG's concerns regarding disclosure of advertiser performance data was not well-founded. The CCI concurred with Google that it provides sufficient information including data, tools and reports on performance other than the quality score to its advertisers.
- Google provides sufficient information and tools for assessing ad and campaign performance including click-through-rate, bid estimates, average position, conversions, time of day reporting, bid simulator and geographic targeting.
- Competition law breaches cannot be based on errors in experimental features and lead to killing innovation in technology markets.

### 3. Unfair Conditions on Trademark Owners

**Investigation by DG:** The DG noted that:

- Unfair conditions were imposed on trademark owners and third parties could bid on those trademarks as keywords in violation of Section 4(2)(a)(i) of the Act.
- Such acts allowed third parties to benefit from the goodwill and brand value of trademark owners and mislead consumers by creating confusion and deception and compelling trademark owners to participate and outbid competitors.
- Google ensured that its own trademarks are not subject to same kind of bidding and unfair conditions.

**Contentions of Informants:** The Informants were largely in agreement with the findings of the DG and added that Google supported a bidding war between owners of trademarks and competitors who would try and outbid such owners for their keywords. It was only Google that profited from monetizing search results by facilitating trademark violations and Informants suffered significant loss due to its competitors being allowed to use its trademarks in their ad space.

**Contentions by Google:** Regarding the issue of trademarked keywords, Google contended that it does not restrict owners of trademark from bidding for the keywords and does not violate Indian trademark laws. Google had also argued that processing complaints in relation to ad texts violating trademark laws by using minor variations of Consim's trademarks was not consistent with trademark law or Google's Ad Text Policy. The Google's Ad Text Policy specifically exempts from investigation ad text that uses the term descriptively in its ordinary meaning rather than in reference to trademarks. Consim's competitor used "Bharat Matrimony" to describe its matrimony services in a descriptive manner and the Ad Text Policy did not address such issues.

**CCI Analysis:** The CCI held that:

- Google's Keyword Bidding Policy ("**Policy**") applied universally permitted advertisers to bid for trademarked keywords and did not amount to imposition of any unfair/ discriminatory condition on the services provided.
- The Policy enabled users to include trademarked keyword in its query and thereby promoted competition and enhanced user choice.
- It was not within the powers of the DG, as an authority under the Act, to delve into trademark issues which are beyond the ambit of an anti-trust regulator.
- With respect to the issue of Google's inability to enforce its *Ad Text Policy* in relation to Consim's trademarks, CCI held that no fault could be found with Google as Consim failed to follow Google's trademark policy procedure on notification, nor provided Google with sufficient time to implement its blocking and monitoring procedure.
- Further, delay in whitelisting one account from a single website does not constitute competition law infringement and is not substantiated with evidence as well.
- The CCI concluded that no evidence was provided to establish imposition of any unfair or discriminatory conditions and it was not within its domain to deal with trademark infringement issues, unless the same raises any competition issues.

### 4. Distribution Agreements

**Investigation by DG:** The DG found Google to be in contravention of Section 4(2)(c) of the Act<sup>11</sup> for distribution agreements with Apple and Mozilla for setting Google as the default search engine. The DG observed that long term contractual arrangements such those executed with Apple and Mozilla, had the potential of strengthening Google's market position in the Relevant Market by denying access to others.

**Contentions of Informants:** The Informants were in complete alignment with the DG on their findings on the anti-competitive nature of distribution agreements executed by Google.

**Contentions of Google:**

- Default setting does not deny market access to competitors, merely provides a convenient way for users to access preferred search service.
- The DG has failed to substantiate their allegations with any evidence of exclusivity in the distribution agreements.
- Google further submitted that other search services including Yahoo!, Baidu and Yandex are default providers on

#### CCI Analysis:

- CCI noted that allegation against Google did not pertain to distribution agreements creating exclusivity but having the potential for Google to strengthen its market position in online general web search and search advertising by denying access to others.
- CCI held that Google's distribution agreements with Apple and Mozilla for a default setting are neither exclusive nor has it been established that such agreements have denied market access.
- The users are free to switch away from the default if they so choose and it is intrinsic for default settings to have only one search engine.
- The CCI also rejected DG's observations that default settings created competitive problems as searching another search services are not apparent for ordinary internet users as the same was not based on any survey or records and merely on "potential" to cause harm is no ground for holding Google liable.

#### 5. Unfair conditions in Syndication / Intermediation Agreements

##### Investigation by DG:

- Google offers online search and advertising services on other websites through syndication/intermediation services. The Online Search and Advertising Syndicate constitute distinct relevant market.
- Due to its dominant position, Google had the ability to impose unfair conditions on agreements executed for syndication/intermediation.
- Google hinders advertisers from transferring ad campaigns to other ad platforms. Such unfair conditions have a tool for discouraging advertisers from multi-homing amounting to denial of market access, under the Act.
- The DG also concluded that agreements of this nature were one-sided, arbitrary and could amount to imposition of unfair conditions under the Act.

##### Contentions of Informants: The Informants agreed with the DG's findings.

Appreciating Google as an essential trading partner for online advertisers, it observed that Google received the lion's share of all advertising. However, the onerous and arbitrary conditions imposed on such advertisers by Google made it exponentially more expensive for any existing advertiser to shift a competitor.

##### Contentions of Google:

- Google disagreed that it restricts advertisers from transferring its campaigns between platforms.
- Indian advertisers successfully use multiple ad platforms.
- The intermediation agreements are non-exclusive and the DG did not actually find abuse of dominance by Google in this respect, but rather only a possibility of an abuse.

CCI Analysis: CCI while discussing allegations of Google hindering advertisers from transferring ad campaigns to other ad platforms (*Terms and Conditions use of Google's AdWords API*) held that:

- DG through its own investigation have concluded that there is no constraint in data interoperability. AdWords API terms and conditions do not impair data interoperability between search advertising platforms.
- DG's findings with respect to the terms and conditions imposed on advertisers were in contravention of Section 4 of the Act, was rejected and set aside.
- CCI noted that the very software/website of Google's which advertisers use to manage their ads, function as a tool to allow multi-homing (i.e. displaying its ads on competitor search engines).
- CCI analyzed the various types of agreements executed with other websites to incorporate Google's search technology and ads on their websites and distinct benefits provided to Indian publishers, advertisers and users.
- CCI held that no exclusivity, de jure or de facto flowed from Google's online search intermediation agreements.
- *CCI concluded that certain restrictive conditions in agreements signed with websites for inserting Google's search bar on their websites disallowed such websites from implementing search tabs that "are similar or substantially similar", are objectionable, unfair and amounted to denial of market access and accordingly was in contravention of Section 4(2)(a)(i) and Section 4(2)(c) of the Act.*

##### Dissenting View:

- The DG failed to define "online search intermediation/syndication services" as a relevant market and Google's dominance also could not be assessed.
- Both DG and the majority view have considered online search intermediation/syndication services as a distinct market which allegedly forecloses competition. The DG and the majority decision both concluded that Google's direct search intermediation agreements includes restrictive conditions imposed on publishers.
- It is pertinent to note that the publishers who were approached by the DG did not find the clauses restrictive. Further based on facets and evidence it appears that publishers enter direct agreements freely and websites generating large volumes of search queries do have some degree of countervailing power. CCI held that in the absence of testimony of partners entering such negotiated contracts, *without any evidence and proper investigation reflecting such clauses to be unfair or imposing restrictions on direct partners, Google cannot be made liable for any violations.*

#### D. Penalty Order

Based on analysis of the above issues, CCI concluded that Google has abused its dominant position in the ranking of universal results prior to 2010, in prominent display and placement of commercial flight unit with link to Google's specialized search options and in unfair conditions imposed under intermediation agreements. Accordingly, CCI has:

- Passed a desist order and directed Google to not resort to fixing positions for universal results;
- Directed Google to display a disclaimer against the commercial flight unit box indicating that the link would lead to Google Flight's page; and



iii. Ordered Google to not enforce the restrictive clauses in the intermediation agreements with immediate effect.

Accordingly, on the three counts of abuse of dominance recognized by the CCI, it imposed a penalty of USD 21 million on Google calculated at the rate of 5% of Google's average total revenue generated from India operations from its different business segments for the financial years 2013, 2014 and 2015. It may also be significant to note that the penalty was imposed by CCI despite noting its objections to Google's insufficient disclosure of its financials for its India operations. To determine the relevant turnover, CCI relied on the recent decision of the Supreme Court in *Excel Crop Care Limited v. Competition Commission of India & Anr.*<sup>12</sup> based on only the 'relevant turnover', i.e. relating to the product in question in tune with the intent of the Act and legal principles.

## ANALYSIS

The CCI in this decision has recognized the pace at which innovation, technology and big data is transforming the economic landscape globally and locally. Appreciating the crucial role that market drivers like Google play in driving India into the future, CCI has iterated that, *"public intervention in such markets should be targeted and proportionate. Such a calibrated approach in technological markets ensures that intervention remains effective; it does not restrain innovation and helps the market to regulate itself."*

While CCI has held against Google on 3 counts, it is interesting that several other grounds were dismissed by CCI. The dissenting /minority view has analysed the facts of the 3 counts and in fact has held that no intervention is required on those three counts as well. Most competition law orders are very fact and evidence based. As rightly stated by the dissenting view that application of law is not amenable to hypothetical frameworks built on perceived premises. The regulatory interventions should be evidence based as opposed to perception based. If Google were to challenge this order, the question will be whether it challenges all the findings including definition of relevant market, finding that Google is dominant in those markets or only challenges the specific findings in relation to three counts. From long term perspective, Google may want to challenge all the findings, else they become precedent in so far as definition of market and finding of dominant position, unless of course the market dynamics change.

— Atikant Kaur, Payel Chatterjee, Pratibha Jain & Gowree Gokhale

You can direct your queries or comments to the authors

---

<sup>1</sup> In *Re: Matrimony.com Limited ("Matrimony.com") and Google LLC & Ors.* with *In Re: Consumer Unity & Trust Society ("CUTS") and together with Matrimony.com the "Informants") and Google LLC & Ors.* (collectively referred to as, "**Google**")

<sup>2</sup> Universal Results – these are groups of results for a specific type of information, such as news, images, local businesses, etc. The results shown in Universal Result groups are stated to be free results.

<sup>3</sup> The relevant product market is defined in as 'a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use

<sup>4</sup> The relevant geographic market is defined as 'a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas

<sup>5</sup> i. market share of the enterprise; ii. size and resources of the enterprise; iii. size and importance of the competitors; iv. economic power of the enterprise including commercial advantages over competitors; v. vertical integration of the enterprises or sale or service network of such enterprises; vi. dependence of consumers on the enterprise; vii. monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; viii. entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; ix. countervailing buying power; x. market structure and size of market; xi. social obligations and social costs; xii. relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition.

<sup>6</sup> Figures of Google's market share, financials and other sensitive information have been redacted from the text of the Order available in the public domain.

<sup>7</sup> Google inserts certain specialized result designs in the SERP in the form of (i) Universal Results - groups of search results such as news, images or local businesses, (ii) OneBoxes – factual responses for searches on currency, weather, temperature, etc. and (iii) Commercial Units – result types set apart in ad space and distinguished with a "Sponsored" label.

<sup>8</sup> OneBoxes provide factual answers to users' queries. OneBoxes return direct answers to, for example, queries about mathematics, stock quotes, local time, currency conversion, and the weather.

<sup>9</sup> Para 248, Page 94 of the Order

<sup>10</sup> Section 4(2)(a)(i) of the Act

<sup>11</sup> Section 4 (2) (c) Indulges in practice or practices resulting in denial of market access [in any manner]; or

<sup>12</sup> Civil Appeal No. 2480 of 2014, decided on May 8, 2017

---

## DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.