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India - Matrimony.com v. Google: A Cat on the Wall Approach to Intervening in the Expanding Digital Space

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In its decision passed on February 8, 2018 the Competition Commission of India (CCI) has imposed a fine of INR 135.86 crores (approximately \$1.36 bn) on Google for abusing its dominant position by engaging in search bias vis-à-vis Google flights service and imposing unfair terms in the intermediation agreements with website owners incorporating Google's search bar and/or ad.^[1] The present decision sets the tone for CCI's intervention in the digital market in India involving the careful balancing of anti-trust intervention with market innovation.

Background

The informants namely Matrimony.com Limited and Consumer Unity and Trust Society raised many allegations *vis-à-vis* abuse of dominance (AoD) by Google. However, this post shall focus on the three main allegations where Google was held liable for AoD, namely:

1. Display of 'universal results'^[2] in fixed positions in the search engine results page (SERP), in deviation from the order of relevance;
2. Manipulation of the search algorithm to favour its own search vertical services like Google flight, Google maps etc. which are prominently displayed in the SERP; and
3. Imposing of unfair conditions in the syndication/intermediation agreements with website publishers.

Delineation of the relevant market and assessment of dominance

The commission defined the relevant market to be (1) the market for online web search services in India and (2) the market for online search advertising in India. CCI also dismissed Google's argument that use of its search services did not involve any consideration/purchase of services. This was because in a two-sided market the data/information collected from the users on every search contributed to 'big-data' analysis and revenue to Google from targeted advertisements.

Further, CCI also found Google to be dominant in the relevant markets based on *inter alia* the following factors: its volume of business, total revenue, market share and the

high entry barriers in terms of scale and technology in the online web search and online search advertisement market in India.

Abuse of dominant position

CCI began this analysis by highlighting the special responsibilities on Google by being dominant in the digital market, where network effects and innovation are crucial. Further, CCI laid down a high standard for antitrust intervention in the fast paced digital market by observing that any intervention must be targeted and proportionate to balance the twin goals of nurturing innovation and addressing consumer harm.

In respect of the first allegation, CCI found Google to be guilty of AoD, as until October 2010 the 'universal results' were displayed in the 1st, 4th or 10th position in the SERP, irrespective of their relevance. However, after October 2010 Google changed its policy in this regard and the 'universal results' appeared in the SERP on the basis of their relevance only. Further, CCI held that Google was providing more space and prominently displaying its flight comparison vertical's box in the SERP. Resultantly, Google was able to use the link inserted in the box to direct users to its own vertical, driving away traffic from the competitor's pages and generating more advertisement revenue in the process.

The third allegation on which the Commission found Google to be guilty of AoD related to the unfair terms in the negotiated intermediation agreements with website publishers offering Google's search/advertisement services on their websites. The relevant term in such agreements directed the website publisher not to implement search technologies which were 'same or substantially similar' to that of Google. CCI found this clause to be violate of antitrust principles as it reduced the choice of website publishers and also in effect denied market access to Google's competitors. Additionally, on this basis CCI held that Google was using its dominant position in the online search market to leverage its position in the online syndicate search agreement market.

In terms of remedy for the above breaches, CCI issued a forward looking cease and desist order directing Google not to revert to the its earlier policy (prior to October 2010) vis-à-vis 'universal results' placement. Further, CCI directed Google to display a disclaimer that the link placed in the commercial flight unit box in the top of the SERP leads to Google's flight comparison vertical's page and not its competitors page. The Commission also directed Google to remove the restrictive clause in the search intermediation agreements. Finally, CCI imposed a penalty of INR 135.86 crores which was a 5% penalty on Google's average total revenue generated from India operations over the relevant period.

Analysis

This decision marks the starting point for CCI's intervention in the digital space and it is expected that the principle of targeted and proportionate antitrust intervention will shape CCI's approach in subsequent cases in the digital market like big-data etc.

However, CCI has not applied this principle in practice as there is inadequate evidence of consumer harm in many of its findings. CCI's findings *vis-à-vis* search bias

relies on Google's public statements and Microsoft's submissions/reports on user behaviour. There was no proper analysis of user's clicking behaviour in India and on whether competitors actually lost out on volumes due to Google's conduct. CCI's observation below highlights this issue of lack of fact-finding:

"The Commission notes that there may be equally efficient websites/specialised search service providers, but due to reduced visibility, they may not be able to sustain and survive in the market for flight search services."^[3]

Further, CCI failed to define online search syndication agreements as a relevant market but found Google to be leveraging its dominance in the online search market to protect its position in the online search syndication agreement market. The above-mentioned issue of evidentiary standards becomes increasingly relevant as CCI is slated to hear on merits the AoD and patent hold-up claims against standard essential patent holder Ericsson.

Contrastingly, the European Commission's (EC) in its 2017 order against Google has extensively relied on market studies/surveys to assess the user behaviour in EU, which showed that moving the first ranked link to the third rank in the SERP reduced the number of clicks by almost 50%.^[4] The EC also analysed the increase in traffic on Google's shopping vertical in comparison with its competitors, in the relevant EU jurisdictions.

Further, in terms of the remedy awarded the EC decision was more market oriented as Google was asked to propose commitments to remedy the breaches. Finally, the EC accepted Google's commitments to provide space to three non-Google alternatives on the SERP next to its shopping vertical unit's box.^[5] The remedy awarded by CCI in directing Google to insert a disclaimer in the link provided in its flight vertical unit's box may be inadequate to address the consumer harm. Therefore, in effect this decision and the paltry fine may not really affect or alter Google's operations and growth in India.

The order is also a limited victory for consumers/competitors as CCI has rejected many allegations against Google including discriminatory conditions on AdWords advertisers and trademark owners through Google's keyword bidding policy etc. However, in spite of its contributions and shortcomings this decision stands as a testament to the difficulty that competition agencies are grappling with globally while setting out the boundaries of antitrust intervention in the digital space.

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