

# Competition News Bulletin

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## Special Edition

### CCI imposes penalty of INR 136 Crores on Google for abuse of dominant position-

The Indian anti-trust regulator, the Competition Commission of India (“CCI/ Commission”) seems to have let Google off with just a rap on the knuckles. CCI vide order dated February 8, 2018 has imposed a penalty of INR 135.86 Crores (approx. USD 21 million) for abusing its dominant position in the market for “*online general web search and web search advertising services*” in India. While the European Union's anti-trust regulator, the European Commission (EC) fined the online search giant \$2.7 billion for a similar infraction, the CCI’s fine of mere Rs 136 crore (5 per cent of Google's India turnover) is widely seen as a mild one and media reports blame CCI having gone easy on the company since the CCI’s Investigating wing, the Director General (DG) had recommended a host of violations against Google. Noticeably, two members of the CCI gave a dissent order finding no evidence of abuse of dominance against Google!



Unlike the EC, the CCI has only asked for disclaimers but not insisted that Google remove its specialized search boxes. Meanwhile, the battle is still on with both sides -the complainant (matrimony.com) and the respondent -Google preparing their appeals against the verdict, which has to be filed within 60 days before the National Company Appellate Tribunal (NCLAT). The details are as follows:

The CCI found Google to have abused its dominant position only on the following counts:

- (1) Universal Results - Prior to 2010 - Unfairly ranking the universal results returned by the general web search in a pre-determined manner rather than by relevance in violation of Section 4(2)(a)(i) of the Act.
- (2) Commercial flights Unit -Unfair display and placement of commercial flight unit with link to Google’s specialized search options/ services so as to deprive the user of the search with additional choices , in violation of Section 4(2)(a)(i) of the Act.

- (3) Negotiated Search Intermediate Agreements - Imposing prohibitions upon publishers under the negotiated search intermediation agreements which restrict their choice and prevent them from using the search services provided by competing search engines, in violation of Section 4(2) (a) (i) , Section 4(2) (c) and Section 4(2) (e) of the Act.

## Facts

The investigation into the alleged abuse of dominant position by Google was initiated by the CCI following two informations i.e. Case No. 07/2012 and Case No. 30/2012 filed by Consim Info Pvt. Ltd (“**Consim**”) (later came to be known as Matrimony.com ) and Consumer Unity and Trust Society (“**CUTS**”) respectively. It was *inter alia* alleged that Google was creating an uneven playing field by unduly favoring its own services, and by doing so leveraged its strong position in various online search market to enter into and enhance its position in ancillary markets.

As per the Informants, Google runs its core business of search and advertising in discriminatory manner causing harm to not only the advertisers but also to the consumers who use the search engine by creating an uneven playing field by favoring Google’s own services and partners through manually manipulating its search results to the advantage of its vertical partners. This not only causes direct harm to competitors in vertical markets, but also causes direct harm to other website owners, since their websites are moved down on the general search results and hence, they receive less clicks as a result of lessened traffic. Further, this also harms consumers as they no longer receive the most relevant results at the top of general search. This was allegedly achieved by Google by mixing many of its vertical results from its vertical search services such as YouTube, Google News, Google Maps etc. into its organic search results.

The CCI upon finding a *prima facie* case on consideration of the allegations, directed the Director General, CCI (“**DG**”) to cause an investigation into the matter under Section 26(1) of the Act. Subsequently, the DG after investigating the allegations, filed the Investigation Report on 27.03.2015 and 14.07.2015 respectively (“**DG report**”), in which the DG recommended the following violations of Section 4(2) (a)(i), Section 4(2)(b)(ii), Section 4(2)(c) and Section 4(2)(e) of the Act.

- i. Google was found to the indulging in search bias by integrating / blending its own specialized / vertical search services / options / features such as YouTube, Google News, and Google Maps etc. in its online general web search services in the Universal Results, One Boxes and Commercial Units.
- ii. Google offers its own specialized search features (Universal Results and Commercial Units etc.) at prominent ranks or positions on the Search Engine Results Page (SERP). Since top results receive higher user attention, Google through this practice steers users to its own products and services, and produces biased results. Doing so, Google leverages its dominance in the general search to protect its market position in the vertical search services.

- iii. By its above unfair practices, Google also hampers the market impeding innovations thereby harming competition and consumers.
- iv. Google follows a non-transparent procedure by not disclosing the Quality Scores and information on bids received from various advertisers for a particular key word in an auction even on historical basis although the same was found to be technical feasible.
- v. Google's policy regarding compensation is entirely discretionary and does not place an obligation to compensate the advertisers for losses that can be attributed to Google systems error.
- vi. Google is not required to pay any monetary consideration for its House Ads which gives it an additional competitive edge. Google being aware of the quality scores that the system assigns to other websites ensures that its House Ads are assigned higher quality scores than its competitors thereby ensuring that its House Ads appear in the top slots above third party ads particularly of its competitors thereby destroying the level playing field for the third parties / its competitors.
- vii. Google's AdWords policy restrict usage of notified trademarks in Ad text of competitors.
- viii. Google being the preferred syndicate service provider for publishers was found to be using its dominant position in online general web search and online search advertising services to impose restrictive conditions under its AdSense program. Prior to 2010, Google was not disclosing AdSense revenue to its online AdSense partners and its agreements with the online partners were found to be one sided with enough scope for arbitrary conduct which was an unfair practice.
- ix. Google through its agreements with customers licensing AdWords API from it was placing restrictions, such as provision on termination without reason, which had the potential to be used as a tool for discouraging advertisers from multi homing thereby being instrumental in denial of market access to competitors.

Google filed detailed objections to the findings of the DG and raised certain preliminary and jurisdictional issues as well.

## **CCI's findings after inquiry**

On consideration of the detailed objections filed by Google, CCI gave its findings on each issue in a detailed order by a 4:2 majority decision.

## **On Preliminary objections**

At the outset, the CCI dealt with the preliminary objections raised as to whether Section 4(a) of the Act would be applicable at all since it was contented that the "services" offered by Google are free and , therefore, there is no purchase or sale of goods or services . CCI, however, did not agree and held that users offer indirect consideration to Google by: (a) providing their attention or eyeballs to Google search

and (b) by permitting Google to collect their personal information, which facilitates generation of revenues by Google. The CCI also considered the fact that the data obtained from its users are subsequently utilized for targeted advertising by Google. Thus it was held that the online search services offered by Google were not entirely “free” as claimed.

## **Relevant market**

For the purposes of competition law analysis, the CCI upon examination of the factors under Section 19(6) and Section 19(7) of the Act, agreed with the relevant markets as determined by the DG as (a) Online General Web Search Services in India and (b) Online search advertising services in India.

## **Dominant position**

The Commission also agreed with the DG finding and considering Google’s high market shares, the market structure and the technical advantages enjoyed by Google held that Google is dominant in both the relevant markets for online general web search services and market for online search advertising services in India. (Para 125).

The Commission also emphasized on the special responsibility and obligation of Google being the dominant undertaking and “the gateway to the internet for a vast majority of users” with special reference to the digital market to ensure not only the fairness of all online web search and search advertising results but also the fairness of all online markets given that these are primarily accessed through Google as the most prominent search engine. (Para 196 & 202).

## **Issues on abuse of dominance under consideration by the CCI**

### **(i) Whether Google biases its search results?**

The Commission agreeing with the DG report held that Google engages in ‘search bias in its specialized results designs i.e. (a) Universal results (b) One boxes (c) Commercial units. However, the CCI found that the abuse of dominant position was only with respect to Universal Results, prior to 2010 and Commercial Units.

Universal Results-are groups of results for a specific type of information, such as news, images, local businesses etc. The CCI found that rankings of Universal Results prior to 2010 were not strictly determined by relevance and were instead pre-determined. It was held that the said practice of Google followed prior to 2010, displaying its Universal Results on fixed positions, was unfair, as it created a misleading façade that such search results appearing prominently in response to queries were algorithmically determined on the basis of relevance. It was held that such a conduct falls foul of the provisions of Section 4(2) (a) (i) of the Act. (Para 216).

CCI however, did not agree with the finding in DG report that Google continues with the bias in its Universal Results after 2010, and took note of Google's submission that it has no means to evaluate results generated by different search services and to select amongst them because it does not have information on their ranking functions. (Para 218&219).

One Boxes – CCI did not agree with the finding in the DG report that there is bias in the sources that Google selects for One Boxes' content in the absence of any actual evidence of such bias to show that Google selected an inferior information for any of its One Boxes'. (Para 230).

Commercial Units- are result types that Google sets apart from free search results. It shows Commercial Units in the space utilized for showing ads which are above or at the right-hand-side of free search results. Google distinguishes Commercial Units from free search results with a label indicating Commercial Units as "Sponsored". In India, Google presently shows Commercial Units for Shopping and Flights only and does not show the Hotels Commercial Unit any more. Commission noted that by integrating Commercial Units for content categories such as Flights with Google's own search options / specialized services and placing them prominently on SERP, Google is able to drive traffic to its own pages and also generate revenues through advertisements / sponsor results. The Commission also took note of Microsoft's submissions provided to the DG relating to image of a "Heat map" and agreed with the DG findings that development of Search Engine Optimization (SEO) services help in improving rankings in Google general search. (Para 238, 242).

Thus, in case of Google's Flight Units in India it was found by CCI that the primary competition concern emanates out of its prominent placement on google search, in addition to providing disproportionate real estate thereof to such unit. Moreover, it contains a link to "Search flights" which takes users to Google's Flights Page and not to a third-party website such as MakeMyTrip.com or Yatra.com. Therefore, it was held that Google has given rise to a search bias by unduly giving prominent placement and disproportionate real estate to the Flight Unit on its general search for directing traffic to its own specialized search service. The insertion of Google's Flight Unit prominently above the blue link results in the general search denies third-party travel verticals, even the opportunity to be displayed on that key "real estate". Thus, the CCI held that as a result of the displacement of algorithmic results, third-party travel verticals are driven to buy Google search advertising, since this is perhaps the only option left for them to re-acquire visibility and traffic, though, at a higher cost.

The CCI held that since most vertical search service providers have revenue generation models which are heavily dependent on user traffic, such an unfair diversion of traffic by Google may not allow third-party travel verticals to acquire sufficient volume of business, with the effect that equally efficient websites/ specialised search service providers, may not be able to sustain and survive in the market for flight search services. Thus, the CCI held that Google was leveraging its dominant position in the General Web Search

to promote its Commercial Flight Units. Google through its search design has not only placed its Commercial Flight Units right at a prominent position on the SERP general search space but has also allocated disproportionate real estate thereof to those Units resulting into either pushing down or pushing out of the verticals who were trying to gain market access. Further, Google has provided links which lead users of Google Flights Units to its specialized search result page (Google Flight) and consequently the users may be deprived of additional choices of results. Such conduct was held to be amounting to an unfair imposition upon the users availing search services in contravention of Section 4(2)(a)(i) of the Act. (Para 248 & 253).

(ii) Whether Google imposes unfair conditions on its advertisers (i.e. AdWords platforms, Trademark issues, Ad Text Policy, AdWords API)?

The findings by the DG with respect to Google's advertising platform i.e. AdWords were that the data that Google provides to AdWords advertisers is "opaque" since it focuses only on one performance metric i.e. the 1-10 Quality score- which as per the DG is of "very limited utility". However, the CCI on perusal of the information before it, noted that Google also provides other metrics and tools for assessing ad and campaign performance as well, such as, inter alia, the Click-through rate (CTR), Bid estimates, Average position, Conversions, Time of day reporting, Geographic targeting, Bid simulator, Campaign drafts and experiments and Auction insights report. Thus the CCI was not convinced with the findings the DG report and observed that Google provides sufficient data to advertisers on the performance of their Ads. (Para 268, 269, 272, 273 to 277).

Trademark issues - An ancillary issue with respect to online advertisements identified in the DG report was that Google abused its dominant position by imposing unfair condition on the trademark owners (particularly those who have notified their trademarks to Google) by allowing their trademarks to be bid as keywords by third parties in online search advertising, which provided the competitors to free ride on the goodwill and brand value of the trademark owners, thereby hampering fair competition.

However, after considering Google's response and the Informants rejoinder thereto, CCI found that Google's Keyword Bidding Policy does not prohibit advertisers from bidding on trademarked keywords. Further, Google applies this policy universally, and permits advertisers to bid on Google's own trademarks as well. It was noted that prohibiting advertisers from bidding on queries that include trademarked terms might result in a perverse situation where Google cannot return ads for competitive or complementary products even when users are searching for them. Therefore, by allowing bidding on trademarked items, it increases the relevance of Google's Ads which benefits users also. CCI noted that the DG report does not point out any unfair condition imposed by Google upon the users or any condition it seeks to impose for blocking competitors of trademark owners from bidding on trademarked keywords. (Para 291 & 293).

Ad Text Policy - The CCI also did not agree with the findings of the DG that Google did not enforce its Ad Text Policy in respect of Consim's trademarks properly or that it failed to stop Consim's rivals from using Consim's trademark such as failing to stop Shaadi.com from using the words "Bharat Matrimony" in the text of its Ads and found that Consim did not comply with Google's laid out procedure for notifying complaints under its Ad Text Policy by directing such complaints to the designated Trademark Operations Team. CCI dismissed the finding of the DG in this regard also. (Para 302 & 314).

AdWords API Conditions -The DG report found that Google's AdWords API terms and conditions restricts data interoperability between search advertising platforms and the restrictions have the *potential of being used as a tool for discouraging advertisers from multi-homing, thereby resulting in denial of market access to competitors*. However, after considering Google's response and the Informant's rejoinder thereto, CCI held that DG findings were speculative in the absence of any actual evidence in the light of the evidence to the contrary provided by Google by showing that advertisers such as MakeMyTrip, Yatra.com, Flipkart.com and JustDial did not counter any such denial of access to competitors or inter-operability of data across different advertising platforms. (Para 338, 345, 348, 350, 352, 353 & 354).

(iii) Whether Google's distribution agreements restrict competition?

The DG found Google to have contravened Section 4(2)(c) of the Act on the ground that two of its distribution agreements (i.e. Google's agreement with Browsers such as with Apple for its Safari browser and with Mozilla for its Firefox browser) set Google as default search engine. The conclusion of the DG is based upon the fact that such contractual arrangements by Google have the potential to strengthen its market position in online general web search and search advertising by denying access to others.

The CCI held that a default setting does not deny market access to competitors and users are free to switch away from the default if they so choose to and that the DG has not presented any evidence to show that these two distribution agreements have denied market access to rivals. Moreover, the distribution agreements are contestable and that Google is stated to have lost one of the two distribution deals namely, the Mozilla agreement in 2014. It was observed that other search services - including Yahoo!, Yandex, and Baidu, are now the default providers on Mozilla's Firefox browser in some countries. Further, it was noted that Microsoft controls search distribution deals with all major PC OEMs and sets Bing as the default search service (via Internet Explorer and Edge). In view of the foregoing, the CCI opined that Google's distribution agreements are neither exclusive nor has it been established that such arrangements have denied market access to any of the competing search engines. The two browser distribution deals with Mozilla's Firefox and Apple's Safari, are not exclusive and merely specify that Google should be the default search service on these browsers. However, the user is not obliged to use that search service. The DG found the default settings to create competitive problems because the process for selecting another search service is not apparent for ordinary internet users, however, the CCI observed that such a finding of

the DG does not appear to be based on records of any survey or evidence to that effect. Moreover, the CCI held that default setting cannot be equated with exclusivity because default arrangements leave partners free to provide users with other search service options as well. Accordingly, the CCI held that no case of contravention of the provisions of Section 4(2) (c) of the Act is made out against Google with regard to distribution agreements with browsers since they neither create any exclusivity nor do they deny market access to competing search engines. (Para 360 & 367)

(iv) Whether Google's intermediation agreements restrict competition?

The DG found that apart from general online search services, Google also offers online search and advertising services on other websites through Syndication/Intermediation services. With regards to advertising, intermediation can take place for both search and non- search advertising and Google offers a distinct online search and advertising Syndicate services under its AdSense program, which constitutes a distinct relevant market. DG found that by virtue of its dominance in the online general search, Google is the preferred Syndicate partner for most publishers wanting to offer search and advertising services on their websites. According to the DG report Google is using its dominance to impose restrictive conditions in its agreements for Syndicate search and advertising services. Further, it was noted by the DG that prior to 2010, Google was not disclosing AdSense revenue sharing with online AdSense partners which was an unfair restriction.

CCI, after considering Google's response and the Informant's rejoinder thereto, noted that Google offers three types of intermediation agreements viz. search intermediation agreements, search ad intermediation agreements or AdSense for Search ("AFS") and Display ad intermediation or AdSense for Content ("AFC"). These agreements were executed either as Online agreements or as Direct agreements, typically, negotiated with some large publishers (negotiated search agreements). CCI found that DG report did not provide any evidence for any prohibition on the use of third party search services or display of third party ads in the search results i.e. AFS or AFC and DG's finding that "there is some scope for Google to interpret these provisions in a manner that in effect imposes exclusivity" was unfounded without any evidence. (Para 403, 406, 413, 415, 416 to 418).

However, on the Google's negotiated search intermediation agreements, the Commission observed that Google prevented partners with whom it entered into negotiated search agreements from implementing on their websites any search services which are the same or substantially similar to Google's search service. It was held that such prohibitions imposed under the negotiated search agreements are evidently unfair and restrict the choice of the partners and prevent them from using the search services provided by competing search engines and amounts to a violation of Section 4(2)(a)(i) of the Act. It was also held that by restricting websites from partnering with competing search services, Google was denying its competitors access to the search business and further marginalizing competitors and endangering their viability, while



strengthening its own position in contravention of Section 4(2)(c) of the Act. It was also held that Google was using its dominance in the market for online general web search to impose restrictive conditions in online syndicate search agreement, in violation of Section 4(2) (e) of the Act. This conduct creates conditions for extending and preserving Google's dominance in search intermediation in perpetuity. (Para 391, 394 to 397).

## **CCI Order/Remedies -**

On the basis of the above findings CCI directed Google to:

1. Desist from fixing of positions in the Universal Result Rankings in future.
2. To display a disclaimer in the Commercial Flight Unit Box indicating clearly that the "search flights" link placed at the bottom leads to Google's Flight Page, and not the results aggregated by any third party service provider, so that users are not misled.
3. Not to enforce the restrictive clauses in its negotiated direct search intermediation agreements with Indian partners, with immediate effect.

## **Penalty imposed**

The Commission, after considering the Google's submissions on the issue of relevant turnover i.e. the revenue generated from its India operations in respect of services specified in the CCI's order dated 20.12.2017, decided to impose a penalty at the rate of 5 per cent of Google's average total revenue from its India operations from its different business segments for the financial years 2013, 2014 & 2015. The penalty amounted to INR 135.86 Crores which was directed to be paid within 60 days from the date of receipt of order.

## **Dissent order**

Two Members of the Commission (Mr. Sudhir Mital and Justice G. P. Mittal), however, did not find any evidence for abuse of dominant position by Google even in respect of the Commercial Flight Unit or negotiated search intermediation agreements or in the Universal Results and hence found no contravention of section 4 of the Act against Google.

***Comments:** This order by CCI, even though subject to appeal, has been welcomed by Indian vertical search engines as it shall be instrumental in creating a level playing field for the smaller competitors in the face of a tech giant stranglehold over local digital business. While the quantum of a \$21 million fine imposed by CCI may be small for the global technology giant, the ruling has raised hopes for Indian digital startups that are feeling the heat from Google's dominance of online search. This is the third international set-back for Google since 2017. In a similar case, the European Union's anti-trust regulators had fined Google to the tune of \$2.7 billion in June 2017*

*for promoting its own products over others. Google had also, earlier in April 2017, settled an anti-trust matter in Russia out of court with a \$7.5 million settlement amount. In the U.S. too, Google had narrowly escaped a lawsuit intended to be filed by the Federal Trade Commission in 2012 for unfair business practices by making a few changes to its policies. This competition law judgement sends an important message to the information technology oligarchs worldwide that India is likely to put up a worthy fight to safeguard the interests of its indigenous stakeholders. Apart from the above observations, it is also noted that unlike in the case of the similar investigation in the European Union, the DG in India, could not gather evidence to corroborate in support of the findings on various grounds which led the CCI to reject them on merits.*



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