



Key Developments under the Indian Antitrust Regime - The Indian Antitrust Regulator Fines Google

February 2018

Overview

On 8 February 2018, the Indian antitrust regulator – the Competition Commission of India (the **CCI**) – issued an order imposing a fine of INR 1.3 billion (approximately USD 21 million) on Google for abusing its dominant position in the online general web search services and online search advertising services markets in India. This concluded a six-year long investigation by the CCI into Google's business practices. As part of the investigation, Google was also penalised for not co-operating with the Director General, which is the CCI's investigative arm, in the investigation process. The CCI's order is in line with the global trend of greater scrutiny by competition regulators into the business practices of large technology companies / digital platforms such as Google and Facebook and comes on the back of the European Commission's record Euro 2.4 billion fine last year on Google for abusing its dominant position in the search engine market.

CCI's findings

The CCI order relates to an investigation that it initiated in 2012 on the basis of complaints filed by an internet platform for marriage alliances

(Matrimony.com) and a consumer protection & competition focused non-governmental organisation (Consumer Unity & Trust Society) against Google Inc. and Google India Private Limited. Subsequently, the CCI also added Google Ireland Limited as a party to the investigation for playing an important role in Google's operations in India.

Similar to the market definitions adopted by the European Commission, the CCI defined the relevant markets to be the markets for online general web search services and online search advertising services in India. Google was found to be dominant in each of these markets due to its very high market shares, absence of effective competition and high barriers to entry (partly because of network effects) in the relevant markets.

The CCI found Google to have abused its dominant position in respect of certain business practices. Out of around twelve counts on which the Director General found Google to have abused its dominant position, the CCI confirmed the findings of the Director General only on three counts, which were:

- ranking of Google's Universal Results prior to 2010 which were not strictly algorithmically determined on the basis of relevance - instead, the ranking was pre-determined to appear on certain fixed positions on the search engine results page (**SERP**). This practice was considered to be unfair to the users as it allowed Google to steer users to its own services by producing biased results. However, the CCI acknowledged that it was a historical infringement and since October 2010 Google had started displaying its Universal Results algorithmically;
- giving preferential treatment to Google's own flights comparison services in India and allocating disproportionate real estate on the SERP for such services. This was considered to be an unfair imposition upon users of web search services as it reduces their ability to access the most relevant results. It was also considered to have the effect of diverting traffic away from competing flights comparison services to Google's own flights comparison services and thereby restricting market participants from competing in a fair manner. The European Commission's decision in the *Google Shopping* case, where Google was fined for giving preferential treatment to its own shopping comparison services against competing shopping comparison services, appears to have acted as a guiding framework for the CCI's finding in respect of Google's flights comparison services; and
- imposing unfair exclusivity conditions under its negotiated search intermediation agreements on publishers who wanted to incorporate Google's search engine on their own websites. Google was considered to have leveraged its dominant position in the online general web search market to strengthen its position in the online search syndication services market and thereby restrict the choice of these

publishers by preventing them from using search services provided by competing search engines and denying market access to its competitors.

Interestingly, the CCI did not find any fault with Google's search and display Ad intermediation agreements (i.e. Google's *AdSense* services) even though the Director General had a contrary view in this regard. The European Commission has already come to the preliminary conclusion that Google has abused its dominant position in respect of AdSense services and these services are currently under investigation by the European Commission.

The CCI did not find any infringement in respect of several of Google's offerings, including *OneBoxes* (i.e. Google's specialised search design to provide factual answers to a query), *AdWords*, trademark bidding, *Google Maps*, distribution agreements and search and display Ad intermediation agreements.

The CCI fined Google at the rate of 5% (as opposed to the maximum 10%) of the relevant average turnover generated by Google between 2013 and 2015 under different business segments from its India operations. For the purposes of calculation of the penalty, Google argued that since its search services were free, no fine should be levied as no turnover is generated from the users of the search engine. However, the CCI held that the concept of relevant turnover cannot be applied to two-sided technology platforms (such as Google) in the same manner as it is applied in the context of conventional multi-product companies and therefore the turnover generated by Google from the entire platform, being intricately interwoven with each other, has to be taken into account for the calculation of fines. The CCI also helpfully clarified that in the case of global companies, it will calculate the relevant turnover only on the basis of the turnover generated by them from their operations in India.

In terms of remedies, the CCI considered Google's business model as well as the technical feasibility of implementing any remedies. For having created a search bias in respect of the ranking of

Google's Universal Results, since Google had already been displaying its Universal Results algorithmically since October 2010, the CCI only directed Google not to repeat such practice in the future. In the case of Google prioritising its own flights comparison services, Google has been directed to display a disclaimer that the "search flights" link leads to Google's own specialised search services page and not to a third party's page. Finally, in respect of the unfair exclusivity clauses in the negotiated search intermediation agreements, Google has been directed not to enforce them vis-à-vis its Indian publishers. Interestingly, the CCI did not order an amendment to such contracts to remove the unfair terms from the contracts going forward.

The decision by the CCI is not unanimous with two of the six members dissenting by not finding Google to be abusing its dominant position, either due to lack of evidence in the investigation report and / or due to disagreement with the analysis carried out by the majority.

Analysis

A recurring theme of the order seems to be the challenge that the CCI faced due to Google's presence on both sides of its network platform which, the CCI believed, led to a conflict of interest in Google's business practices. As part of its analysis, the CCI tried to find a balance between Google's legitimate business rights vis-à-vis the rights of its users and business partners and acknowledged that especially in the technology / digital market, it is important that any intervention by an antitrust authority be "targeted and proportionate".

Similar to the treatment by other authorities and commentators when looking at the behaviour of big data firms / digital platforms, the CCI also seems to have pushed the envelope in terms of the theories of harm in emphasising the special responsibility and obligation applicable to dominant undertakings vis-à-vis "fairness" in their business practices.

This order establishes that Google is dominant in the online general web search services and online search advertising services markets in India and is likely to act as a framework for any future

complaints against Google. The order will also allow parties affected by Google's infringing services to bring compensation claims before the appellate tribunal. It will be interesting to see how "loss" or "damage" is proven in order to successfully claim compensation.

Future outlook

Business practices of large technology / digital companies are clearly under the spotlight of antitrust authorities and the CCI's order against Google should be viewed as part of this global trend. Whilst this decision underlines the seriousness of Google's conduct in the CCI's eyes, it also suggests that when it comes to high technology / digital markets, the CCI is open to applying its tools with restraint and to intervening in a targeted and proportionate basis only, so that a balance can be achieved between a legitimate business model on the one hand and consumer protection, innovation and competitive markets on the other hand.

We are closely monitoring developments regarding this and if you would like any further information on any aspect of this note, we would be happy to assist.

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