

Google Case Study: Multi-Jurisdictional Allegations of Abuse of Dominance

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Abstract: *Google, an American tech-based MNC, started its operations as an Internet search engine in 1998. Over the years it has diversified into other products and services like Gmail, Google maps, cloud computing, operating system and mobile devices to name a few. The company has witnessed rapid growth since its inception and today Google has grown into a dominant player in the global search engine market, having nearly 90% world market share as in the first quarter of 2016.¹Over the past few years, its conduct and operations have displeased the competitors who have made allegations of abuse of dominance by Google. Consequently the company has been investigated into by the Competition Authorities in the USA, EU and India.*

Keywords: Internet, Cloud Computing, Mobile Devices, Market Share, Competition.

Introduction: Among these alleged cases of abuse of its dominance in its relevant market by the technology giant Google, one in Europe has recently reached to its logical conclusion with a record fine of €2.4bn for abusing its dominance, while in India it is still under investigation. These cases need to be analyzed on one to one basis as though

the allegations are similar but the competition regimes vary with each country.

USA: First allegations and First Inquiry:

The Federal Trade Commission (FTC) is the apex body of USA, which looks into the anticompetitive business practices. It is illegal in the country for a business to enter into agreements like price fixing or rigging, and also to monopolize because they harm competition. It is worth mentioning that monopoly in itself is not considered unlawful but any act that tries to retain monopoly using unfair methods is.²

Before looking into abuse of dominance concerns, let us see, basically, how a search engine works. Internet is a reservoir of information, which is unorganized, jumbled, and changes constantly. Therefore to fetch relevant information search engines are used which frame computer programmes, called algorithms, that scout/dig the web content. The probable responses are located and rated on the basis of anticipated likelihood of their appositeness and then presented to the user. Also when a user looks for information on the Internet, the nature of query provides the search engine with important information i.e. area of interest at that moment. This is

¹<https://www.statista.com/statistics/216573/world-wide-market-share-of-search-engines/>

²<https://www.ftc.gov/enforcement/anticompetitive-practices>



highly valued by online advertisers who can now spot the potential customers and match the ads to particular catchwords.

Many of Google's competitors have claimed that it has violated antitrust laws by utilizing its dominant position in the web market. *First*, it was alleged that the company twisted the Google search results with a motive to give preference to its own products and services. This is called search bias. This negatively impacted the competing websites because it reduced their search traffic (read profits since it considerably diminishes the click-through) by downgrading their ranking on the search webpage and drove it away to Google's vertical offerings. This practice of Google was alleged to be anticompetitive because it stifles competition from other search websites which may limit Google's dominance. It also discourages the vertical websites to make investment in new content. A vertical site is one that specializes in search on specific areas like restaurants, flights, food, shopping, tourism. eg Yelp, TripAdvisor, Zomato, Food Panda. Google, too, has ventured into such vertical offerings like Google local, Google shopping, Google flights, Google finance. The competing vertical sites have complained that Google altered its algorithms to favorably position its own vertical sites over that of the rival. For eg: where the natural search result showed Yelp as relevant to a user's query on city search, its tweaked algorithm automatically put Google Local on the top of the displayed results. It helped Google to drive the search traffic to Google's

properties and, as a corollary, also increase advertisement revenues because advertisers always want their ads to reach as wide consumer base as possible. Also contrary to Google's vertical competitors who spend their resources to improve their properties so as to get good ranking on the search engine result page (SERP), Google just places its vertical sites at whatever position it desires. Thus Google is the sole determiner of the results it displays and since its algorithms are not known to anyone outside the company, it has raised serious suspicion. Not only this, companies like Expedia, TripAdvisor believe Google uses its search might to dictate terms in industries that Google itself does not compete in and that it sets competition rules within their industries. Google maintains that changes made to the search engine are for the benefit of consumers, even though they may harm the competitors. FTC investigated into the matter and said that due to the complexity of the nature of the business it is difficult to establish if Google acted in bad faith by compromising the search results. This is why the report, although acknowledged the malpractice, recommended the commission not to take action on this account.

Second, Google was charged with scrapping i.e. copying information from the competing websites that it used to refine the search results of its verticals. It could do so because of the standard license agreement that allowed the company to utilize data feeds of third party. The data is important because it provides feedback on whether Google's algorithms give good quality outcomes and

also woo advertisers. The content of any site that Google crawls, to categorize for Google's search engine, is used to optimize its vertical websites. To compute the marketability of a product to rank it in Google Shopping, it used Amazon sales rank. Similarly for Google Local it obtained review content of Yelp. Later it introduced Hotspot-its own product to gather reviews- and supplemented it with review content of competing websites like Yelp, TripAdvisor, without ascribing it to them. These websites raised this issue with Google and asked for removal of their content from Google's Hotspot. Google warned that such removal would also mean erasing them from Google's web search as well. But they could not afford exclusion from Google's web search results since they depended on it to reach the users. Thus Google could secure its advertisers, preserve dominance and retained the power to increase advertising prices without a compelling threat from rivals. Incidentally, some critiques do not see scrapping as anti competitive. They argue that as long as the content at issue is publically available and not protected by copyright laws, it may not be seen as anti competitive. But the FCT Staff report has acknowledged that the likely effect of this move of Google is decline in motivation of the vertical rivals to invest and develop content as they cannot fully utilize the gains from innovation.

Third, Google had been accused of imposing restrictions on the advertisers to manage advertisement campaigns across different platforms simultaneously. The

'AdWords' application programming interface (API) was restrictive because it made difficult for advertisers to send critical data for ad-campaigns. Google's restrictive conditions arrested the development and marketing of aids that would help advertisers to simultaneously conduct ad campaigns. Websites like Amazon and eBay formed their own multi-homing³ tools that can manage multiple search network ad campaigns at the same time, but small advertisers found it difficult to justify sparing funds to develop their own software for the same. Handling a search advertisement campaign is a time-consuming activity, therefore expending resources for marketing on other platforms with little additional click-on`sin exchange is not considered worthwhile. Without API constraints, many marketers would expand their advertising to competing search networks (like Bing, Yahoo) if cross platform optimization tool is made available. Thus Google used unfair methods of competition to preserve monopoly.

Fourth, exclusive agreement is another area of discontent. ``Google's exclusive AFS (AdSense for service) agreements effectively prohibits the use of non Google search and search advertising within the sites and pages designated in the agreement. Some exclusive agreements cover all properties held by a publisher globally, others provide for property by property (or market by market)

³ Multi-homing is the practice of connecting a host or a computer network to more than one network. Here it refers to advertisers who advertise on multiple search networks.

assignment.⁴ The terms of eBay's AdSense agreement include *requirements that eBay show as many Google AdSense ads on each page as third party advertisements, that no third party agreements appear above the Google AdSense advertisements, that Google AdSense advertisements cannot be interspersed with third party advertisements and that Google AdSense advertisements cannot be less prominently displayed than third party advertisements.*⁵ These restrictive deals drive the search traffic to Google and prevent the rivals from having a fair opportunity in building a search user base. Thus by signing such restrictive deals Google violated antitrust laws.

After thorough investigation, FTC recommended the US government not to take action against Google due to lack of sufficient evidence. A settlement was reached between Google and FTC according to which Google voluntarily agreed to permit advertisers to optimize ad-campaigns across multiple networks, simultaneously and also allowed websites to exclude their data from being used in Google's vertical products.

EUROPEAN UNION: First successful conviction of Google for abuse of dominance

Google is also undergoing legal troubles overseas markets outside its domestic turf of USA. It has a monopoly in Europe as well where 90% of the Internet searches are done

on its search engine. However, being a monopolist is not an offence in Europe but misusing it is, as is in USA. One of the first critics of Google's practices was Foundem who filed a formal complaint with European Commission (European Union's equivalent to FTC of USA) in 2009 and following a series of complaints against Google's misconduct European Commission started investigating in 2010. The first case is against Google's comparison shopping service. In its preliminary conclusion, European commission said that Google has abused its dominant position by *'systematically favoring its own comparison shopping service' by displaying its shopping service links before others*, even if the results are not relevant to the user's query. It diminishes the competitive spirit of other players in the market and is to the detriment of consumers. There were more complaints on how Google uses the content it scrapes from other websites. These allegations are not new but what raises more suspicion is the fact that FTC inquired into its similar conduct in USA. The second case is regarding Google's advertising operations. Google not only places ads on its own search engine but also on third party websites who have a search box on their site, eg: newspapers and telecom operators. Through AdSense for search Google acts as an intermediary for other websites looking for advertisers for their search results page. It is dominant provider of this service with nearly 80% market share⁶ in Europe over the

⁴ Federal Trade Commission's Staff Report, page:54

⁵ Federal Trade Commission's Staff Report, page:58

⁶ European Commission Press release Antitrust: Commission takes further steps in investigations



past decade. Its advertising contracts are said to breach antitrust laws because, one, they are exclusive i.e. they prohibit third party websites to take advertisements from Google's competitors. Two, they ask the website to take a minimum number of ads from Google and secure a premium place for them. Also the contracts explicitly asks not to display competing ads above or next to Google's ads. Three, they require the websites to seek Google's approval before making any alterations in the display of competing ads. This conduct of Google would seem to be an act of dominance to even a layman. The third charge against the company is against Android, the mobile operating system. More than half of internet traffic comes from smart phone and tablet users which is expected to increase in future. About 80% of smart phones in Europe and in the world use Android. It is an open source software, meaning that it can be used by device manufacturer and can be tweaked to suits the specific needs. But the problem is that Google places arduous obligations on firms using Android and thus stifles competition. How? Firstly, it insists that manufacturers pre-install Google Search and Google Chrome applications and set them as default options in the device. Thus rival search engines are denied the opportunity to become default search service on majority of devices sold in Europe. Eg: if Google's mobile browser Chrome is already there when you buy a mobile, it would be very hard to persuade people to even try an

alternative. Secondly, it restricts software modification. If a manufacturer desires to pre-install Google propriety apps like play store, Google search, Google signs anti fragmentation agreement that prevents manufacturer from selling devices that operate on modified versions of android- which showed the prospective of being a viable alternative to Android. Thirdly, Google has illegally paid manufacturers and mobile network operators to exclusively pre-install Google Search on their devices. Google has defended its actions saying that its business model helps to keep manufacturer's cost low, allowing free use of Android, while giving consumers unmatched control over their devices. But this not European Commission sees it. It believes that these practices may lead to further strengthening of Google's dominant position in universal Internet search services, besides limiting the ability of rival mobile browsers to compete. They also hamper the progress of operating systems based on Android open source code.

In the end EU has concluded in last week of June 2017 that Google has abused its dominance of search engine market in building its online shopping service and fined it for this a record sum of €2.4 billion. The European authorities concluded that by artificial and illegal promotion by Google of its in house price comparison service in search results, the Google denied it's consumers real choice or options and also its rival firms an ability to compete with it on a level playing field. The judgement has given Google a ninety days window to stop its anti

alleging Google's comparison shopping and advertising-related practices breach EU rules



competitive illegal activities and also to appraise the regulating authorities about its plans to reform its methods or alternatively the Google faces a fine up to €10.6 million per day which is worked out as equivalent to 5 % of average daily global turnover of Google's parent company Alphabet.

Even after this decision the investigation of European Competition authorities is still continuing in the allegations of abuse of dominant positions by Google in its provisions of maps, images and information on local services.

INDIA: Under Investigation

With its 125 million population India has emerged as huge market for technical companies like Google. With its huge resources Google has a prominent place in Indian market not off late like elsewhere in world, a few complaints against the Google for its alleged anti competitive practices surfaced in India. Competition Commission of India (CCI) is a body set up under Competition Act, 2002 that looks into business practices that have adverse effect on competition. On the basis of initial complaints received from Consumer Unity and Trust Society (CUTS) and Bharat Matrimony, CCI started enquiry into the alleged abuse of dominance by Google. The director general of CCI found that from 2009-2014 Google's market share in web search was 85%,⁷ making it a dominant player in India as well. In the complaint it

⁷<http://www.livemint.com/Companies/5D4c8f9kKB41yL99Rfm4H/Why-did-CCI-write-Google-a-bad-report-card.html>

was alleged that Google rigged the search results displayed on its webpage. Google gave preference to its own services by altering its algorithms. This creates an unequal platform for competition for other players in the market. CUTS accused it of search bias, search manipulation, denial of access and creation of entry barriers.⁸ These accusations are similar to those made in USA, Europe and other parts of the world. Not only are the results redesigned, Flipkart has observed that the rank of its links correspond to the amount of money it expended on Google advertising. The probe also found that Google's protection of trademarks of advertisers was unsatisfactory. The case in point is a bid by several companies to buy Google search ad keywords for trademarks of their competitors, so that when a user searches for the competitor on Google, their own advertisements would come above the search results. Eg: search for BharatMatrimonial would display the ads of Shaadi.com before the results. The Delhi High Court restrained them from doing so. The CCI investigation has also claimed that Google abused its dominance by including clauses in its agreements that put limits on using services of third party search engines. The Google User Safety policy and AdWords policy are also said to be highly arbitrary and vague which lets Google unilaterally terminate the advertising campaign. Also the process of bidding on AdWords is not transparent. Furthermore, the

⁸http://www.cci.gov.in/sites/default/files/07302012_0.pdf, page 3

director general found that Google imposed constraints on API access to discourage advertisers from multi-homing their ad campaign. If found guilty of these charges, CCI can levy a fine of upto 10% of Google's three year annual average turnover. Incidentally, CCI had imposed a fine of Rs 10 million for not cooperating in the investigation.

These investigations are yet to reach to a stage of conclusion where there could be some decision but there are strong chances that Google might have to face repercussions in case it is found flouting the fair competition regime in India.

Conclusion

Besides these above mentioned allegations and investigations Google is also facing the antitrust charges that are also initiated in Germany, Taiwan, Egypt and Brazil. Thus in light of assertion of market regulators to enforce a fair competition, Google has certainly some task ahead to realign its policies with that of fair competition regime. This attempt by authorities should be seen in light of fair and just regulatory framework that is felt necessary to avoid any collapse of entire system as witnessed in sub prime crises which initiated in USA and brought big slump in global economy.

However, the same time there is also a need to balance between fair competition and advantages enjoyed by enterprises on back of their new research and development efforts, as both should be viewed as

complimentary in nature rather than contradictory.

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