

Google: An Interminable Friction of Abuse of Dominance- A Comparative Study between the EU and India

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I. INTRODUCTION

The expansion and rise of the digital platforms have fueled the transformation of digital markets in the recent years and we are in the process of witnessing a trend towards integrated technological services. For an instance the acquisition of LinkedIn by Microsoft, the acquisition of WhatsApp and Instagram by Facebook has led us in a direction of better social interactions and a dedicated connectivity.¹ Digital platforms like Facebook, Google, and Amazon etc. have immensely contributed to the development of digitally based economy. While this technology enabled market is convenient and beneficial for both users and competitors across the world, the burning question is about the hidden and/ or potential concerns behind the practices these platforms are involved in which, may harm the competitive structure of the market and ultimately the consumers. Apparently, since a decade the conduct of Google has brought new challenges in the digital market attracting the attention of competition law watchdogs worldwide and concerns like this will continue to gain attention of anti-trust and other concerned authorities in the future as well.

Search engines are the only source for searching content on the internet (the gateway) and the available various popular search engines are Google, Bing, and Yahoo which are top three search engines as of 2019.² As per the statistical research conducted by *Statista* as of April 2019, Google stood first having the highest market share of 88.47%, whereas Bing and Yahoo held only 4.81% and 3.13% of worldwide market share respectively.³ In the abuse of dominance cases, it goes without saying that how crucial role the market share plays and from the recent data it can be derived that in terms of search engine services Google has acquired a dominant position in the global market.

Google being one of the most popular and used search engine, has attracted the attention of the European Commission ('EC') and the Competition Commission of India ('CCI') regarding numerous anti-competitive conducts in the last decade. Pursuant to the investigations conducted, the European Commission in June, 2017 adopted a decision concerning Article 102 of the Treaty on Functioning of European Union ('TFEU') and Article 54 of the European Economic Area ('EEA') Agreement to restrict Google from abusing its dominance as a general search engine by giving illegal advantage to its own comparison-shopping service, concluding its 7-year-long inquiry into Google Shopping case, imposing a record setting fine of €2.42 billion on Google.⁴ Later in July 2018 a fine of € 4.34 billions was imposed by the EU Commission for abusing its dominant position by tying Google search application with Play Store, which is 'Google's official store and portal for Android apps, games and other content for Android powered phone'⁵ and Google Chrome browser,

¹ Dr Avantika Chowdhury, 'Agenda The Google case: shop till you drop (off the screen)' March 2018, *Oxera Compelling Economics*

² Alex Chris, 'Top 10 Search Engines in the World' SEO Articles Reliablesoft.net, Digital Marketing Agency, Last accessed 24 June 2019

³ J Clement, 'Worldwide desktop market share of leading search engines from January 2010 to April 2019' <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/> Last edited 21 June 2019, accessed 1 July 2019

⁴ Antonio Buttà, 'Google search (shopping): an overview of the European commission's antitrust case' *Italian Anti-trust Review*, N. 1 (2018), *The New Frontiers of Innovation and Competition. Vol II, Digital Economy Case Law*, DOI: 10.12870/iar-12872, p 45

⁵ Google Play Store, *Androidcentral.com*, April 29, 2019, <<https://www.androidcentral.com/google-play-store/home>> accessed 3 July 2019

which is a web browser of Google itself used as a tool to search other webpages. Recently in March 2019, the European Commission has imposed a fine of € 1.49 billions for its abusive practices in online advertising.

Anti- competitive conduct of Google has not only distorted competition in the Europe but also India on the parallel issues. While in India, the CCI based on the allegations made by Matrimony.com and Consumer Unit Trust Society of India ('CUTS') in two independent complaints (later clubbed together) against Google for abusing its dominance in Indian market by giving preferential treatment to its own vertical search sites and manipulating search results which resulted into the breach of Indian anti- trust laws under Section 4 of the Competition Act, 2002 ('the Act')⁶ levied a fine of INR 135.86 Crore.⁷ Another investigation against Google calls for in the matter of Android abuse case wherein Google is alleged to have abused its dominant position in India recently in 2019.⁸

Looking at the case laws in the developing digital market the European Commission also understood the growing importance of digital platforms and to know more about the structure and the operation of such markets initiated an investigation into the e- commerce sector.⁹ However, there is a little jurisprudence in India in the field of competition law regarding digital platform inquiries. Although the case of Google in both the leading common law countries is of particular interest because Google is a dominant player in both of the countries having major market share and higher market power. The issues raised in various above-mentioned cases rings an alarm bell pertaining to the abusive conduct of Google in different jurisdictions infringing anti-trust provisions. However, for the purpose of this study our focus will be limited to the cases involving preferential treatment of Google's own vertical search services in the Europe as well as in India.

The aim of the study is to explore the scope of market definition in defining a digital relevant market in order to establish dominance especially for the two or multi sided market like Google because it not only provides search services but also works as an infrastructure for other brands to build and develop their business.¹⁰ I will also evaluate the rationale applied by the competent authorities of both the jurisdictions, the European Commission and the Competition Commission of India respectively in order to find out the similarities and differences laid down in the conduct of Google Inc. and to see whether existing law is sufficient enough to address the emerging issues in the digital economy. The present study scrutinizes the conduct of Google in relation to theories of harm in the Europe and India for the alleged and established breach of anti-trust laws pertaining to abusing its dominant position. I argue that *ex post* intervention through competition law is insufficient to deal with the challenges involved in the digital platform and therefore we need *ex ante* regulations to address these challenges more effectively.

In order to find out common issues raised on the conduct of Google both in India and Europe and appreciable effects caused in the market I will discuss two major case laws wherein Google abused its dominant position in the Europe and India by giving self- favoring treatment to its own services, trying to make a comparative jurisdictional analysis. I will use the scholarly literature and the decision pronounced by both the jurisdictions to find out the answer to my research questions set in the paragraph above. I will also highlight upon the recent developments by the European Commission in shaping competition law policies in the digital economy.

The structure of the paper is as follows. First part of the paper explains the complexities involved in the definition of relevant market especially when it involves the digital platforms and their two- multi sided market. It also explains the factors both the EU Commission and the CCI considered in the Google case while finding out the relevant markets for the alleged abuse of dominance in the Europe and India. The second part introduces the concept of dominance and why it is pertinent to have market power in order to establish dominance in the given market. It also handles the question whether market share is the only resource of dominance or there are other factors which needs to be considered? Along with that the section also ponders upon the anti- trust body's

⁶Pallavi Panigrahi, 'CCI's Decision on Abuse of Dominant Position by Google' IndiaCorpLaw, 10 March 2018, accessed 19 July 2019

⁷ Case Nos. 07 and 30 of 2012, Competition Commission of India, Matrimony.com v Google, 8 February 2018, para 439. The Commission imposed a penalty on Google at the rate of 5% of the average total revenue generated from India operations from its different business segments for the financial years 2013, 2014 and 2015. (para 438)

⁸Aditya Kalra, 'India orders anti- trust probe of Google for alleged Android abuse', Reuters, 10 May 2019, accessed 21 August 2019

⁹Anti- trust sector inquiry into e- commerce, sector inquiry by the European Commission <http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html> Last updated on 10 May 2017, accessed on 1 July 2019

¹⁰ David Baltimore, R. Alta Charo, Daniel J. Kevles, Ruha Benjamin, 'The rise of the Platform Economy', Summit on Human Gene Editing, Issues in Science and Technology, National Academies of Sciences, Engineering and Medicine, The University of Texas at Dallas, Arizona State University, Spring 2016, p 2

observation about Google's market power and dominance in both the countries. The third part answers the following questions focusing on the reasonings of the EC and CCI in the matter at hand. Why did the Commission think that Google did something wrong? Whether the Commission continues to follow or depart from the theory of harm adopted in other abuse of dominance cases? E.g. Microsoft, IMS Health, McGill. Is the theory of harm same in both the jurisdictions? Is the conduct of Google same as in India as in the Europe? Can we transplant theory of harm from one jurisdiction to the other? The fourth part showcases why we need a revised regulation which can strengthen the existing law and the fifth part concludes the paper.

1. Definition of Relevant Market

Once the potential anti-trust issue has been identified, the concern of competition authorities is to decide the market in which the entity operates. The case to be examined under Article 102 of the TFEU to assess whether the concerned undertaking is a dominant player or not for alleged abuse of dominance, the threshold requirement to prove such dominance is to find out the relevant market as a criterion.¹¹ There may be a possibility that a single firm operates into multiple markets and for that it is of utmost importance to establish the market in which it holds dominance to be abusive. Therefore, the market definition always plays a crucial role while deciding dominance cases because it also offers a test for substitutability which can be used to measure the competitiveness of an undertaking.¹² And doing so is a contentious aspect especially on the interdependence of competition law and online platforms.

In particular, deciding relevant market for online platforms is a complicated task because it has not been dealt with in the current practice more frequently and there is an intense debate among the practitioners to define the relevant market¹³ because most of the entities epitomize either two-sided or multi-sided markets.¹⁴ According to David Evans,¹⁵ 'a two-sided market is a market in which a firm acts as a platform: it sells two different products to two groups of consumers, while recognizing that the demand from one group of consumers depends on the demand from the other group and, possibly, vice versa.'¹⁶ and an entity having two or more independent distinguished consumer groups can be treated as multi-sided market.¹⁷ Thus the services offered by Google constitutes a multi-sided market because 'a search engine such as Google, for example, provides value to three distinct groups of economic agents: websites that are indexed and made available to people through search queries; people making search queries; and advertisers.'¹⁸

The definition of relevant market helps in establishing market share of an undertaking in the respective relevant market(s) and Article 102 of the Treaty on the Functioning of the European Union (TFEU) cannot be applied unless an undertaking has a substantial market share in the established relevant market.¹⁹ It is noteworthy to mention here that the market share, which traditionally was considered a strong indicator of market power²⁰ is not the only criteria to establish dominance especially in the digital economy considering two-

¹¹Case T-62/98 *Volkswagen v Commission* ECLI:EU:T:2000:180, para 230

¹²William H. Boshoff, 'Why define markets in competition cases?' Stellenbosch Economic Working Papers: 10/13 MAY 2013, p. 3

¹³ Maurits Dolmans & Andrew Leyden, 'Internet & Antitrust: An Overview of EU and National Case Law' e-competition No. 45647, at p. 2 as referred from Kokkoris, I. (2017), 'The Google Case in the EU: Is There a Case?' *The Antitrust Bulletin*, 62(2), p. 313–333 <<https://doi.org/10.1177/0003603X17708362>>

¹⁴ 'Market Power in Digital Platforms' prepared for the European Commission, 30 September 2018, contributed by Oxera to the European Commission's one-day conference entitled 'Shaping competition policy in the era of digitization' p. 2

¹⁵ David S. Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' 20 *YALE J. ON REG.* 325 (2003)

¹⁶ For a market to be two-sided, it is enough that one indirect network effect is present. For more on what makes a market two-sided and on identifying two-sidedness in practice, see Lapo Filistrucchi, 'How Many Markets Are Two-Sided?' 7 *CPI antitrust chron.*, no. 2, July 27, 2010; Lapo Filistrucchi, Damien Geradin & Eric van Damme, 'Identifying Two-Sided Markets' 36 *world competition* 33 (2013)

¹⁷ Sebastian Wismer & Arno Rasek, 'Market Definition in Multi-sided Markets' DAF/COMP/WD(2017)33/FINAL, Organisation for Economic Co-operation and Development (OECD), 15 November 2017, p 2

¹⁸ Sean McDaniel and Craig Berry, 'Digital Platforms and Competition Policy: A Literature Review' prepared for the IPPR Commission on Economic Justice, October 2017, p 13

¹⁹ Market Definition, Understanding Competition Law, Office of Fair Trading, Competition Law 2004, p 3

²⁰ Franka Cimbi, 'An analysis of abuse of dominance of online platforms in the digital market, with regard to breach of data protection law', University of Amsterdam, July 2018, p 7

multi sided online platforms.²¹ There are other factors like entry barriers, demand and supply- side substitutability, network effects (direct and indirect) which needs to be considered while deciding abuse of dominance cases because the dynamics of online market changes quickly as they need constant technological innovations and improvements.²²

The fundamental principles of the market definition are (a) demand- side substitutability, (b) supply- side substitutability and (c) potential competition.²³ And further the significant criteria to decide the relevant market are the (a) relevant market product and (b) relevant geographic market. 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.'²⁴ And the relevant geographic market is the area in which the players sells its goods and services. However, there is an emerging debate to define the characteristics of the digital markets and, 'considering the two- multi sided nature of the markets, the first question which needs to be addressed is whether to include one or all the sides of the market while considering the relevant market.'²⁵ In particular the authorities and the courts are more concerned about the abuse of dominance cases involving digital platforms.²⁶

The traditional device rigorously applied to measure the demand- side substitutability for the market in anti- trust concern is the 'Small Significant Non- Transitory Increase in Price test' ('SSNIP test') which was originally designed for the single- sided markets. The test defines that the price increase of usually 5 or 10% for a non- transitory period of one year would be profitable for a hypothetical monopolist in a smallest market of substitutable goods. The applicability of the same test due to the intricate nature of the market definition in two or multi- sided markets is a challenging task (Noel and Evans 2005 Filistrucchi, Geradin, E. v. Damme, et al. 2013).²⁷ Noel and Evans further argues that SSNIP test tool is not accurate for a market of interdependent groups where the increase or decrease in the demand of one side of the group affects the other side of the group and this type of indirect network effects distorts the results delivered by the SSNIP test.²⁸ The European Commission report on Competition Policy for Digital Era argues that in the cases involving digital market, we should put more emphasis on theories of harm and anti- competitive strategies instead of market definition.²⁹

²¹ OECD, 'Measuring Market Power in Multi-Sided Markets', DAF/COMP/WD(2017)35/FINAL, 14 November 2017, p 6

²² GSMA Association, 'Resetting competition policy frameworks for the digital ecosystem', London: GSMA 2016, p 20

²³ Speech by Commissioner Mario Monti, European Commissioner for Competition Policy, 'Market definition as a cornerstone of EU Competition Policy' 5 October 2001, p 4

²⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), Official Journal of the European Communities, para 7. See also Case 31/80 *L'Oréal v De Nieuwe AMCK* [1980] ECR 3775, paragraph 25; Case C-62/86 *AKZO v Commission* [1991] E C R I-3359, paragraph 51, where 'It is settled case-law that, for the purposes of applying Article 86 of the Treaty, the market for the product or service in question comprises all the products or services which in view of their characteristics are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services.' Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, para 33

²⁵ Lapo Filistrucchi, Damien Geradin, Eric van Damme, Pauline Affeldt, 'Market Definition In Two-Sided Markets: Theory And Practice' *Journal of Competition Law & Economics*, Volume 10, Issue 2, June 2014, Pages 293–339, <<https://doi.org/10.1093/joclec/nhu007>>

²⁶ Jens- Uwe Franck and Martin Peitz, 'Digital platforms: Market Definition and Market Power' *Oxford Business Law Blog*, 29 May 2019

²⁷ Ralf Dewenter, Ulrich HeiMeshoff, Franziska Löw, 'Market Definition of Platform Markets', Helmut Schmidt Universität Hamburg / Helmut Schmidt University Hamburg Fächergruppe Volkswirtschaftslehre / Department of Economics Diskussionspapier Nr. 176, Working Paper No. 176, p 5. (PDF) *Market Definition of Platform Markets*, accessed 4 July 2019

²⁸ Evans and Noel, 'The analysis of mergers that involve multisided platform businesses' (2008) 4:3 *Journal of Competition Law and Economics* 663-695, Evans and Noel, 'Defining Antitrust Markets When Firms Operate Two-Sided Platforms' (2005) 3 *Columbia Business Law Review* 667-702 as referred from Sebastian Wismer & Arno Rasek, *Market definition in multi- sided markets*, Directorate For Financial And Enterprise Affairs Competition Committee, OECD, DAF/COMP/WD(2017)33, 26 May 2017, p. 11

²⁹ Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, 'Competition Policy for Digital Era' *Final Report*, European Commission, p. 3- 4

This part of the study further discusses the analogous parameters and factors considered by the European Commission and the Competition Commission of India in defining relevant market and establishing dominance in the matter of Google abusing its dominance in the jurisdictions of the Europe and India.

1.1. Market Definitionas adopted in the Google Case

The assessment of market definition and market share is an initial impediment in reaching to the appropriate outcome in deciding the case against or in favor of Google. The European Commission in establishing the market for (i) General Search Services; and (ii) Comparison Shopping Services³⁰ and the Competition Commission of India in establishing the market for (i) General Web Search Services and (ii) Online Search Advertisement Services³¹ as the relevant market has adopted the assessment on the role of (i) Big Data, (ii) Demand- side Substitutability, and (iii) Supply- side Substitutability.

1.1.1. Personal Data as a Monetary Consideration or as a substitution for currency

A contention was raised by Google before the CCI regarding the applicability of Section 4(2)(a)³² of the Act, which talks about unfair/ discriminatory condition or price in purchase or sale of goods or services that Section 4(2)(a) cannot be applied as there is no purchase or sale of goods in the matter at hand because the search services are provided at zero cost by Google.³³ And an issue on the parallel line is also dealt in the EU Google Comparison Shopping Case.³⁴The EU Commission sets out mainly three reasons for the Google general search services to constitute an economic activity even though internet search services are provided for free of charge, which means the consumers do not pay any direct monetary value in exchange of using the internet services.³⁵

Firstly, the Commission emphasizes on the personal data collected by Google explaining that even if users do not pay any direct monetary value for using general search services, they indeed contribute to the monetization of the services by agreeing to Google's privacy policy on storing and re- using their personal data.³⁶

Secondly, the two- sided/ multi- sided nature of the platform connects two independent groups of consumers and in the instant case, the revenue generated through online search advertising is proportionate to the number of users using general search services, therefore more users can generate more revenues which in return is a beneficial commercial strategy by offering services of free general search.³⁷

³⁰ Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 *Google Search(Shopping)*) (notified under document number C(2017) 4444), OJ C 9, 12.1.2018, p. 11–14, part 2 on Market Definition and Dominance.

³¹ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 102, Also see paras 19 and 55.

³² (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition.

³³ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 80

³⁴ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 5.2.1.1 of the decision

³⁵ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, paras 157-160

³⁶ Antonio Buttà, 'Google Search (Shopping): An Overview Of The European Commission's Antitrust Case' Italian Anti- trust Review, N. 1 (2018), *The New Frontiers of Innovation and Competition. Vol II, Digital Economy Case Law*, DOI: 10.12870/iar-12872, p 50. Also see, Commission decision para 160

³⁷ Antonio Buttà, 'Google Search (Shopping): An Overview Of The European Commission's Antitrust Case' Italian Anti- trust Review, N. 1 (2018), *The New Frontiers of Innovation and Competition. Vol II, Digital Economy Case Law*, DOI: 10.12870/iar-12872, p 50. Also see, Commission decision para 160

And lastly, ‘the Commission observes that general search services compete on non-price parameters of competition such as: i) the relevance of results; ii) the speed with which results are provided; iii) the attractiveness of the user interface; and iv) the depth of indexing of the web.’³⁸

The CCI also discarded Google’s argument, emphasising on the role of Big Data in the digital economy³⁹ and held that even though there is no direct consideration paid by the users to Google for using web search services, (i) the undivided attention of the users to Google Search Engine Result Page (SERP) and (ii) permission to collect and further utilise their data is treated as an indirect consideration which increases the potential of generating revenues for Google through sponsored advertisements and also by attracting more advertisers to advertise their product on Google.⁴⁰ This type of behaviour typically showcases the multi- sided nature of search engines where the functioning of the market is interdependent on the internet users, website owners and online advertisers where Google works as a platform to cater to the needs of all the groups.⁴¹

Looking at the multi- sided nature of the market from a different perspective, when a user types for any query on the search engine platform such as Google, there are two different types of results delivered, first one is the ‘organic results’ which are displayed based on the relevance of the query initiated by the user accumulated by the crawlers and second is the display of advertisements which are displayed on the top above the organic results.⁴² Here, if the user clicks on one of the organic results, the search engine does not receive any monetary value in return, whereas if the user clicks on one of the advertisements displayed on the top, the search engine receives revenues as decided in the bid for per click.⁴³ Therefore, the Commission holds its view that online search services constitutes an economic activity rejecting Google’s contention.⁴⁴

1.1.2. Demand- side Substitutability

The test for demand- side substitutability calls for whether the consumers will switch to other product if the price of product in question is increased by 5 or 10%. However, as learned above there is no direct exchange of payment between the consumer and Google, here it can be assumed that whether the existing consumers would switch to a different market of search services to initiate a querye.g., from general search services to specialized search services.

The two relevant market identified by the EU Commission are (i) market for general internet search services and (ii) market for comparison shopping services. The EU Commission observes that there is less demand- side substitutability between (i) the market for general internet search services and (ii) other online search services such as content sites⁴⁵, specialized search services⁴⁶ and other social networks.⁴⁷ The EU Commission further observes that there is a difference in the type of (i) services offered (general search services tend to offer all the content available on the internet on the other hand content sites lead the user to direct information site such as Wikipedia or IMDB⁴⁸, specialized search services only focus on the specific information in the field of search specialization⁴⁹ and social sites lead the users to interact with people of similar interest⁵⁰), (ii) technical features (like source of the data, web crawling vs user input/ information provided by third parties) and (iii) the way

³⁸ Antonio Buttà, ‘Google Search (Shopping): An Overview Of The European Commission’s Antitrust Case’ Italian Anti- trust Review, N. 1 (2018), The New Frontiers of Innovation and Competition. Vol II, Digital Economy Case Law, DOI: 10.12870/iar-12872, p 50. Also see, Commission decision para 160

³⁹ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, Paras 81, 84, 85

⁴⁰ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 82

⁴¹ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 41

⁴² C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 83

⁴³ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 87

⁴⁴ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 87

⁴⁵ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 5.2.1.2.1

⁴⁶ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 5.2.1.2.2

⁴⁷ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 5.2.1.2.3

⁴⁸ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 164

⁴⁹ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 167

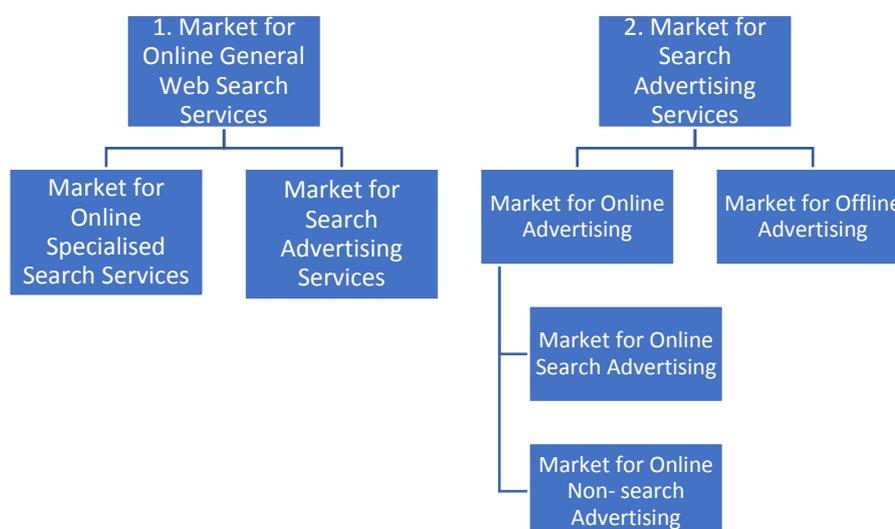
⁵⁰ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 179

revenue is generated (search advertising and paid fees or commission based) between the general search services and specialized search services.⁵¹

The second relevant market identified the Commission is the market for comparison shopping services which ‘(i) allow users to search for products and compare their prices and characteristics across the offers of several different online retailers (also referred to as online merchants) and merchant platforms (also referred to as online marketplaces); and (ii) provide links that lead (directly or via one or more successive intermediary pages) to the websites of such online retailers or merchant platforms.’⁵² The Commission observes that the type of services offered by comparison shopping services is not substitutable with those offered by any other specialized search services like hotels, flights and any other online retail or merchant platform services or offline shopping tools, therefore the market for comparison shopping services is a distinct relevant market.⁵³

To assess the relevant market for (i) online general search services and (ii) search advertising services the CCI has considered the substitutability of three sets of markets as follows:

The *first set* is substitutability between (i) online general search services and (ii) search advertising services and specialized search services,
 the *second set* is substitutability between (i) online and (ii) offline advertising market and,
 the *third set* is substitutability between (i) online search and (ii) online non- search advertising market.



(Table 1: Markets for substitutability test)

1.1.2.1. Substitutability of online general web search services and search advertising services and specialized search services

To establish the market for general web search services as an independent relevant market, the CCI has made an attempt to find the substitutability between the market for online general web search services and the market for search advertising services.⁵⁴ In order to do so, the CCI has considered the following reasonings as submitted by the Director General (‘DG’) in the investigation report.⁵⁵

The DG considering the characteristics, intended use and price found out that the services of general web search and online search advertising services cannot be substituted on account for generation and display of results and

⁵¹ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, paras 161-183

⁵² CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 191

⁵³ Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — *Google Search (Shopping)*) (notified under document number C(2017) 4444), Section 2 Market definition and dominance, Para 5

⁵⁴ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 90

⁵⁵ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, paras 90 to 94

clicking behavior of the users.⁵⁶ The CCI analyzed that there are many limitations associated with the option of direct search services as it not only requires the users to be aware of specific website but also requires them to remember the Uniform Resource Locator (URL) to type and search on the internet, which is digitally an impossible task leading to the conclusion that direct search services and general web search services do not form substitutable markets.⁵⁷

Considering the issue of substitutability of general search services with specialized search services, the DG opined that the specialized search services intends to provide results for any specific user queries like flights, hotels or travel and the general search services allows the user to receive information on a variety of topics, therefore both the markets cannot be used as substitutes.⁵⁸

Resultantly, the Commission holds online general web search services to be a distinct relevant product market in accordance with the provisions of Section 2(s) read with Section 19(7) of the Act.⁵⁹

1.1.2.2. Substitutability of online and offline advertising

From the consumer's point of view who uses advertising services in any form, the DG assessed that whether the platform for online and offline advertising can be treated as substitutable markets for the purpose of identifying relevant market in the case at hand. For treating both the market as an independent and non- substitutable, the Commission has provided with reasons that the success of online advertising depends on the population who uses the service of internet. Having said that there is a need to understand the fact that a large number of population in India still does not have an access to the internet services, therefore the modes used for offline marketing such as radio, newspaper, or television form an independent market for those users who are not using internet services.⁶⁰ The Commission also considered other characteristics such as cost of advertising and monitoring the reach of advertisement to the users which, is significantly cheaper in online advertising market than offline advertising market and concluded that both the markets cannot be substituted.⁶¹

The DG also found out during the investigation that the market for online advertising is unique from the market for offline advertising or any other form of advertising in the context of text, images, email based, social networking or through mobile applications.⁶²

1.1.2.3. Online search and non- search advertising

The Commission in agreement with DG's findings based on characteristics, intended use and price of search and non- search advertisements⁶³ concluded that the market for online search advertisements and the market for online non- search advertisements form a distinct relevant market⁶⁴ and cannot be substituted.

The DG in his investigation report has explained the difference between online search advertising and online non- search advertising by analysing that online search advertising intends to target potential clients as it is user-initiated query and is based on the interest of the user while on the other hand non- search advertising is used for the purpose of building brand awareness.⁶⁵ Revenue generation for the markets are also different as in online search advertisement the payment is made on the basis of per click whereas in non- search advertising market it is paid per thousand clicks.⁶⁶

⁵⁶ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 17 conclusion by DG, also see para 90 analysis by the Commission

⁵⁷ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, paras 47, 91

⁵⁸ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 48

⁵⁹ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 94

⁶⁰ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 50, also see paras 96, 97

⁶¹ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 50, also see paras 96, 97

⁶² C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 17

⁶³ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 98

⁶⁴ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 99

⁶⁵ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, paras 17 and 51

⁶⁶ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 98

1.1.3. Supply- side Substitutability

The test for supply- side substitutability calls for a scenario where the demand is increasing in the other side of the market and whether the suppliers can easily switch their production to fulfill the demand in the other market. The test in the case at the hand is whether the competitors can provide the services offered by Google presently without having to highly invest into the technology.

The EU Commission concludes that the services provided by Google on static devices like PCs, desktop and mobile devices constitute a dominant relevant market according to global average monthly market share as of February 2017⁶⁷ and there are high entry barriers as the new entrant needs to make significant investments, both in terms of time and resources to afford the cost of developing algorithms, crawling and indexing the data.⁶⁸ Therefore, resulting into limited supply side substitutability.

Considering the consistent high market share of Google in both the relevant markets in India (the market for general web search services and the market for online search advertising)⁶⁹ the Competition Commission of India is of the opinion that, despite given the high entry barriers like network effects, high cost of investment in technology, minimum scale requirements,⁷⁰ financial and high capital investment risk, economies of scale, regulatory barriers⁷¹ in a platform which requires continuous technological innovation it is unlikely that the users would switch to a competitor's services in a short or medium time span and even if they do, 'in a multi-sided market the effect of marginal switch of users on one side of the market (like search service) may not lead to a switch on the other sides (like search advertising).'⁷²

2. Dominance and Market Power

The threat to the competitive structure of the market is not dominance *per se*. What unease the anti- trust authorities is the abuse by the undertaking dominant in the existing market or with the help of dominance in one market tries to gain power in the separate market. Because if so, is the case, an entity dominant in one market can cement its dominance in the other market thereby expanding dominance into other markets. Even though market share holds paramount importance in abuse of dominance cases, the CCI also has time and again reiterated that it is not the only criteria to prove abuse of dominance.⁷³ 'This focus on market shares is even less appropriate when it comes to technology-enabled markets, where it is often the case that, within a very short time period, a firm hitherto seen as the dominant market player will see its market share evaporate and be demoted to an also-ran.'⁷⁴ Putting in other words market share can be a tool for measuring an undertaking's historic success but cannot be used as a threat to the potential competition. The other resources can be used to analyze market power is network effects, competitive constrains etc. because in digitally driven markets with the changing dynamics it is difficult to keep an eye on ongoing competition and innovation.

⁶⁷ See for instance the global average monthly market share percentages from NetMarketShare: <<http://marketshare.hitslink.com/search-engine-market-share.aspx?qprid=4&qpcustomd=1>> downloaded on 7 February 2017. The comparison of the figures published in March 2015 and February 2017 indicates that the six largest providers of general search on mobile devices during that timeframe have consistently been Google, Yahoo, Bing, Baidu, Ask and AOL as referred from Commission decision, table 1, footnote 114

⁶⁸ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, paras 184-188

⁶⁹ The CCI considered the number of searches, number of search result page views during the year 2009 to 2014 for the market of general web search services, para 112 and to uphold dominance of Google in the market for online search advertising services CCI considered the revenues earned by Google from AdWords and AdSense during the year 2010 to 2014, para 115

⁷⁰ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 21

⁷¹ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 104

⁷² C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, paras 117-119

⁷³ See Case No. 39 of 2012 *Re Mr Ramakant Kini v Dr L H Hiranandani Hospital, Powai, Mumbai*, para 85, Case No. 6 & 74 of 2015 *Re Fast Track Call Cab Pvt Ltd & Meru Travel Solutions Pvt Ltd v ANI Technologies Pvt Ltd*, para 55

⁷⁴ Miguel Rato And Nicolas Petit, 'Abuse Of Dominance In Technology- Enabled Markets: Established Standards Reconsidered?' *European Competition Journal*, April 2013, p 11-12

2.1. Rationale of the European Commission

The EU Commission held Google dominant on the basis of the following grounds. (i) Market Share⁷⁵, (ii) existing barriers to entry and expansion⁷⁶, (iii) the infrequency of user multi-homing and the existence of brand effects⁷⁷, and (iv) the lack of countervailing buyer power.⁷⁸

The European Commission in the decisions made in previous dominance cases has already distinguished between the market for general internet search and vertical internet search which is a specialized online search on specific segments like travel, legal and medical.⁷⁹ According to the fact sheet the European Commission concluded that Google is a dominant player in all the 31 EEA country's national market holding market share as high as more than 90% for the purpose of general internet search since 2008 except for Czech Republic wherein the Commission found Google to be dominant since 2011.⁸⁰ To establish a competent search engine it requires substantial amount of investment in terms of time and resources like research and development.⁸¹ Also to provide relevant results of the queries the search engine should receive high amount of traffic which enables the improve the user experience and detects any changes in the user behavior.⁸² Moreover the positive feedback effect which can be derived from direct and indirect network effects treat as an additional barrier to entry.⁸³ The behaviour of users in the EEA shows that only a minority users switch to the other general search services who use Google general search service as their main general search service as called Multi-homing.⁸⁴ Talking about the lack of countervailing power, Google also agrees with the Commission's assertion that the users are not able to find any other services in relation to Google.⁸⁵

2.2. Rationale of the Competition Commission of India

So far as dominance of Google in India is concerned the investigation of the DG showcases that for a period of 6 (2009 to 2014) and 5 (2009 to 2013) years Google was a dominant player in the market for general search services and online search advertising services respectively.⁸⁶

The CCI has not only considered the market share of Google but has also accounted for other factors such as size of Google, economic power, resources, entry barriers and commercial advantages while considering dominant position in India.⁸⁷ In the opinion of DG, 'there exist significant entry barriers in the nature of high cost, technology, network effects, minimum scale requirements, and contractual restrictions etc. that bestow substantial economic power on Google and place it at a major advantage.'⁸⁸ Henceforth, it can be concluded that Google is able to play independently of competitive forces in the relevant market due to such high entry barriers.

⁷⁵ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 6.2.1

⁷⁶ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 6.2.2

⁷⁷ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 6.2.3

⁷⁸ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 6.2.4

⁷⁹ Case No COMP/M.5727 - *Microsoft/ Yahoo! Search Business*, para 31

⁸⁰ European Commission Fact Sheet, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service – Factsheet, Brussels, 27 June 2017, European Commission Press Release Database

⁸¹ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 285

⁸² CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 287-289

⁸³ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 292-296

⁸⁴ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 306, also see table 5- multi-homing by users depending on their primary general search services.

⁸⁵ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 316-318

⁸⁶ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 20

⁸⁷ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 21

⁸⁸ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 21

In order to maintain confidentiality of the data submitted by Google with respect to market share for a specific period and traffic received by Google in both the markets, CCI has redacted the statistics and figures from the public version of the decision.⁸⁹

3. Actions of Google Unparallel with Competition Law Policy: An Assessment on the Theory of Harm

An effortless legal analysis for an abuse of dominance case falls under the scope of Article 102 of the TFEU and Section 4 of the Indian Competition Act. A dominant position is 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.'⁹⁰ The European Commission in the precedent decisions has already established that Article 102 of TFEU and Article 54 of the EEA Agreement not only tries to restrict a dominant firm strengthening its dominant position in the given market but also aims to save the competitive structure in the common market by not allowing a dominant undertaking to cement its dominance in a separate market.⁹¹ Article 102 of the TFEU and Article 54 of the EEA Agreement is capable of restricting a conduct concerning the repercussions of dominance which is capable of distorting the competition regardless of actual distortion.⁹² To address Google's argument that during the identified period of abuse there were no competitors who ceased their services and therefore, there is no foreclosure of the competition,⁹³ the EC referred to its previous decisions of *Michelin v Commission*⁹⁴, *British Airways v Commission*⁹⁵, and *Intel v Commission*⁹⁶ which has already established that for the Commission to prove abuse of dominance it is not pertinent to establish actual distortion of competition whereas only the conduct potential enough or likely to have an appreciable effect is sufficient to restrict the conduct⁹⁷ because it is not relevant that how many competitors were active during the period of abuse but in the absence of abuse the number of competitors would have been greater.⁹⁸

Specifically, the issue of self- preferring abuse as given in the present matters, falls under the scope of clause (c) of Article 102 of the TFEU regarding 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.' And the similar provision of which can also be found under clause 2 sub- clause (a)(i) and (ii) of Section 4 of the Act regarding 'directly or indirectly imposing unfair or discriminatory (i) condition or (ii) price in purchase or sale of goods and service.'

Looking at the position in India is quite different as Indian anti- trust watchdog, the Competition Commission of India, has put its first step in the digital market by restricting the anti- competitive conduct of Google in the market for online general web search and online syndicate search services.⁹⁹ The legal provision for abuse of dominance in India is under Section 4 read with the assessment criteria mentioned under section 19(4) of the Act. 'While determining the abusive conduct of a dominant enterprise or group, a three-step analysis is required to be undertaken involving the determination of the relevant market, assessment of dominance and the

⁸⁹ Atikant Kaur, Payel Chatterjee, Pratibha Jain and Gowree Gokhale, 'CCI Intervention to Achieve A Level Playing Field in the Digital Space' Competition Law Hotline, Research and Articles, Nishith Desai Associates, 21 February 2018. Accessed 19 July 2019

⁹⁰ Stephanie Honnefelder, 'Fact Sheets on the European Union European Parliament, Economic and Monetary Union, Taxation and Competition Policies' Competition Policy, April 2019. As referred from Case 27/76, *United Brands*

⁹¹ Case C-333/94 P, *Tetra Pak v Commission*, EU:C:1996:436, paragraph 25; Case T- 228/97, *Irish Sugar plc v Commission*, EU:T:1999:246, paragraph 166; Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, paragraph 1344

⁹² Case C-549/10 P, *Tomra Systems and Others v Commission*, EU:C:2012:221, paragraph 68, Case T-321/05, *AstraZeneca*, EU:T:2010:266, paragraph 347, confirmed on appeal in Case C-457/10 P, *AstraZeneca v Commission*, EU:C:2012:770, paragraphs 109 and 111. See also Case T-286/09, *Intel v Commission*, EU:T:2014:547, paragraph 186

⁹³ Statement of Objection, (SO) response para 366, see CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 601

⁹⁴ Case T-203/01 *Michelin v Commission*, EU:T:2003:250, paragraph 245

⁹⁵ Case T-219/99 *British Airways v Commission*, EU:T:2003:343, paragraph 298

⁹⁶ Case T-286/09 *Intel v Commission*, EU:T:2014:547, paragraph 186

⁹⁷ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 602

⁹⁸ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 603

⁹⁹ Aditya Kalra, Aditi Shah, 'India's antitrust watchdog fines Google for abusing dominant position' Reuters Technology news 8 February 2018

assessment of abusive conduct.’¹⁰⁰ Having established the relevant market in the previous section, this section analysis assessment of dominance and assessment of abusive conduct in both the jurisdictions.

3.1.Self-Preferencing Treatment and Abuse of Dominance by Google in the EU

The investigations by the Commission started back in November 2010 when the European Commission decided to initiate anti- trust inquiry against Google Inc. for the alleged breach of abusing its dominance in its online search violating Article 102 of the TFEU.¹⁰¹ The various concerns of the Commission regarding the conduct of Google¹⁰² the primary of which was regarding prominent display of Google’s own specialized search services that was communicated to Google in 2013 followed by Statement of Objection (SO) sent in the year 2015¹⁰³ and 2016.¹⁰⁴ On the basis of preliminary findings the Commission opined that the conduct of Google was oppressive of consumer interest and innovation.¹⁰⁵ To understand the technical aspects of the decision it is crucial to understand the functioning of comparison shopping services.

3.1.1.How Comparison-shopping services operate?

The competitiveness in the digital market depends on the ‘traffic’ brought to the website and in the matter of comparison- shopping services it holds paramount importance because it brings new retailers who wish to list their product on the site for comparing their products as well as the customers who wish to use the services of comparing various products which, generates more clicks and which, attracts higher revenues in return. Here the term ‘traffic’ is used in reference to the audience who visits the websites for using the services offered by the comparison shopping sites, therefore, more the audience, more the traffic, representing the effectiveness of a site.¹⁰⁶ If a merchant wants to showcase its advertisement(s) (ads) on Google general search page, Google Comparison Shopping Services (CSSs) help the merchants acting as any other CSSs at the same time to bid for the advertisements by creating a separate account to participate in the bid that the comparison shopping services offer.¹⁰⁷ The EU Commission in the matter at hand has compared the user traffic with an asset mainly for the following reasons. (i) ‘Traffic enhances the ability of comparison shopping services to convince merchants to provide them with data about their products’, (ii) ‘traffic generates revenue that can be used to invest in order to improve the usefulness of the services provided’, (iii) ‘traffic allows machine learning effects, thereby improving the relevance of the results of comparison shopping services and the usefulness of the service they offer to users’, and (iv) ‘traffic allows comparison shopping services to generate more original user reviews’.¹⁰⁸

¹⁰⁰Cyril Shroff and Avaantika Kakkar, ‘India: Abuse of Dominance’ The Asia- Pacific Antitrust Review 2019, 19 March 2019

¹⁰¹ Antitrust: Commission probes allegations of antitrust violations by Google, IP/10/1624, Brussels, 30 November 2010, European Commission Press Release Database. Last updated 19 Feb, 2018

¹⁰²European Commission Press Release, ‘Commission obtains from Google comparable display of specialized search rivals’, the Commission raised concern regarding (i) The prominent display, within Google’s web search results, of Google’s own specialized web search services as compared to competing specialized web search services, (ii) The use by Google without consent of original content from third party web sites in its own specialized web search services, (iii) Agreements that oblige third party web sites (“publishers”) to obtain all or most of their online search advertisements from Google and (iv) Contractual restrictions on the transferability of online search advertising campaigns to rival search advertising platforms and the management of such campaigns across Google's AdWords and rival search advertising platforms, Brussels, 5 February 2014

¹⁰³European Commission Press Release, ‘Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android’, Brussels, 15 April 2015

¹⁰⁴European Commission Press Release, ‘Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules’, Brussels, 14 July 2016

¹⁰⁵EU press release 2014

¹⁰⁶Big Commerce Essentials, ‘What is Website Traffic and How to Interpret it?’ <<https://www.bigcommerce.co.uk/ecommerce-answers/what-is-website-traffic-and-how-to-interpret-it/>> accessed 5 July 2019

¹⁰⁷About advertising with Comparison Shopping Services, Google Merchant Center Help, <<https://support.google.com/merchants/answer/7558973?hl=en-GB>> accessed 6 July 2019

¹⁰⁸ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 7.2.2, paras 444- 451

3.2.2.Harm to the Competitors

3.2.2.1. Self- preferring bias

The abusive search bias according to the Commission denotes ‘the more favorable positioning and display, in Google’s general search results pages, of Google’s own comparison-shopping service compared to competing comparison-shopping services,’¹⁰⁹ which, the Commission found to be violative of Article 102 of the TFEU because the conduct of Google is outside the purview of competition on merits.¹¹⁰

The Commission observes that as a consequence of Google’s preferential treatment to its own comparison-shopping services, the traffic was diverted from competing comparison-shopping services to its own comparison shopping services, and such divergence was capable of having anti- competitive effects in the national markets for general search services and comparison shopping services with in EEA.¹¹¹

In the year 2004, Google launched a service called ‘Froogle’ in the United Kingdom which, was renamed as ‘Google Product Search’ in the year 2008 and is now known as ‘Google Shopping’ since 2013 entering into a new market of comparison-shopping services in the Europe.¹¹² It offers the service of comparing prices and products of different online merchants such as Amazon, eBay, Flipkart and other like competitors. However, Froogle wasn’t getting as popular as any competitor’s services until Google prominently positioned its own comparison services in a rich format and demoted its competitors services in general search pages by certain algorithms.¹¹³ The characteristics of Google comparison shopping services are the same that of competitor’s services however, the positioning of Google services is above all the search results in a highly visible place¹¹⁴ along with richer graphics, pictures and dynamic information.¹¹⁵ As a result of the top positioning of Google comparison shopping services, it gets more clicks by the user because ‘analysis of user behavior that indicates that generic search results generate significant traffic to a website when they are ranked in the first three to five generic search results on the first general search results page.’¹¹⁶

3.2.3.Harm to the Consumers

Agustin in his blog ‘How Google is eroding consumers’ freedom to choose’ argues that the by way of Google’s preferential positioning and abusive treatment to its competitors the ‘consumers are harmed because they might not get the most relevant results but rather those which are in Google’s interest.’¹¹⁷ The preferential positioning of its own services made it less accessible for the consumers to switch to its competitor’s services as the EU Commission considering the user behavior analysis concluded that the users will only consider the highly ranked results irrespective of their relevance.¹¹⁸

3.2.4.Evidence considered by the EC

For reaching out to this conclusion the Commission has heavily relied on the quantitative evidence i.e. traffic and visibility on the Google general search pages collected by a monitoring company named *Sistrix* for a period of 6 years from 2010 to 2016. After a careful analysis based on the statistics, the Commission opined that before the introduction of Panda algorithm in 2011 the visibility of the competitors services was highest followed by an irrecoverable sudden drop.¹¹⁹ The Commission has also based its rationale on the user behavior which concludes that the top three to five search results on general internet search gathers significantly higher amount

¹⁰⁹ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 7.2

¹¹⁰ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 7.2, 341

¹¹¹ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 431

¹¹² CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, paras 26-35

¹¹³ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, section 7.2.1., para 344

¹¹⁴ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 379

¹¹⁵ *Ibid*

¹¹⁶ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 7.2.3.1, para 453

¹¹⁷ Agustin Reyna, ‘How Google is eroding consumers’ freedom to choose’ Trans-Atlantic Consumer Dialogue (TACD), 22 March 2018. Also see Commission decision para 597, ‘the Conduct is likely to reduce the ability of consumers to access the most relevant comparison shopping services.’

¹¹⁸ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 598 and 599

¹¹⁹ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 361, also see the Graphs on Sistrix visibility index for comparison shopping services in the United Kingdom, Germany, France, Italy, Spain, paras 362-377

of traffic compared to later results.¹²⁰ As a result of the conduct of Google, there is substantial ‘decrease in generic search traffic from Google's general search results pages on a lasting basis to almost all competing comparison shopping services in each of the thirteen EEA countries.’¹²¹ The Commission found evidence of drops of traffic on Google’s competitor’s website of 92% in Germany, 85% in the UK, and 80% in France.¹²² On the similar timeline at the beginning of abuse in 2011 when Google’s competitors traffic was demoting significantly there was 45- fold increase in traffic in Google’s comparison shopping services in the UK, 35- fold in Germany, 29- fold in the Netherlands, 19- fold in France, 17- fold in Spain and 14- fold in Italy.¹²³

The Commission concluded that the conduct of Google in the market for General Search Services and Comparison-Shopping Services is capable of distorting competition in the national market and is having potential anti- competitive effects.¹²⁴ On the basis of material facts and evidences presented the Commission concluded that the conduct of Google was potential enough to harm the competitive structure in the market even if the market for comparison shopping services was a part of a broader relevant market including merchant platforms¹²⁵, both in the market for general internet search services¹²⁶ and the market for comparison shopping services.¹²⁷

From the reasoning of the Commission, it can be concluded that the conduct of Google was capable of leading to higher fees for merchants, higher prices for consumers and less innovation by way of foreclosing competition in comparison shopping services.¹²⁸ Also, the conduct can also lead the competing players to cease their services¹²⁹ as a result of lessened incentive to innovate and improve shopping services under the impression that it will attract more users.¹³⁰

The behavior also reduces not only the competitor’s incentive but also Google’s ability to improve the quality of the services as it is not competing on merits in the platform.¹³¹

3.2.5.Arguments set forth by Google- The Applicable legal test

The EC rejected Google’s argument that the conduct did not amount to abuse of dominance mainly on three grounds. Firstly, Google argued that the Commission did not consider application of *Bronner case*¹³² the criteria of which are ‘(a) indispensability of the product for carrying on the business in question, (b) the fact that the refusal is preventing the appearance of a new product for which there is a potential consumer demand, (c) the refusal is likely to exclude all competition in the secondary market and (d) the refusal is not justified by

¹²⁰ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017 section 7.2.3.1. Analysis of user behavior, para 454-455. Also see Table 19 Average click rate per rank of generic search results on the first Google general search results page in 2010, p 125

¹²¹ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 462. Section 7.2.3.2. Impact of the Conduct on generic search traffic from Google's general search results pages to competing comparison shopping services. P 126

¹²² European Commission Press Release, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, Brussels, 27 June 2017

¹²³ European Commission Press Release, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, Brussels, 27 June 2017

¹²⁴ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 591-592

¹²⁵ Summary of Commission decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping)) (notified under document number C(2017) 4444), Section 3 Abuse of a Dominant Position, Google’s conduct has potential anti- competitive effects

¹²⁶ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 7.3.3

¹²⁷ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, Section 7.3.2

¹²⁸ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 593

¹²⁹ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 594

¹³⁰ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 595

¹³¹ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 596

¹³² Case C-7/97, *Oscar Bronner GmbH & Co. KG*, EU:C:1998:569, Section 7.4 Google’s argument with regard to the applicable legal test, para 645

objective justifications.¹³³ The Commission refused Google's contention referring to numerous decisions because it did not ask Google to 'transfer an asset or enter into agreements with persons with whom it has not chosen to contract.'¹³⁴ Secondly, the conduct of cementing dominance in the adjacent market is an independent established form of abuse beyond the scope of competition and for that there is no need for the rules to be known in advance¹³⁵ as argued by Google.¹³⁶ And lastly, the Bronner case does not indicate that 'that alleged improvements in product designs should be assessed under a different legal standard to that developed to assess the use of a dominant position on one market to extend that dominant position to one or more adjacent markets.'¹³⁷

3.2.6 Theory of Harm Based on- The Essential Facility Doctrine/ Refusal to Deal

Bo Vesterdorf argues that considering the EU competition policy and jurisprudence dominant firms who are not essential facilities do not have any obligation to deal with the competitors on any terms and favoring their own business cannot be held abusive of their dominance¹³⁸ because Article 102 of the TFEU only aims to restrict abuse of dominance and not dominance *per se*.¹³⁹ As per the settled principle of 'essential facility' it is necessary that (i) refusal to deal by a dominant firm would eliminate all the effective competition in the market and (ii) the services of dominant undertaking are indispensable to carry out downstream competitors business as there is no actual or potential substitute for the services.¹⁴⁰ And such a proposition has been confirmed in numerous decided cases.¹⁴¹ Considering the EU jurisprudence on essential facility doctrine the dominance of Google in the general search market does not constitute an essential facility as the rivals or competitors can switch to other search engine services like Yahoo and Bing. Moreover they can also promote and advertise their business via other modes such as Facebook, Pinterest or direct mobile applications or even through other online vendors therefore Google cannot be charged for abusing its dominance.¹⁴² However Nicolas Petit contrasts the view of Bo Vesterdorf in his paper called '*Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf*' which pretends that the arguments of Bo Vesterdorf has no legal basis and the essential facility doctrine is too restrictively and narrowly construed.¹⁴³ Nicolas Petit further argues that a dominant undertaking can be scrutinized under Article 102 other than the principle of essential facility such as discrimination¹⁴⁴,

¹³³ Case C-7/97 *Oscar Bronner GmbH Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I -7791, [1999] 4 CMLR 112, paras 39 – 41

¹³⁴ Case T-65/98, *Van den Bergh Foods*, EU:T:2003:281, paragraph 161, upheld on appeal in Case C- 552/03 P, *Unilever Bestfoods Ireland v Commission*, EU:C:2006:607, paragraphs 113 and 137. See also the Opinion of Advocate General Mazák delivered on 15 May 2012 in Case C-457/10 P, *AstraZeneca v Commission*, EU:C:2012:293, paragraphs 94-95 as referred from commission decision para 651

¹³⁵ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 649

¹³⁶ Statement of Objection (SO) response para 152-153, 159, also see CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 646

¹³⁷ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 652

¹³⁸ Vesterdorf, Bo, 'Theories of Self-Preferencing and Duty to Deal - Two Sides of the Same Coin?' (January 31, 2015). Theories of self-preferencing and duty to deal - two sides of the same coin? Bo Vesterdorf, *Competition Law & Policy Debate*, Volume 1, Issue 1, February 2015, p.4-9.. Available at SSRN: <<https://ssrn.com/abstract=2561355>> p. 4

¹³⁹ Ibid p 5

¹⁴⁰ Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebs- gesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, EU:C:1998:569, para 27

¹⁴¹ See e.g. Case C-418/01, *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG*, EU:C:2004:257, Case T-504/93, *Tiercé Ladbroke v. Commission*, EU:T:1997:84, Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 T-374/94, *European Night Services Ltd (ENS), Eurostar UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission*, EU:T:1998:198

¹⁴² Vesterdorf, Bo, 'Theories of Self-Preferencing and Duty to Deal - Two Sides of the Same Coin?' (January 31, 2015). Theories of self-preferencing and duty to deal - two sides of the same coin? Bo Vesterdorf, *Competition Law & Policy Debate*, Volume 1, Issue 1, February 2015, p.4-9.. Available at SSRN: <<https://ssrn.com/abstract=2561355>> p 8. Also see Bronner, 1998 E.C.R. I-7791 para 57

¹⁴³ Petit Nicolas, *Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf* (April 29, 2015). Available at SSRN: <https://ssrn.com/abstract=2592253> or <http://dx.doi.org/10.2139/ssrn.2592253>

¹⁴⁴ Ibid at p. 3

tying¹⁴⁵, unfair pricing¹⁴⁶ and other legal avenues.¹⁴⁷ Petit proposes two prongs to the *indispensability* test of *Bronner*.¹⁴⁸ One of which is whether there are any actual alternatives available to switch to¹⁴⁹ and the other is whether creating other variants is economically viable or not?¹⁵⁰ ‘This argument is used to suggest that in the context of *GoogleSearch*, even if the substitutability test could be satisfied due to availability of alternative routes to the market for comparison shopping sites, it also has to be established that it would be “economically viable” for another undertaking to replicate Google’s search engine.’¹⁵¹

The approach adopted in the cases of *Magill*, *IMSHealth* and *Microsoft*, by applying in the *GoogleSearch* case proves that the existence of other search engines through which the access is sought, neither makes the services of Google search indispensable to carry out business nor it will exclude all the effective competition in the market.¹⁵² Therefore, the abusive conduct of Google cannot fall under the essential facilities doctrine.

3.3. Search Bias and Abuse of Dominance by Google in India

The CCI acknowledged that Google having maintained consistently high market shares enjoyed other technical advantages and held that Google is a dominant player in the market for general web search services and market for search advertising services.¹⁵³ Having established Google’s dominance, the Commission considered the following issues to assess the abuse. The first issue was whether Google biases search results?¹⁵⁴ The second issue was whether Google imposes unfair conditions on its advertisers?¹⁵⁵ The third issue was whether Google’s distribution agreements restrict competition?¹⁵⁶ And the last issue was whether Google’s intermediation agreements restrict competition?¹⁵⁷

In this part, I will constrain my discussion only to the issue pertaining to search bias by Google in India as considered by the CCI. The Commission has emphasized on the extra ordinary responsibility of a dominant player especially in the digital market where due to the multi- sided nature of the market and high network effects can lead to entry barriers and high switching cost for the users.¹⁵⁸ The CCI in the decision regarding the special responsibility of Google has explained that,

‘Since Google is the gateway to the internet for a vast majority of internet users, due to its dominance in the online web search market, it is under an obligation to discharge its special responsibility. As Google has the ability and the incentive to abuse its dominant position, its “special responsibility” is critical in ensuring not only the fairness of the online web search and search advertising markets, but also the fairness of all online markets given that these are primarily accessed through search engines.’¹⁵⁹

The Commission on the basis of investigation report submitted by the DG concluded that Google was guilty of search bias with respect to its specialized results designs namely (i) Universal Results, and (ii) Commercial Unit

¹⁴⁵ *Ibid* at p. 5

¹⁴⁶ *Ibid* at p. 6

¹⁴⁷ *Ibid* at p. 7

¹⁴⁸ *Ibid* at p. 12 and 13

¹⁴⁹ Petit Nicolas at p. 12. Also see Akman, Pinar, *The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law* (July 19, 2016). [2017] (2) *Journal of Law, Technology and Policy* 301, p. 313

¹⁵⁰ Petit Nicolas at p. 13 Also see Akman, Pinar, *The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law* (July 19, 2016). [2017] (2) *Journal of Law, Technology and Policy* 301, p. 313

¹⁵¹ Petit at para 12-13 and also see Akman, Pinar, *The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law* (July 19, 2016). [2017] (2) *Journal of Law, Technology and Policy* 301, p 314

¹⁵² David Wong, ‘Competition Law in the Computer Age: Examining Microsoft v Commission’ *keep Calm Talk Law*, 19 January 2018, accessed 5 August 2019

¹⁵³ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 125

¹⁵⁴ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 172

¹⁵⁵ *Ibid*

¹⁵⁶ *Ibid*

¹⁵⁷ *Ibid*

¹⁵⁸ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, paras 196 and 199

¹⁵⁹ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 202

but CCI did not held Google liable for search bias in (iii) One Boxes¹⁶⁰ contrary to DG's findings.¹⁶¹ CCI dismissed the unsubstantiated finding of the DG that OneBoxes 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.¹⁶² The design of Search Engine Result Page (SERP) is crucial and any intervention in such design may result in consumer harm, as it is an integral part of competition on merit.¹⁶³

3.3.1. Universal Results

Universal Results are groups of search results for a specific category of information, such as news, images, or local businesses.¹⁶⁴ In support of Google's argument that universal search results improve the quality and relevance of results¹⁶⁵, Google submitted that after 2001 it developed category specific universal results. News articles were considered on the basis of how recent they are, local businesses were measured by location and for products Google considered price, rating and stock availability to improve the quality of the service offered by Google.¹⁶⁶ Google failed to provide material evidence to support its contention that it was inefficient to provide search results on the basis of relevance.¹⁶⁷

On the basis of investigation report and submissions by Google the CCI concluded that before 2010 the Universal Results were not ranked according to their relevance but were pre-determined with regard to their 1st, 4th and 10th positions, the practice which according to the Commission is not within competition on merits because the unfair conduct of Google created an impression that the search results were showed on the basis of relevance by the algorithms.¹⁶⁸ However, the CCI did not agree with DG's investigation that Google continued with the search bias even after change in algorithms made the results free floating based on their relevance post 2010.¹⁶⁹

3.3.2. Commercial Units

Commercial Units are result types that Google sets apart in ad space and distinguishes from search results with a "Sponsored" label.¹⁷⁰ In India the Commercial Units are only shown for shopping and flights.¹⁷¹ Google resists the contention of DG that Google treats the Commercial Units in a preferential manner because '*they are based on mechanisms that do not apply in an equivalent manner to links to non-Google websites.*'¹⁷² The Commission also observed that the conduct of Google raised anti-competitive concerns as clicking on the placement of commercial unit i.e. flight unit in India it leads the user to google flights page in a separate window and not to a third-party website like Yatra.com or MakeMyTrip.com.¹⁷³

¹⁶⁰ 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 as explained by the CCI in decision, para 165

¹⁶¹ MM Sharma, 'CCI Imposes Penalty of Rs. 136 Crores on Google for Abuse of Dominance', Vaish Associates Advocates as published on Mondaq, 30 April 2018, accessed 2 August 2019

¹⁶² Atikant Kaur, Payel Chatterjee, Pratibha Jain and Gowree Gokhale, 'CCI Intervention to Achieve A Level Playing Field in the Digital Space' Competition Law Hotline, Research and Articles, Nishith Desai Associates, 21 February 2018, accessed 25 August 2019

¹⁶³ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 204

¹⁶⁴ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 165

¹⁶⁵ It was stated that Universal Results improve the quality and relevance of Google's results in three ways: (i) they group results for a specific information category; (ii) they select results within a group based on category-specific signals that allow Google to find more relevant results for that category of information; and (iii) they show results in formats tailored to the type of information at issue, CCI decision para 209

¹⁶⁶ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 211

¹⁶⁷ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 215

¹⁶⁸ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 216

¹⁶⁹ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, paras 213 and 224

¹⁷⁰ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 165

¹⁷¹ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 232

¹⁷² C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 233

¹⁷³ C. Nos. 07 & 30 of 2012, Competition Commission of India, Matrimony.com v Google, para 248

The CCI considered the studies conducted by the European Commission on the importance of rank results in SERP and the user clicking behaviour as referred by Microsoft to the DG.¹⁷⁴ And was also of the opinion that majority of the revenue generated through the commercial units solely depends on the user traffic¹⁷⁵ and Google unfairly diverting the traffic to its own vertical search services as a result of prominent placement of Google flight unit in a Google dominant general search market is leveraging the dominance of general search market into the market for specialised search services in India.¹⁷⁶ The Commission was also concern about the user data collected by Google which can be further utilised in generating revenues from advertisers and such data may not be benefitted the other vertical search pages.¹⁷⁷

In consideration of the conduct of Google in Universal Results and Commercial Unit, the CCI found Google to be violative of Section 4(2)(a)(i) of the Act.¹⁷⁸

3.3.3. Analysis of the decision

The decision of the CCI in the Google Search Bias matter has been severely criticized on several grounds.¹⁷⁹ The CCI has no or little application of the of the principle adopted in the Google Search Bias case in practice as the decision is not sound enough to indicate upon the harm caused to the consumer or even to the competitors.¹⁸⁰ Not only on the harm theory but CCI has not efficiently analyzed the user clicking behavior in India in contrast to the European Commission's analysis in the matter of Google Shopping Case in the EU wherein the EC indicate that number of clicks were reduced by almost 50% when moved to third rank from the first rank on the SERP.¹⁸¹ The dissent order also highlights that the sponsored commercial flight unit is distinguished from the free/ generic blue link search results and thereby it cannot be assumed that the user will only or largely click on the Google sponsored result merely because of the prominent placement above the free results.¹⁸² The conclusion against Google's conduct indirectly tries to establish that the web users are not intellectually sound enough to understand the relevance of the links for their initiated query.¹⁸³ 'Finally, the views of the users of Google, on whom the Google Flights Unit is allegedly an unfair imposition, have not been accounted for in any manner in the investigation. Leave alone a reasonable sample of users, not even a single user/ searcher's view or even anecdotal account is on record for us to understand how users actually perceive the Google Flights Unit.'¹⁸⁴

¹⁷⁴ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, paras 243, 244

¹⁷⁵ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 253

¹⁷⁶ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 248

¹⁷⁷ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 249

¹⁷⁸ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, paras 216 and 253, Also see the order of the Commission, para 420, (a) Ranking of Universal Results prior to 2010 which was not strictly determined by relevance. Rather the rankings were pre-determined to trigger at the 1st, 4th or 10th position on the SERP. Such practice of Google was unfair to the users and was in contravention of the provisions of Section 4(2)(a)(i) of the Act and (b) Prominent display and placement of Commercial Flight Unit with link to Google's specialised search options/ services (Flight) amounts to an unfair imposition upon users of search services as it deprives them of additional choices and thereby such conduct is in contravention of the provisions of Section 4(2)(a)(i) of the Act

¹⁷⁹ Smriti Parsheera, 'CCI's order against Google: infant steps or coming-of-age moment?', *The Leap Blog on Law, Economics and Policy*, 22 February 2018, accessed 3 August 2019

¹⁸⁰ Sahithya Muralidharan, 'India- *Matrimony.com v Google*: A Cat on the Wall Approach to Intervening in the Expanding Digital Space' *Kluwer Competition Law Blog*, 20 March 2018. Also see dissent order para 18, 'It is our considered view that without any relevant data on or analysis of user click behaviour in India vis –à–vis the Commercial Units or actual traffic flow to these units, diversion of traffic by Google to the extent that would prevent third-party verticals to acquire sufficient volume of business, as claimed by the Majority, is not substantiated.' Page 179. And para 21 page 180 (main decision)

¹⁸¹ EU decision paras 454 to 461 also see C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 11 of the dissent order

¹⁸² C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, Dissent decision, para 8

¹⁸³ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, para 8

¹⁸⁴ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, Dissent order, para 13

4. Is the Existing Law Sufficient Enough to Handle the Emerging Issues? - A Need For Revised Regulation

Diker Vanberg argues that ‘the commercialization of search coupled with innovative business models that change persistently, there is a growing potential for search engines to engage in anticompetitive practice.’¹⁸⁵ ‘With the rise of virtual competition’ there is an ongoing concern from the point of view of some, that there is a need for more intervention as access to big data and assistance from the network effect is leading to high concentration levels, while on the other hand ‘non-interventionists state that the threat of disruptive innovation pressures even dominant firms to innovate and compete.’¹⁸⁶ There is a need to revisit the process of defining a market concerning abuse of dominance cases in online platform¹⁸⁷ as ‘in the digital world, market boundaries might not be as clear as in the “old economy”. They may change very quickly.’¹⁸⁸ Nowadays, the scale of economies and strong networks witnesses that usually competition happens for the market and not in the market. The volatile nature of the platforms makes it challenging to assess the cases in the stipulated period of time because of the complexities involved on the assessment of anti- competitive concerns. ‘By “preventive arm”, we mean *ex-ante* measures, which could alleviate the concerns that competition policy is unable to keep pace with market developments in high-tech sectors as by the time regulators issue their decisions, markets have typically already evolved.’¹⁸⁹

There is a need to understand how the technology of algorithms operate and undertake functions like indexing, ranking, displaying content, triggering and crawling. Due to these types of editorial functions there is a possibility that the algorithms have in- built biases for a certain type of content even without the knowledge and anticipation of the designer.¹⁹⁰ And such are characterized by the property to automatically learn and improve from experience without being extensively programmed as installed in the Google search.¹⁹¹ The presence of complex algorithms in the Google case in both the jurisdictions have highlighted the presence of potential issue in competitiveness of online platforms. In the era of data driven market ‘there is the need to shift towards smart regulation, which understands the dynamics of digitised hands.’¹⁹² Looking at the complex algorithm based markets the question is who to be held responsible for the challenges associated with it. The algorithms themselves keep changing and adapting information and one cannot control the type of result it provides.¹⁹³

Considering, the decision of European Commission in the Google comparison shopping services case, the Commission did not pronounce any remedy instead placed the burden on Google to come up with a solution which can address the Commission’s concerns on theory of harm. This indicates that the Commission is still not clear as to which conduct can be allowed and which is to be restricted. The argument can be based on the notion that even after 8 years long investigation the Commission did not directed Google towards remedial approach rather rejected Google’s three set of commitments during the investigation.¹⁹⁴ The EC mandated Google to bring

¹⁸⁵ Diker Vanberg, A, ‘From Archie to Google -Search engine providers and emergent challenges in relation to EU competition law’, European Journal for Law and Technology, Vol. 3, No. 1, 2012, p. 1

¹⁸⁶ Ariel Ezrachi, Maurice E Stucke, ‘The fight over antitrust’s soul’, Journal of European Competition Law & Practice, Volume 9, Issue 1, January 2018, Pages 1–2, <https://doi.org/10.1093/jeclap/lpx070> p. 1

¹⁸⁷ Daniel Mandrescu, ‘Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)’ (2018) 41 World Competition, Issue 3, pp. 453–483, p 453

¹⁸⁸ Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, Competition Policy for Digital Era, Final Report European Commission, p 3

¹⁸⁹ NME submission to the European Commission: Shaping competition policy in the era of digitisation, News Media Europe, p 8

¹⁹⁰ Nicolo Zingales, ‘Google Shopping: beware of ‘self- favouring’ in a world of algorithmic nudging’ Competition Policy International (CPI), February 2018, p 3

¹⁹¹ Cade Metz, ‘AI Is Transforming Google Search. The Rest of the Web Is Next’, Wired (2 April 2016). Available at <<https://www.wired.com/2016/02/ai-is-changing-the-technology-behind-google-searches/>>

¹⁹² Nidhi Singh and Anku Sharma, ‘Googly for Google: Competition Commission of India Tests Search Engine’s Stance’, KSLR Commercial & Financial Law Blog, May 3 2018 <<https://blogs.kcl.ac.uk/kslrccommerciallawblog/2018/05/03/googly-for-google-competition-commission-of-india-tests-search-engines-stance/>> accessed 2 August 2019

¹⁹³ Beata Mäihäniemi, ‘Lessons from the Recent Commission’s Decision on Google. To Favour Oneself or Not, That is the Question’, Working paper, The Legal Tech Lab, University of Helsinki, p. 21

¹⁹⁴ Dr Avantika Chowdhury, ‘The Google Case: shop till you drop (off the screen)’, Competition Economics, Oxera, March 2018. Last accessed on 7 August 2019

an end to the infringement within 90 days of the decision¹⁹⁵ and also demanded to notify the Commission about the measures by which Google intend to comply with anti- trust regulations.¹⁹⁶

It is highlighted by the members of the CCI in the dissent order of Google Search Bias case in India that the regulatory intervention should be based on material evidence contrary to base on mere perception about the market functionality because exponential growth of digital commercial activity enables the platform players to acquire huge personal data and the conduct of such dominant platforms should only be scrutinised when the activity of which hampers the consumer interest or innovation.¹⁹⁷

Personal data has been used in substitute of currency in both the cases. This implies that although the digital platforms provides increased transparency and reduced cost but at the expense of consumer data which can further be utilised in order to manipulate the search results and the advertisements displayed and even the market prices to an extent.

The Furman report on ‘Unlocking Digital Competition’ also proposes to establish ‘digital markets unit’¹⁹⁸ to tackle the challenges of the digital market that as in the digital strengthening economy there is a need for updated policies to handle abusive practices which can maximise consumer welfare and reduce entry barriers that hinder the competition.¹⁹⁹ There is a realisation for the need to develop new regulations or amend the existing law to deal with the challenges involved in the digital space therefore, the EU Anti- trust Commission launched e- commerce sector inquiry in order to find out potential barriers and anti- trust concerns related to the digital single market.²⁰⁰

European competition policy commissioner, Margrethe Vestager observed that, ‘European citizens face too many barriers to accessing goods and services online across borders. Some of these barriers are put in place by companies themselves. With this sector inquiry my aim is to determine how widespread these barriers are and what effects they have on competition and consumers. If they are anti-competitive we will not hesitate to take enforcement action under EU antitrust rules.’²⁰¹ The Commission understands that e- commerce is crucial for economic growth and there might be practices which might hamper the growth of the market being restrictive under either Article 101 or 102 of the TFEU and therefore, this investigation would help the Commission to understand the prevailing practices in the digital market and open cases against anti- competitive practices.²⁰² The Commission gathered information regarding the consumer goods and digital content from nearly 1900 stakeholders and 8000 distribution agreement and license agreements throughout the EU as a result of which the Commission successfully initiated three anti- trust investigations against holiday accommodation, PC video games distribution and consumer electronics pricing practices²⁰³ which potentially can hamper the competition.²⁰⁴

Considering the growing nature of digital platforms, collected consumer data can further be utilised to decide the market prices. Ariel Ezrachi argues that, if the players in the market can decide the competitive price then why not the Government does so using price algorithms.²⁰⁵ Citing an example of San Francisco city which faced parking price issues in the year 2011, the wireless parking program sensor decided the prices according to the

¹⁹⁵ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 701

¹⁹⁶ CASE AT.39740 *Google Search (Shopping)*, European Competition Commission, 27 June 2017, para 702

¹⁹⁷ C. Nos. 07 & 30 of 2012, Competition Commission of India, *Matrimony.com v Google*, Dissent order, para 33, page 189

¹⁹⁸ *Unlocking Digital Competition*, Report of the Digital Competition Expert Panel, p. 5

¹⁹⁹ *Ibid* at p. 2 and 5

²⁰⁰ Anti- trust sector inquiry into e- commerce, European Commission available at <http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html>

²⁰¹ Antitrust: Commission launches e- commerce sector inquiry, IP-15-4921 European Commission Press Release

²⁰² Antitrust: Commission launches e- commerce sector inquiry factsheet, MEMO/15/4922, Brussels 6 May 2015

²⁰³ Anti- trust: Commission opens three investigations into suspected anticompetitive practices in e- commerce, IP/17/201, European Commission Press Release, Brussels 2 February 2017

²⁰⁴ Antitrust: Commission publishes final report on e- commerce sector inquiry- frequently asked questions, MEMO/17/1262, European Commission Fact Sheet, Brussels 10 May 2017

²⁰⁵ Ezrachi, Ariel, and Maurice E. Stucke. *Virtual Competition*, Harvard University Press, 2016. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/uea/detail.action?docID=4742341> p 213

high and low demand rather than charging a static price for all the time.²⁰⁶ Similarly in the given scenario as well the Government(s) should come up with such kind of solutions which can control the anti- competitive nature of the activities in the digital market.

The three sided dimensions which reflects the concern regarding the nature of digital competition is that (i) the ability of degrading the quality for a platform which is economically driven; (ii) the consumers are not in a position to accurately assess the quality degradation; and (iii) it is nearly impossible or quite challenging for other players to convey the degradation of quality to the consumers and ask them to switch.²⁰⁷

The Furman report proposes numerous recommendation to enhance the existing competition regulation which promotes fair, pro- competitive conduct by these type of platforms.²⁰⁸ In the report's view 'the best way of achieving these outcomes is through introduction of a digital platform code of conduct, that clarifies acceptable conduct between digital platforms and their users, and is developed collaboratively by the proposed new digital markets unit with platforms and other affected parties.'²⁰⁹ Another way of achieving this goal is to foster data systems with mobility and open standards which can contribute to the competition and innovation.²¹⁰ The implementation of the proposed recommendation would imply that the EU competition policy is departing from economic based approach to a presumption of illegality in the favour of technology enabled markets.²¹¹ These recommendations are indeed helpful in creating a newly developed regulation however there are also certain risks attached with the implementation of the same. It is unclear whether this would result into a successful mechanism or would further deteriorate anti- trust stand.

5. Conclusion

'Established online platforms that are subject to very low competitive pressure both inside the market or from potential new entrants are unlikely to pay a price in terms of loss of users if they increase participation costs, change their privacy settings, or even if their reputation is compromised.'²¹² Therefore, I think in the digital age, there is a need to adopt concrete rules and regulations to handle abusive behavior by dominant entities in digital platform, because there is already existing literature and development on the offline market and related concerns. As discussed in the sections above there are a number of factors which distinguishes the market for search based services and online advertising services from most of the other markets. The distinctive factors are two- multi sided nature, network effects, self-learning algorithms, high level of research and development, and constant need for innovation. Therefore, there is no comparison between single sided markets and multi sided markets because the factors mentioned are not considered in single sided market assessment.²¹³ On one hand, network effects increase the possibilities for consumer welfare however, on the other hand, it also raises potential threat to the competitive structure of the market and increases entry barriers. It is undisputed that the market for search engine has no other substitution because search engines work as 'an essential first point of call for anyone venturing onto the internet.'²¹⁴ According to Kristine Laudadio a high number of the users on the one side of market can attract higher revenues in the other side of the market by attracting more advertisers who want to take the advantage of more users coming to a platform such as Google which increases the positive feedback loop because the Google can provide additional services to its users by funding in the innovation or through acquisition of the other type of services such as Google Maps, YouTube and Google Reviews through

²⁰⁶ Ezrachi, Ariel, and Maurice E. Stucke. *Virtual Competition*, Harvard University Press, 2016. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/uea/detail.action?docID=4742341> p 214

²⁰⁷ Jubin Mehta, 'Boomerang Commerce, a Dynamic Price Optimization Company Raises \$8.5 Million,' *Your Story* (July 16, 2014), <https://yourstory.com/2014/07/boomerang-commerce-raises-8-5-million> accessed 21 August 2019, Ezrachi, Ariel, and Maurice E. Stucke. *Virtual Competition*, Harvard University Press, 2016, p 139

²⁰⁸ *Unlocking Digital Competition*, Report of the Digital Competition Expert Panel, p. 58.

²⁰⁹ *Unlocking Digital Competition*, Report of the Digital Competition Expert Panel, p. 58, para 2.24

²¹⁰ *Unlocking Digital Competition*, Report of the Digital Competition Expert Panel, p. 65- 77

²¹¹ Elias Deutscher, 'Is Furman right to propose ex ante platform regulation as the best way to address competition concerns in the digital economy?' *Competition Policy Blog*, Centre for Competition Policy

²¹² *The Age of Artificial Intelligence, Towards a European Strategy for Human-Centric Machines*, EPSC Strategic Notes, European Political Strategy Centre, Issue 29, 27 March 2019, p. 7

²¹³ David S. Evans & Michael Noel, 'Defining Antitrust Markets When Firms Operate Two-Sided Platforms' 2005 *COLUM. BUS. L. REV.* p. 664

²¹⁴ Rufus Pollock, 'Is Google the Next Microsoft?' *Competition, Welfare and Regulation in Online Search*, 9 *REV. NETWORK ECON.* 1 (2010)

the additional revenue generated from the online advertisements.²¹⁵ The search engines not only attracts the users and the advertisers but also retains their data in order to improve the search results and relevance of the advertisement displayed.²¹⁶ The data can then further be used to attract advertisers for which the users have higher demand and this interdependence reduces the chances of users switching to the other competitor search engine. As rightly argued by Rufus Pollock in this context that 'search engines display many of the characteristics of natural monopolies, as their cost structure involves important fixed costs, such as hardware, support, updates, and monitoring, but almost zero marginal costs on both the user and advertiser side of the market.'²¹⁷

As a general phenomenon the ultimate goal of competition law is to protect and promote competition which can be achieved through two means. Firstly, by preventing anti- competitive activities *ex- ante* through legislative intervention and secondly, by punishing or detecting the harm caused on the competitive market structure with *ex- post* mechanism.²¹⁸ As observed in the Google cases the goal of the competition law is attempted to achieve through the *ex- post* mechanism once the dominance was abused. The EC left the scope of addressing competition issue open for Google to determine and ensure that the harm to the competition is restored and Google's conduct does not hamper the competition in future.²¹⁹ Therefore, there is a need for a compelling regulation which can help in adopting *ex- ante* measures to be abide by undertaking(s) to ensure the compliance with the maintenance of market structure. This step will be beneficial in two ways. First it will help the players in the market in effective regulation of the digital platforms and second the anti- trust authorities can keep an eye on the conduct of such platforms to make sure that the consumer interest is not at stake. The Google case is just a signal for the authorities to be prepared for such kind of abuses or anti- competitive activities for future. The market for search engine as it is seen today, Google has been a dominant player since a quite long time and considering the entry barriers which require the existing or potential competitors to substantially invest in the research and development it is no sooner possible that any other player can override the market power held by Google today. Needless to mention that Google also operates in the other markets apart from the market for general search services or comparison shopping services or online advertising services. With this line of cases at hand there is an urge in the present online market to have a concrete set of *ex- anteregulations* because 'While some markets may self-correct, the findings of the Furman report suggest that rapid self- correction in markets dominated by large digital platforms is unlikely.'²²⁰

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