

USD 21 MILLION PENALTY IMPOSED ON GOOGLE FOR
ABUSE OF DOMINANT POSITION

The *Competition Commission of India* (hereinafter referred to as, “CCI”), has held ¹ in its recent *Order* (hereinafter, referred to as “Order”) on an Information filed under Section 19 (1) (a)² of the *Competition Act, 2002* (hereinafter referred to as, “Act”) by Matrimony.com that *Google*³ has abused its Dominant Position and imposed a penalty of 21 million USD on Google on the *relevant turnover*⁴-

ISSUES CONSIDERED BY CCI:

1. What is the **relevant market(s)**⁵ in the present case?
2. Whether Google is dominant in the said relevant market(s)?
3. If the finding on Issue No. 2 above is in the affirmative, whether Google has abused its dominant position in contravention to Section 4⁶ of the Act?

¹ In Re: Matrimony.com Ltd. v. Google LLC & Ors, (Case No. 07 of 2012), CCI’s Order dated February 8, 2018.

² Section 19 (1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 or sub-section (1) of Section 4 either on its own motion or on—(a) receipt of a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association.

³ Google (“**Google**” shall denote collectively the three Opposite Parties *viz.*, **Google LLC, Google India Private Limited and Google Ireland Limited**).

⁴ Relevant Turnover as discussed by the Supreme court of India in *Excel Crop Care Limited v. Competition Commission of India & Anr.*, Civil Appeal No. 2480/ 2014

⁵ The term ‘relevant market’ is defined under Section 2(r) of the Act as the market, which may be determined by the Commission with reference to ‘relevant product market’ and ‘relevant geographic market or with reference to both the markets.

⁶ Section 4- Abuse of dominant position- (1) No enterprise shall abuse its dominant position.

CCI'S ORDER-

1. Google enjoys a dominant position in Online General Web Search and Web Search Advertising Services markets in India.
2. CCI has held that Google was abusing its dominant position by favoring its own vertical partners in its search results.
3. The CCI refrained from issuing any *cease order* since the contravention remained confined to the period between May, 2009 - Oct, 2010 and was no longer continuing.
4. However, the CCI issued a *desist order* directing Google to refrain from such activities in future.
5. CCI has directed Google to *not enforce* any restrictive clauses on third party websites.
6. Further, CCI relied on the Hon'ble Supreme Court's judgment, *Excel Crop Care Limited v. Competition Commission of India & Anr.*, Civil Appeal No. 2480/ 2014 to impose penalty under Section 27 (b)⁷ of the Act only on "relevant turnover", thus, imposing a penalty of US 21\$ ml on Google for abusing its dominant position.

FACTUAL MATRIX

An information was filed under Section 19 (1)(a)⁸ of the Act by erstwhile Consim Info Private Limited, now Matrimony.com Ltd and ***Consumer Unity & Trust Society*** (hereinafter referred to as, "**Informants**") alleging contravention of provisions of Section 4⁹ of the Act.

It was stated by the Informants that Google, being in dominant position because of its market share, size, resources and reputation, was manipulating its search results to the advantage of its vertical partners. It was alleged in the information that Google was

⁷ Section 27 (b) impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse

⁸ *Supra* note 2.

⁹ *Supra* note 6.

mixing many of its vertical partners' results into its organic search results, thereby, prominently displaying its own sites and those of its vertical partners.

DIRECTIONS TO THE DIRECTOR GENERAL AND FINDINGS THEREOF

CCI after considering the material available on record, *vide* its order dated 03.04.2012, directed the **Director General** (hereinafter referred to as, “**DG**”) under Section 26 (1)¹⁰ of the Act to cause an investigation into the matter.

On observations by the DG that **Google Ireland Ltd., Ireland** (hereinafter referred to as, “**GIL**”), a subsidiary of Google Inc., was an important party in terms of conduct of operations in India, the CCI directed GIL to be included as **Opposite Party** (hereinafter referred to as, “**OP**”). On the issue of dominance, Google was found to be a dominant market in both, Online General Web Search Services and Online Search Advertising in India. It was observed by the DG that Google did not disclose the details of their quality scores to the Advertisers.

It was also noted by the DG that Google's Compensation policy to compensate advertisers for losses attributable to system errors on the part of Google was entirely discretionary.

Google was also not required to pay any consideration for its house ads which gives it an edge over other Competitors. Since Google is aware of the quality scores, it is even in a position to ensure that its own house ads are assigned a higher quality score.

Further, it was found that Google was using its dominant position to impose certain restrictive conditions in its Agreements for syndicate search and advertising services,

¹⁰ Section 26- Procedure for inquiry on complaints under Section 19- (1) On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under Section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.

which varied across types of Agreements, which in turn was restricting competing service providers by creating entry barriers for them.

Google also entered into several agreements with third party tool developer entities containing restrictive clauses, which was causing competition to be affected adversely. Thus, the DG found Google to be contravening the provisions of Sections 4(2)(a)(i), 4(2)(b)(ii)¹¹, 4(2)(c)¹² and Section 4(2)(e)¹³ of the Act.

ANALYSIS

The Competition Commission of India (hereinafter referred to as, “**CCI**”) held that Google has abused its Dominant Position on account of the following:

i. DISCRIMINATION IN SEARCH RESULTS:

The Universal Results’ ranking prior to 2010 were **not** strictly determined by relevance, which was held to be unfair to the users and in contravention of the provisions of Section 4 (2)(a)(i)¹⁴ of the Act.

Contentions of Google: Google argued that its search design was like free search and stated that the results were determined purely by relevance. Prior to 2010, the fixed positions of Universal result were due to lack of technological know-how, Google contended that the content providers whose result showed in the boxes did not pay Google and hence, the question of favoring vertical partners did not arise. It was stated by the OP

¹¹ Section 4-(2) There shall be an abuse of dominant position, if an enterprise,-(a) directly or indirectly, imposes unfair or discriminatory- (i) condition in purchase or sale of goods or services (ii) price in purchase or sale (including predatory price) of goods or service;

¹² Section 4-(2) There shall be an abuse of dominant position, if an enterprise,-(c) indulges in practice or practices resulting in denial of market access

¹³ Section 4-(2) There shall be an abuse of dominant position, if an enterprise,-(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

¹⁴ *Supra* note 11.

that its business model was two sided i.e., it not only provided service to users but also had a paid engagement with advertisers.

CCI's Majority View: Google was driving traffic to its own pages which enabled it to generate higher revenues through advertisements. The ranking results were affected from Google utilizing its dominant position in the general web search to provide gateway for users to find relevant verticals. On an observation made by the CCI with respect to the Search Flight, it was held that Google was unfairly placing commercially paid results above the most relevant results, thereby depriving the users of additional choices by pushing down or pushing out other travel related websites and making unfair impositions upon users, which was found to be in contravention to the provisions of Section 4 (2)(a)(i)¹⁵ of the Act.

ii. UNFAIR CONDITIONS IN NEGOTIATED SEARCH INTERMEDIATION AGREEMENTS

On Google's *negotiated search intermediation agreements*, the CCI observed that Google was preventing partners with whom it entered into negotiated search agreements from implementing any search services on their websites that were substantially similar to Google's, which was also a contravention to Sections 4(2)(a)(i)¹⁶, 4(2)(c)¹⁷ and Section 4(2)(e)¹⁸ of the Act.

Contentions of Google: Google contended that the Intermediation Agreements were non-exclusive and that the investigation by DG did not

¹⁵ *Supra* note 11.

¹⁶ *Ibid*

¹⁷ *Supra* note 12.

¹⁸ *Supra* note 13.

point to abuse of dominance but merely, only a possibility of abuse of dominance.

CCI's Majority View: CCI concluded that there were certain restrictive conditions in these Agreements which amounted to denial of market access and was accordingly in contravention of Section 4¹⁹ of the Act.

iii. UNFAIR DISTRIBUTION AGREEMENTS

Google had Distribution Agreements with Apple and Mozilla for setting Google as the default search engine. These long term contractual arrangements were strengthening Google's position in the relevant market by denying access to others.

Contentions of Google: Google contended that merely setting Google as the default search engine would not deny market access to competitors. Google pointed out that there was no evidence of exclusivity in the Distribution Agreements. It was further submitted that other search engines were default providers on Mozilla's browser in few countries.

CCI's View: CCI noted that this allegation against Google was with respect to the potential it created for strengthening its position in the market. CCI stated that these agreements were non-exclusive and it not been established that these agreements were denying market access. Since the users were free to use other search engines by changing the settings, CCI rejected DG's observations stating that there was no ground for holding Google accountable.

iv. UNFAIR CONDITIONS ON TRADEMARK OWNERS AND THIRD PARTIES

Google was imposing unfair conditions on trademark owners and third parties could not bid on those trademarks as keywords. However, its own trademarks were not subject to same kind of bidding and unfair conditions.

¹⁹ *Supra* note 6.

Contentions of Google: Google contended that it does not restrict owners of trademark from bidding for the keywords and does not violate Indian Trademark Laws. The Ad Text Policy of Google specifically exempted any investigation against third parties using any term descriptively in ordinary meaning and any complaints in relation to Ad Text violating trademark were not addressed in its Ad Text Policy.

CCI's View: CCI concluded that there was no evidence to establish any imposition of unfair conditions and it was not CCI's jurisdiction to deal with trademark related infringement issues. Similarly, it was not within the powers of the DG to delve into trademark issues which were not covered under the scope of an Antitrust Regulator.

PENALTY

CCI relied on the Hon'ble Supreme Court's judgment, *Excel Crop Care Limited v. Competition Commission of India & Anr.*, Civil Appeal No. 2480/ 2014 to impose penalty under Section 27 (b)²⁰ of the Act only on "relevant turnover", thus, imposing a penalty of US 21\$ ml on Google for abusing its dominant position.

-by Kopal Shrivastava

Eesha Govilla

²⁰ *Supra* note 7.