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**FROM THE DARLING OF SILICON VALLEY TO A MONOPOLY
GATEKEEPER: GOOGLE’S ANTI-TRUST VIOLATIONS AND PRIVACY
CONCERNS**

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ABSTRACT:

For many years, Google has used anticompetitive tactics to maintain and extend its monopolies in the markets to become one of the wealthiest companies on the planet, with a market value of \$1 trillion and an annual revenue exceeding \$160 billion. This has led to several conflicts between Google and various state authorities across the globe. Google has thus faced several lawsuits, indicating its abuse of dominant position in the market. The U.S. Department of Justice has accused Google of maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets. The Competition Commission of India (CCI) has also currently accused Google of exploiting its dominant position in the Indian smartphone market. This paper analyses several such pending and decided lawsuits filed against Google, which have significant implications for the anti-trust laws of various countries. A handful judgements have drawn a connection between the privacy breaches and anti-trust concerns of big data companies. Google has faced considerable scrutiny over the years due to its privacy concerns, as it collects a massive amount of user data, which it then uses to serve targeted ads. This paper examines the effect of Google’s privacy concerns on its anti-trust violations, drawing an inference that they must be read in consonance to determine the extent of Google’s anticompetitive practices.

Keywords: Antitrust, competition law, dominant position, monopoly, privacy.

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INTRODUCTION:

In recent years, the growth and development of digital platforms has driven the change of digital marketplaces, and we are currently seeing a trend toward integrated technological services. Better social interactions and devoted networking have been made possible, for example, by Facebook's acquisition of Instagram and WhatsApp and Microsoft's acquisition of LinkedIn. Even though this technology-enabled market is convenient and advantageous for users and competitors worldwide, the competitive structure of the market and eventually the customers could be harmed by the hidden and/or prospective issues behind the actions these platforms engage in.

Over half of the worldwide internet market is operated by the Big Five in tech: Google, Amazon, Apple, Facebook, and Microsoft.² Due to these conglomerates' expansion and the purchase of more businesses, they now are able to participate in anti-competitive practises such market dominance abuse, deep and widespread market control, and the signing of both horizontal and vertical agreements. Antitrust authorities in a number of places are keeping an eye on these businesses because of their actions. In regards to antitrust issues, such as search manipulation, Android dominance, and online advertising monopoly, Google in particular has often been at the centre of criticism in many regions of the world.

The sole way to search for content on the internet is via search engines, which serve as the gateway. As of 2019, the most prominent search engines are Google, Bing, and Yahoo.³ According to the data available on Statista, Google held the most global market share with 81.95 percent, followed by Bing with 10.51 percent and Yahoo with 2.61 percent.³

With a \$1 trillion market value, Google is among the world's richest firms and acts as the only gatekeeper to the internet for billions of users and innumerable marketers. In order to preserve and grow its monopolies in search and search advertising, Google has employed anticompetitive practises for years. Google has by tying up with several other companies like

²Conor Sen, "*The 'Big Five' Could Destroy the Tech Ecosystem,*" Bloomberg, November 15, 2017, <https://www.bloomberg.com/opinion/articles/2017-11-15/the-big-five-could-destroy-the-tech-ecosystem>

³Alex Chris, "*Top 10 Search Engines in the World*" Reliablysoft.net, Digital Marketing Agency, <https://www.reliablysoft.net/top-10-search-engines-in-the-world/>

Apple, etc., has actively cut down on the choice available to the customers in the market.

Relating to such antitrust violations of Google, several countries globally have initiated actions and have also fined the enterprise billions of dollars over the last few years.

Moreover, Google has notoriously been known to violate the privacy of its users. Google, as a major technology company, has faced privacy concerns over the years due to its vast data collection practices, the range of services it offers, and its advertising-driven business model. Google collects a significant amount of user data across its various services, including search, Gmail, YouTube, Maps, and more. Google tracks the location of users through various services, such as Google Maps and mobile devices. This data is used to personalize user experiences, but it also raises concerns about the extent of information collected and how long it is retained.

Google uses the data it collects to create detailed user profiles for targeted advertising. While personalized ads can improve user experience, some users are concerned about the extent of data profiling and the potential for it to be misused. Google has faced criticism over allegations of unclear privacy policies and issues related to obtaining user consent for data collection.

It is important to note that the competition law jurisprudence has slowly started to incorporate privacy violations of a particular enterprise while analysing its anti-competitive practices. It is contended that privacy should be one of the foremost non-price parameters to understand the extent of a company's abuse of dominance in the market. Though certain jurisdictional issues have hindered authorities from adjudicating on privacy concerns along with antitrust matters, gradually but progressively, some authorities including the Competition Commission of India have proceeded in the integrationist direction.

ANTI-TRUST LAW IN INDIA AND GOOGLE'S COMPLIANCE ISSUES:

A. Overview of the competition law in India:

The Competition Act, 2002⁴ is the principal legislation in India that deals with matters of competition and attempts to stop anti-competitive behaviour in the marketplace. The

⁴ Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India)

Monopolies and Restrictive Trade Practices Act, 1969⁵ was replaced by this act. The primary objective of the Competition Act is to promote fair competition and prevent practices that have an adverse effect on competition in India.

The act establishes the Competition Commission of India (CCI)⁵ as the oversight organisation in charge of enforcing the nation's competition laws. The CCI consists of a chairperson and members⁶ and is empowered to investigate and adjudicate matters related to anti-competitive practices.

The act prohibits agreements⁷ that significantly impair competition, such as bid-rigging, cartels, and contracts that limit the manufacture, supply, distribution, storage, purchase, or control of goods or services. The act prohibits the abuse of dominant positions by enterprises. Abuses of dominant position might include actions like setting unfair or discriminatory terms, charging predatory prices, and restricting production or technological advancement at the expense of customers. The act also regulates combinations, which include mergers and acquisitions that may have an appreciable adverse effect on competition in India.

When it comes to antitrust violations in India, the Competition Commission of India has the power to impose penalties on the infringers. The order must include justification for any fine that is awarded that is different from the acceptable amount indicated in the guidelines. The guidelines are intended to assist CCI in assessing the right amount of penalty. Penalties should not be disproportionate, it is undeniably true, but that does not imply they should not be based on global turnover. Ultimately, the severity of the violation determines the penalty, which can range from 0% to 10% of the average turnover of the infringer company for the past three financial years or three times its profits for the past three financial years whichever is higher.¹²

B. Google's compliance with the Antitrust laws in India:

Google being one of the leading search engines, undeniably has a dominant position in the market, having over 80% of the market share among leading desktop search engines.¹³ To reach such a position in the market and more importantly to maintain that position, google

⁵Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India)

⁶Monopolies and Restrictive Trade Practices Act, 1969, No. 54, Acts of Parliament, 1969 (India)

⁷Competition Act, 2002, § 7, No. 12, Acts of Parliament, 2003 (India)

has engaged in anti-competitive practices be it enter into anti-competitive agreements with other players in the market, or abuse its dominant position in the market. On multiple occasions, google has been held under fire by the Competition commission of India for engaging in such practices. One such incident involved the CCI imposing a fine of INR 135.86⁸ crore under Section 4 of the Competition Act, 2002, in response to Google's alleged abuse of its dominance in the Indian market by favouring its own vertical search sites and manipulating search results. The allegations were made by Matrimony.com and Consumer Unit Trust Society of India ('CUTS') in two separate complaints. The commission imposed a penalty of 5% of Google's average total revenue generation from its Indian operations from various business segments for the financial years of 2013, 2014 and 2015.⁹

C. CCI's case against Google (Google Android case):

Google, having been involved in numerous legal proceedings in India and various other countries globally concerning its anti-competitive practices, encountered another lawsuit in India in the recent past.

The informants, in their petition¹⁰ against Google stated that Android is an open-source mobile operating system, freely usable and developable. Most Indian smartphone and tablet manufacturers used Android along with Google's proprietary applications and services known as Google Mobile Services (GMS). GMS includes apps like Google Maps, Gmail, and YouTube, exclusively available through GMS and not separately downloadable by manufacturers. To install these services, manufacturers must enter agreements with Google, and end-users cannot directly access these services. They also claimed that Google requires smartphone and tablet manufacturers in India to exclusively pre-install Google's applications and services to access any part of GMS. This practice is claimed to hinder the development and market access of rival applications, violating competition laws. Additionally, Google is accused of tying or bundling certain applications and services with other Google offerings, preventing the development and market access of competitors. Furthermore, Google

⁸Matrimony.com v Google, Case Nos. 07 and 30 of 2012, Competition Commission of India, para 439.

⁹Supra n.14

¹⁰Umar Javeed vs Google LLC, Case No. 39 of 2018, Competition Commission of India

allegedly prevents manufacturers from developing and marketing modified versions of Android on other devices.

The Director General's investigation found that Google's insistence on pre-installing the entire Google Mobile Services (GMS) suite through the Mobile Application Distribution Agreement (MADA) constitutes the imposition of unfair conditions on device manufacturers. Requiring the pre-installation of Google's proprietary apps, particularly the Google Play Store, upon the signing of the Android Field Test Agreement (AFA)/Android Compatibility Commitment (ACC), was determined to diminish manufacturers' ability and motivation to develop devices with alternative Android versions. This practice was deemed to restrict technical development to the detriment of consumers, solidify Google's dominant position in the online search market, and impede market access for competing search apps. The Director General also concluded that Google's actions amounted to imposing unfair or discriminatory conditions, limiting app development to the detriment of users, and violating Section 4 of the Competition Act.¹⁹

In the Indian case *Sonam Sharma v. Apple*¹¹, "Tying" was recognized by the CCI as being anti-competitive. It established the prerequisites for what amounts to anti-competitive behaviour.

- i. There must be two distinct products or services that can be tied together;
- ii. The seller's economic power over the tied product must be strong enough to significantly limit free competition in the tied product's market; and
- iii. The tied arrangement must have an impact on a "not insubstantial" amount of commerce.

All three requirements are met by Google's licencing arrangements. Initially, it connects the Android OS to its Play Store and GMS folder. Secondly, it possesses the economic clout and a stronghold in the smartphone sector to limit competition in the relevant market and compel buyers/consumers to buy the linked product. Third, a substantial amount of commerce will be impacted by any action taken by Google regarding the installation or non-installation of a service in the relevant product market, as Reuters reports²² that smartphones running the

¹¹Sonam Sharma v. Apple (2013) 114 CLA 255

Android operating system account for approximately 98% of the relevant smartphone OS market.

Subsequently, on October 20, 2022, the Competition Commission of India (CCI) ordered²⁴ Google LLC and Google India Private Limited to cease and desist from indulging in anti competitive practices and imposed a penalty of INR 1337.76 Crores. Google appealed this decision to the National Company Law Appellate Tribunal (NCLAT), arguing against bias and defending its agreements with equipment manufacturers. Google claimed its popularity was due to effectiveness and that dominance did not constitute abuse. CCI argued that Google's 98% control of India's smartphone app market violated competition laws, accusing Google of unfair practices in the Google Play Store. CCI labelled Google's policies as “digital feudalism,” “digital slavery,” “technological captivity,” “chokepoint capitalism,” and “consumer exploitation.” CCI directed Google not to force manufacturers to pre-install applications, not offer incentives for search service exclusivity, and not restrict app uninstallation.²⁵

On March 29, 2023, NCLAT upheld CCI's decision, stating Google maintained dominance, denying market access to competing search apps. NCLAT deleted certain directions but upheld the penalty of INR 1337.76 Crores.²⁶ Though Google had previously approached the Supreme

Court appealing the order of the NCLAT denying interim stay, the Supreme court granting relief to Google and affirmed NCLAT's order.²⁷ However, Google's appeal of the NCLAT's order is yet to be disposed of and is reported to be listed for final hearing in front of the Supreme Court in the initial months of 2024.²⁸ Google, as of now has deposited the entire fine amount of 1337.76 crores in the consolidated fund of India within the 30-day time period as directed by NCLAT.²⁹

5. GLOBAL ANTI-TRUST LITIGATION AGAINST GOOGLE:

A. UNITED STATES OF AMERICA

The US Justice department filed a complaint against Google in 2020 to restore

competition in search and search advertising markets.³⁰ According to the complaint, Google has signed a number of agreements requiring it to be the pre-installed default general search engine on billions of computers and mobile devices worldwide, as well as prohibiting the preinstallation of competitors. Together, these agreements effectively lock up the main ways that users access search engines and the internet. Specifically, Google is accused in the Complaint of maintaining illegal monopolies in search and search advertising by:

- Signing exclusivity contracts that prohibit the preinstallation of any rival search engine.
- Forming partnerships and other agreements that compel the preinstallation of its search programmes in strategic places on mobile devices and render them unchangeable, irrespective of user choice.
- Committing to long-term contracts with Apple that mandate Google be used as the primary search engine on the company's well-known Safari browser and other Apple search tools, thus making it the only search engine available.

Generally buying preferred treatment for its search engine on gadgets, online browsers, and other search access points with monopolistic earnings, resulting in an ongoing and self-reinforcing cycle of monopolisation.³¹

The justice department along with several Attorney Generals of various American states filed another complaint in 2023 against Google for monopolizing digital advertising technologies. The complaint, which was filed in the U.S. District Court for the Eastern District of Virginia, claims that Google controls a monopoly on important digital advertising technologies, sometimes known as the “ad tech stack,” which allows advertisers to purchase ads and reach prospective clients and website publishers to sell ads. The public has never-before-seen access to ideas, artistic expression, information, products, and services thanks to the advertising money generated by website publishers using ad tech solutions. The goal of this monopolisation case is to provide fair and financial relief for the American people while also restoring competition in these significant markets, according to the Justice Department and State Attorneys Generals.³²

B. EUROPEAN UNION (EU)

Article 102 of the Treaty on Functioning of the European Union (TFEU)³³ and Article 54 of the European Economic Area (EEA) Agreement³⁴ prohibit Google from abusing its dominance as a general search engine by illegally giving its own comparison-shopping service an unfair advantage. The European Commission concluded its seven-year investigation into the Google Shopping case in June 2017 after conducting investigations as a result of which Google was subjected to a fine of €2.42 billion.³⁵ By connecting the Google search application to the Play Store, which is “Google's official store and portal for Android apps, games, and other content for Android-powered phones,” and the Google Chrome browser which is Google's own web browser that can be used to search the internet Google violated its dominant position, and in July 2018, the EU Commission fined the company €4.34 billion in furtherance of such violation. In March 2019, the tech giant was additionally fined €1.49 billion by the European Commission for using abusive online advertising practises.³⁶

C. UNITED KINGDOM

A multibillion-pound lawsuit against Google has been filed by UK consumers in 2023³⁷ who claim the business is to blame for increases in cost-of-living expenses. The complaint filed under the Competition Appeal Tribunal alleges, on behalf of all consumers in the country, that Google has suppressed competition in the search engine sector, leading to price increases throughout the UK economy. It is said that Google has suppressed competition in mobile searches and has increased the costs that advertisers pay to appear on the Google search page as a result of its market dominance. Such costs are then passed on to the consumers who have to face the brunt of increased advertising prices.³⁸

Another investigation into whether Google has misused its dominating position in ad tech has been initiated by the UK's Competition and Markets Authority (CMA). In order to guarantee default status on Safari in the UK alone, Google reportedly paid Apple over £1.2 billion in 2019, according to the CMA.³⁹

D. JAPAN

The Japanese Fair-Trade Commission is currently closely examining Apple as a result of the government's antitrust inquiry into the business being launched and earlier research. The FTC is required to prepare a report explaining why the level of competition has not increased and investigating any anti-competitive practices by Apple and Google.⁴⁰

6. GOOGLE'S PRIVACY CONCERNS VIS-À-VIS ABUSE OF DOMINANT POSITION:

A. Interplay between Privacy and Competition Law:

While the advancement of technology and IT industry in India as well as around the world is truly commendable, there have been rising concerns recently with respect to big companies holding huge amounts of personal data of users to manipulate digital markets. Google being one of the companies dealing with big data, has been target of multiple lawsuits relating to breach of privacy and other data protection concerns. There have been instances of several data-driven tech mergers; harming the competition in the market along the way, by diluting data privacy and creating barriers to entry into the market. Privacy violations undoubtedly has the capability to act as one of the non-price parameters in determining the abuse of dominant position by an enterprise.

One of the most notable instances of the interaction between privacy and competition emerged specifically on February 7, 2019, when Facebook was forbidden by the Bundeskartellamt from combining user data from multiple sources.⁴¹ The German National Competition Authority, or Bundeskartellamt, declared that:

“(i) Facebook-owned services like WhatsApp and Instagram can continue to collect data. However, assigning the data to Facebook user accounts will only be possible subject to the users’ voluntary consent. Where consent is not given, the data must remain with the respective service and cannot be processed in combination with Facebook data.

(ii) Collecting data from third party websites and assigning them to a Facebook user account will also only be possible if users give their voluntary consent.”⁴²

However, the Düsseldorf Higher Regional Court set aside this order stating that a competition

authority cannot adjudicate on the matters of privacy which is covered under the GDPR.⁴³ Nonetheless, this decision of the Bundeskartellamt sparked a public conversation around the inclusion of privacy violations as a non-price parameter while analysing the abuse of a company's dominant position in the market.

There are primarily two approaches as to whether privacy concerns should be considered in tandem with antitrust violations or not – the separatist school and the integrationist school.

Separatists maintain that antitrust legislation and the mandate for consumer protection are distinct from one another both historically and doctrinairely. These viewpoint's proponents are reluctant to include privacy issues in antitrust analysis. They contend that this combination would create uncertainty regarding the application of the consumer welfare test, which is essentially an economic one in antitrust law.⁴⁴

This integrationist school goes beyond efficiency and pricing considerations in prescribing competition law. It takes into consideration non-price factors that help maximise the welfare of consumers, such as quality and innovation. By incorporating competition based on privacy, it aims to expand the definition of quality.⁴⁵

The latter approach is in line with the conclusions of the CCI's Market Study on the Indian Telecom Sector⁴⁶, which pointed out that privacy could be a non-price element in competitiveness. In particular, it brought up a number of difficulties related to data processing in the market for digital communications. It sparked questions about what exactly qualifies as "free consent" when dealing with a powerful online organisation. It was observed that insufficient privacy requirements provide an objective harm to customers, resulting in lower consumer welfare levels. This highlights the CCI's broad interpretation of competition law, which includes privacy under its ambit.

According to the CCI, data-sharing between WhatsApp and Facebook amounted to a degradation of quality in 2021, and the CCI recognised privacy as a non-price parameter of competition in its prima facie order against WhatsApp.⁴⁷ The order addressed the 2021 privacy policy modification from WhatsApp about the platform's sharing of user data with Facebook. In order to implement the new policy, WhatsApp emailed users prompts requesting their agreement by a certain date, failing which they would lose access to all of WhatsApp's services. The CCI observed that, in contrast to WhatsApp's prior policy revisions, the 2021

privacy policy did not provide users with a “opt-out” alternative, making it a “take-it-or-leave-it” decision. According to the observation, consent in this context cannot represent the voluntary assent of users given WhatsApp's dominant position.⁴⁸

WhatsApp was judged by the CCI to have collected and shared data in an arbitrary manner in its order. This behaviour generated exclusionary consequences and strengthened its market dominance, especially when combined with its dominant position. This exploitative behaviour was found to be in violation of Section 4 of the Competition Act, 2002.⁴⁹

B. Google’s privacy concerns and its implications on Antitrust violations

Google has contended in several cases, both Indian and International that its users don’t pay money directly for the use of its services, because of which it cannot be considered as an economic activity. If a company is not engaging in economic activity, ultimately it cannot be held liable for abuse of dominant position. However, the European commission has clarified in the Google Shopping case⁵⁰ that the users divulging their personal data contributes to the company’s monetization.

Although Google's general search services are offered without charge, meaning users do not pay any direct money value for access to the internet, the EU Commission lays out three primary arguments for why they nevertheless qualify as an economic activity.

Firstly, the Commission highlights the personal information that Google collects, stating that although consumers do not directly pay for generic search services, they do help to monetize the offerings by consenting to Google's use of their personal information for storage and repurposing. Secondly, the platform's two-sided and multi-sided design links two distinct consumer groups. In this instance, online search advertising revenue is directly correlated with the volume of users utilising general search services, meaning that a higher user base can yield higher revenue, which is advantageous from a business standpoint as it allows for the provision of free general search services. And finally, 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.*”⁵¹

Since Google has a dominant position in the market, it is only prudent to view its collection and possible misuse of user personal information as one of the key non-price parameters while analysing whether it has abused its dominant position.

It is also important to note however, that authorities while dealing with antitrust violations, especially cases of abuse of dominant position have leaned against considering privacy concerns as a non-price parameter citing jurisdictional issues. However, it is contended that especially in big data companies which acquire large amounts of personal information from its users, it is pertinent to consider that they are at a higher risk of being misused by such enterprises in the name of getting an edge over their rival companies.

CONCLUSION:

With immense growth in technology in the recent years and scope for much larger growth in the coming years, big data companies like Google will continue to monopolize the market and more importantly the Internet if they are not regulated. Google has undoubtedly used anti competitive practices to maintain the top spot in the market, and the several billion dollars of fine imposed by various competition authorities of the world is proof of the same.

Moving forward, with the rise of Artificial Intelligence (AI) and concerns over Intellectual property as well as privacy, it is important to keep a check on enterprises like google to prevent rise in monopolistic practices. Google has not only been subjected to litigation in several antitrust lawsuits but also those concerning privacy violations. Countries like South Korea, Australia, USA, has held Google under fire for violating privacy laws. It is of utmost importance to consider Google's privacy violations in consonance with its antitrust violations in order to truly comprehend the magnitude of Google's abuse of dominance in the market.