



Abuse of Dominance in Cyberspace: A Critical Analysis

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Abstract

The dominance of cyberspace is a burgeoning issue for commercial benefits. Undue advantage is being taken for exploitation of the consumers as well as competitors by dominating the cyberspace, sometimes by major share in market or the innovations. The courts and regulating agencies are worried much due to the growth of users from 36 million to 2.8.billion between 2000 and 2015, with average growth of 17.5%. Google has specially dominated the cyberspace and affected many of the competitors. Competition Commission of India has also found that Google was in dominant position in the relevant markets, based on its market share and presence of high entry barriers and scale advantage, which limited ability of users to switch to other online search engines. On the three counts of abuse of dominance recognized by the CCI, it imposed a penalty of USD 21 million on Google, calculated at the rate of 5% of Google's average total revenue generated from India operations for the financial years 2013, 2014, and 2015. Even European Commission has found violations and imposed a stunning fine of \$5 billion on Google. But, Google denied and argued that it never violated any norms and dominated the cyberspace, as it is all due to the creation, expanding, and innovative and research-oriented technology.

Keywords: Space, Dominance, Abuse, Cyber space, Competitors, Laws

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INTRODUCTION

Cyberspace is the network at global level of various interdependent information technologies, telecommunication networks, and computer-based processing systems. It is quite different from the space as space is the lawyer's natural environment, which represents our space in the physical environment. The understanding of cyberspace has become more relevant to stop cybercrimes and dominance of cyberspace for commercial use. As the revolution growth of internet technology has transformed the ability and approach of the marketers and consumers by the principal of "if anybody build it, people will come" due to network effects, the number of chances for the demand for the products increase manifold due to rise in number of users. Rao and Klein rightly said that "An Industry platform with network effects leads to many more users for adopting the platform, which results to more users and complementors [3]. Internet's remarkable growth is a model example of what is known as network effects, a positive demand side externality in which the value of a product or service to an individual user rises as the

number of users increases. It is amazing to know that internet users grew from 36 million to 2.8 billons between 2000 and 2014 with average growth of 17.5%.

Strategic cyber defense "loss" is a decrease in trust or a delay in delivery of a crucial cyberspace element or component of an element. The strategic cyber defense loses if the attacker can:

- i) Retard the delivery of cyberspace elements or components needed for critical decisions;
- ii) Reduce the velocity of dataflow in the defender's cyber systems;
- iii) Force the use of outdated/outmoded equipment or systems to secure cyberspace elements or components;
- iv) Impede the exchange of cyberspace elements or components among the defenders; or
- v) Retard improvements or adoption of cyberspace technologies. Clearly, cyber attackers will attempt to increase their capabilities in all five areas. Of critical importance during a cyber attack is that not all elements of cyberspace or

components of each element are of equal value and the value of each element or component varies over time due to changes in the decision context [2].

The large-scale companies like Google, Facebook, Snapchat, Twitter, etc., are dominating cyberspace and almost their platforms are visible online.

Capitalism has supported the increase of “winner takes all” businesses, where Google and Facebook get more than 70% of all US online advertising spending.

It happens and works like forces behind any internet company, i.e., firstly, capture a vast audience that depends on your service. Secondly, work out how to make money from the customers. Ultra-growth often comes from breaking the usual rules of business and exploiting escapes or just ignoring the law. Many companies operate with an underlying assumption that the law somehow doesn't apply to the internet; a number of companies have discovered too late that it certainly does, from Napster to TV re-broadcaster Aereo to Airbnb to Uber.

Google was a clear winner, with one or more of its various advertising technologies appearing on the majority of publishers seen by public whose data were in the sample. Google-branded advertising tracking and targeting technology was found on 80% of publishers, and products from its mobile ad network subsidiary and AdMob on 19%. Facebook got the second most extensive tracking network. The credit goes to its “Like” button; its technology was present on 23% of publishers' sites. (M Simonite, 2013)



PURPOSE OF THE STUDY

This article addresses the nature of cyber dominance, with a focus on firms dominating the cyberspace for commercial benefits. It contains a background discussion on internet technology and growth of internet technology.

The article also presents available laws, legal framework available in Indian system along with some judgments regarding dominance of some firms pronounced by the courts and controlling agencies. This article also focuses on the available legal and technical solutions for stopping or reducing cyber dominance. It will also find the violations, if any, of the norms of the cyberspace along with justification of defaulters.

RISKS TO A COMPETITIVE MARKETPLACE AND CONSUMER PROTECTION

Domination in the market due to legitimate result of innovation is not the automatic violation of antitrust law merely. It happens only if the firm is engaging in anti-competitive behavior especially in the US.

But in Europe, there is a somewhat lower market share brink for creating a presumption of firm dominance in a relevant market than exists under US antitrust law. However, despite some differences of distinction at the margins, there is substantial overlap amongst the US and Europe as well as other non-U.S. jurisdictions in the kinds of acts that can constitute abuse of significant market power. These may include exclusionary agreements, predatory pricing, product bundling, or refusal to provide competitors with vibrant information or access to an essential facility or a network that is necessary in order to be able to contest on the merits.

CASE OF GOOGLE

According to the European Commission, Google has about a 90% share in the markets for general internet search services, licensable smart mobile operating systems, and app stores for the Android mobile operating system, making it dominant.

Google is the leading example of high technology in respect of search engine and social networking, which has a large number of users and abundant data collected from the users. Therefore, Google is dominating, powerful in the fast changing internet-based market. Hence, it is a reasonable concern for the courts to understand the effects on competition of an alleged competitive practice. Due to their

overall strategies and plans, they have almost control over the market.

It becomes eminent for the regulators and court to differentiate between companies with considerable power, those are basically gaining the legitimate commercial gains of successful innovations versus the companies exploiting the substantial market power that such innovation make possible to unethically ban competition.

Competition law and Antitrust cases in the recent past involving firms in other high-tech markets like Microsoft in the operating software and browser space, can provide guidance for regulators and courts in examining comparable scenarios in social network spaces and the search engine.

Google carries significant position over internet searching and hence is dominating in this field due to 90% share in the European Union. The other competitors have blamed that Google is manipulating search results from consumers' use for the benefit of the advertising firms displaying advertisement on Google. It results barriers to the entry for rival advertisers attempting to compete with Google in search-dependent online advertising markets.

This built-in favoritism in the display of search results, competitors, and antitrust regulators have charged for creating significant barriers to entry for rival advertisers and shopping sites attempting to compete with Google in search-dependent online advertising markets. That may be due to additional free features like Google Maps and News. As per Waller, every time when new features are added into an existing dominant platform software, less integrated competitors are harmed. But, consumers are also potentially harmed as well by diminution of choice and the possible exclusion of better options [4].

European Commission in its antitrust investigation listed the following four areas of concern in 2012:

1. **Display Favoritism:** Due to vertical search services which refer to specialized "search engines which focus on specific

topics and subjects, like restaurants, news and products, which result in favoured treatment compared to those firms which are competing.

2. **Competitive Data Misappropriation:** It has been blamed that Google is using the material in its own website without prior permission of the competitors, which may have been copied from the competitors' websites.
3. **Exclusivity:** It has almost finished competing providers of search advertising intermediation services due to de facto exclusivity required by the advertisers to obtain all or most of their requirement of search advertisement from Google.
4. **Restrictions on Ad Campaign Portability:** It has become difficult for the competitors as Google has placed boundaries on "the portability of online search advertising campaigns from its platform AdWords to the platforms of competitors. It has also imposed contractual restrictions on software developers, which prevent them from offering tools that allow the seamless transfer of search advertising campaigns across AdWords and other platforms for search advertising.

The Competition Commission of India by its order dated February 8, 2018 held that Google enjoys dominant position in relevant market in India and has abused its dominant position in breach of the provisions of the Competition Act, 2002. The CCI imposed penalty of USD 21 Million, applying the proportionality principle and calculating penalty based on the relevant turnover from the direct sales operations only in India.

This CCI ruling is a first of its kind in the Indian context in relation to the digital space. Interestingly, the decision is not a unanimous decision, but is 4:2. Even the majority view has not held against Google on all counts of allegations, but only three of them. Minority view has not concurred with the majority view on all the three counts.

Two informants, i.e., Matrimony.com and CUTS alleged that Google abuses its dominant position in the market and runs its core

business of search and advertising in a discriminatory manner causing harm to consumers.

The two grounds alleged by informants were as follows:

- i) **Google's Search Engine Services:** Google was alleged to promote its own vertical search, irrespective of whether they were the most relevant or popular sites to the search. It was alleged that such acts lead to denial of access and creates entry barriers.
- ii) **Google's Advertising Services:** Google's dominant position in the relevant market has allowed it to saddle consumers and clients with discriminatory and unfair pricing conditions.

Applicable Law

Section 4 of The Competition Act, 2002, prohibits any enterprise from abusing its dominant position. The term 'dominant position' has been defined in The Competition Act as 'a position of strength, enjoyed by an enterprise, in the relevant market, in India. The CCI analyzes factors under Section 19(4) of the Act to determine whether an enterprise is abusing its dominant position in the relevant market.

i) Relevant Market

The CCI held that Google functioned differently and was distinguishable from a direct search option by typing the URL, which requires the user to be aware of the exact websites and the relevant information, which the user is seeking. It agreed with the Director General's findings and held that specialized online search services were not comparable to online web search services as pricing and registration requirements vary between both.

ii) Dominance of Google

The CCI held that Google was in a dominant position in the relevant markets, based on its market share and presence of high entry barriers and scale advantage which limited ability of users to switch to other online search engine. The CCI noted that high-technology services demand continuous innovation, given the barriers to entry and Google's scale advantage, it is

very unlikely that a large number of users would switch to competing search engines. Google's market share has been consistently high, which ensures its dominant market position.

iii) Abuse of Dominant Position by Google

Apart from general web search services, Google also provides specialized services such as: Google Maps, Google News, Google Flights, Google Reviews, Google+, YouTube, etc. The Director General alleged that Google blended these specialized services with its web search services to mislead consumers to their specialized services by placing them in prominent positions on the web search results page, through a combination of Universal Results, OneBoxes and Commercial Units.

Based on detailed information provided, the Director General concluded that Google has been abusing its dominant position in the relevant markets on the following three counts:

- i) **Universal Results:** Universal Results are groups of search results for a specific category of information, such as news, images, or local businesses. The CCI noted that until 2010, Universal Results were not displayed in accordance with their relevance but were limited to certain 'fixed positions'. Such practices were held unfair as it created misleading notions that such search results were in response to queries based on relevance or determined algorithmically. CCI dismissed Google's argument that it lacked the technology to do so at the time in the absence of evidence.
- ii) **OneBoxes:** OneBoxes provides factual answers to users' queries. OneBoxes return direct answers to, for example, queries about mathematics, stock quotes, local time, currency conversion, and the weather. CCI dismissed the DG's finding that Universal Results were biased as the 'more results' option would lead a user to Google's search options and not any other search service. CCI dismissed the finding of the DG that OneBoxes shows biased data and held that the mere possibility that it may not select the most relevant

provider is not actual evidence of bias.

- iii) **Commercial Units:** Commercial Units are result types that Google sets apart in ad space and distinguishes from search results with a “Sponsored” label. Taking the example of Google Flights, the CCI observed that while a ‘sponsored’ label qualifies the link to Google Flights, but by integrating the said link prominently with the search engine result page, Google is able to generate higher revenues through advertisements by driving traffic to its own page. Google through its search design placed commercial units at a prominent position on search result page and also allowed pushing down of vertical trying to gain market access. Accordingly, CCI found this conduct of Google to be anti-competitive and in contravention of Section 4(2)(a)(i) of the Act, as it imposed unfair/discriminatory condition on purchase of services.

European Commission v. Google, Inc.

Antitrust law was the first dispute against Google by the EU competition law. Most systems of competition law bars companies from abusing dominant market positions; therefore the EU is not applying concepts unknown to the United States. The Google and EU will go head-to-head on the law, but behind this lawyering is something important, the significance of competition law to the European project of an “ever closer union of peoples.” DNA of the European project is part of regulating private sector power. It is there from its early beginnings in the early 1950s (e.g. the Schuman Declaration). The purpose of the project was to prevent another European war through economic integration. Therefore, the founding agreements gave authority over economic competition in the common market to supra-national institutions. Observing competition of economic nature facilitates the creation and operation of the common market, as well as defends individuals, societies, and Govt. from the political influence that monopolies and lobbies can exercise.

In brief, Google reflects the nature of the EU’s *raison d'être*. The EU’s firmness on competition law has been challenged as obsolete given the expansion of the common

market, liberalized trading regimes, and the rise of disorderly technologies. In fact, for the EU, competition law is fundamental, not momentary. This promise does not mean the EU will prevail against Google. It does, however, partially explain why the EU brought the case: Europe accepts as true that competition law can help adopt an ever closer union of peoples.

European Influence v. American Innovation

Dispute is arising within the legal case from the EU’s exercise of political power against the United States technological innovation. European Commission’s charges against Google have highlighted the gap between the scarcity of tech innovation in the EU and the seemingly harsh, globally spreading innovation from the US companies. But now Europe is slowly noticing its failure to develop many of the platforms supporting the online economy, because without much struggle and war, major world dignitary territory has been captured by America. But the common market cannot face the standard innovation of the United States, which compels EU to use political and regulatory authority conditions of competition in the common market and economic activities. Innovative companies always look for good margins in EU only, which give power to EU to political and economics policies to control the market. The Google case also allows the EU to flex its economic muscles to stress its policy preferences in other areas of digital policy, such as imposing its views on the protection of personal data and electronic surveillance in a post-Snowden age. In this sense, competition law reflects not only fundamental EU principles but also a source of European power in international relations.

Sovereignty v. Silicon Valley

Innovations from Silicon Valley challenge political authority and sovereignty due to the. Google’s success in Europe. Google also challenge it poses to the EU’s ethos and political influence associated with EU competition law.

Google is a powerful case in point. Many countries framed their own rules to counter

Google. In 2010, the Chinese largely forced Google to kowtow to Beijing or leave China, and Google left. Although the EU is not a state, it exercises supra-national authority over the conditions of competition. So, its charges against Google are and attempt to bring the company's activities under its political and legal control. Other countries, such as India and Russia, are also scrutinizing Google's behavior in their respective territories.

So, the EU case against Google is, indeed, a big deal for economic, political, and technological reasons that have global implications [1].

ANALYSIS: CASE OF INDIA

Competition Commission of India (CCI) in its decision has recognized the pace at which technology and innovation is transforming the economic landscape globally. Appreciating the crucial role that market drivers like Google play in driving India into the future, the CCI observed that "public intervention in such markets should be targeted and proportionate. Such a calibrated approach in technological markets ensures that intervention remains effective; it does not restrain innovation and helps the market to regulate itself."

Based on analysis of the above issues, CCI concluded that Google has abused its dominant position. Accordingly, CCI has:

- i) Passed a desist order and directed Google to not resort to fixing positions for universal results.
- ii) Ordered Google to not enforce the restrictive clauses in the intermediation agreements with immediate effect.
- iii) Directed Google to display a disclaimer against the commercial flight unit box indicating that the link would lead to Google Flight's page.
- iv) On the three counts of abuse of dominance recognized by the CCI, it imposed a penalty of USD 21 million on Google calculated at the rate of 5% of Google's average total revenue generated from India operations for the financial years 2013, 2014 and 2015.

ANALYSIS: CASE OF EUROPEAN UNION

The European Commission has pointed out that in

three following areas Google has abused its dominant position:

- i) European Commission (EC) imposed a stunning fine of \$5 billion on Google; it is a record by any regulator on any firm, for alleged anti-trust laws violations. This proves the illegal practices regarding Android mobile devices due to this heavy fine by the EC.
- ii) The decision of the EC has arrived at a time when the US is literally engaged in a trade war with many countries. It has many reactions of the present president and former presidents calling the decisions of EU's protectionist, as the internet has been created, innovated, expanded and got excellence while owning. Recently President Trump has also shown that US business is at a disadvantage due to the decisions of the then EC.
- iii) The main allegation against Google is that it is compulsory bundling search and Chrome with its Play Store and operating system. It has also obstructed phone manufacturers from running forked version of Android. Thirdly, it has also paid to mobile phone manufacturers and service providers to pre-install exclusively the Search app on their devices. Therefore, The EU ordered to stop these practices and ordered another fine of 5% of Google's average daily revenue, in case it does not comply with the orders.
- iv) Google was not accepting this and denied all allegations by telling that Android has created many more choices for everyone by providing very smart ecosystem, unique innovation with affordable price. According to Google CEO Sundar Pichai, the Commission has ignored "how much choice Android delivers" to phone makers and service providers. Google went on arguing that it licenses its Android software to phone makers and service providers free of cost in free business model of Android.

(Dhanendra Kumar, executive director, World Bank and Former chairman, CCI)

This understanding is important if we are to build and withstand a web that reflects the diverse cultures of its global users, rather than the economic incentives of a single company. Google and advertising: digital capitalism in the context of Post-Fordism, the reification of language, and the increase of

fake news [5].

FINDINGS AND CONCLUSION

It is found from this study that internet has grown very rapidly and users' network has increased manifold. The Americans have literally created the internet with their innovations and very intelligently used their innovation into business. The Europeans countries could not face the competition given specially by Google and Facebook. There is no doubt that Google has captured the market with almost 90% share of the market mostly due its innovation and quality products. But, it has no right to kill the competitors, especially in European countries and India. Due to this only, CCI imposed a penalty of USD 21 million on Google calculated at the rate of 5% of Google's average total revenue generated from India operations for the financial years 2013, 2014 and 2015. Even European Commission has found violation and imposed a stunning fine of \$5 billion on Google. Therefore, countries are using their safeguard to protect their firms and even China made Google to quit the Market. But it is found and concluded that if you want to protect yourself at cyber space, you have to face the competition and build your immunity to survive in the market. Every country has the right to legally and legislatively protect

itself.

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