

Google's India case and a return to consumer-focused antitrust

February 8, 2018

[Geoffrey A. Manne](#)

What happened

Today, following a [six year investigation](#) into Google's business practices in India, the Competition Commission of India (CCI) issued its [ruling](#).

Two things, in particular, are remarkable about the decision. First, while the CCI's staff recommended a finding of liability on a litany of claims (the exact number is difficult to infer from the Commission's decision, but it appears to be somewhere in the double digits), the Commission accepted its staff's recommendation on only three — and two of *those* involve conduct no longer employed by Google.

Second, nothing in the Commission's finding of liability or in the remedy it imposes suggests it approaches the issue as the EU does. To be sure, the CCI employs rhetoric suggesting that "search bias" can be anticompetitive. But its focus remains unwaveringly on the welfare of the consumer, not on the hyperbolic claims of Google's competitors.

What didn't happen

In finding liability on only a single claim involving ongoing practices — the claim arising from Google's "unfair" placement of its specialized flight search (Google Flights) results — the Commission also roundly *rejected* a host of other claims (more than once with strong words directed at its staff for proposing such woefully unsupported arguments). Among these are several that have been raised (and unanimously rejected) by competition regulators elsewhere in the world. These claims related to a host of Google's practices, including:

- **Search bias involving the treatment of specialized Google content** (like Google Maps, YouTube, Google Reviews, etc.) other than Google Flights
- **Search bias involving the display of Universal Search results** (including local search, news search, image search, etc.), except where these results are fixed to a specific position on every results page (as was the case in India before 2010), instead of being inserted wherever most appropriate in context
- **Search bias involving OneBox results** (instant answers to certain queries that are placed at the top of search results pages), even where answers are drawn from Google's own content and specific, licensed sources (rather than from crawling the web)

- **Search bias involving sponsored, vertical search results** (e.g., Google Shopping results) other than Google Flights. These results are not determined by the same algorithm that returns organic results, but are instead more like typical paid search advertising results that sometimes appear at the top of search results pages. The Commission did find that Google’s treatment of its Google Flight results (another form of sponsored result) violated India’s competition laws
- **The operation of Google’s advertising platform (AdWords)**, including the use of a “Quality Score” in its determination of an ad’s relevance (something Josh Wright and I discuss at length [here](#))
- **Google’s practice of allowing advertisers to bid on trademarked keywords**
- **Restrictions placed by Google upon the portability of advertising campaign data to other advertising platforms through its AdWords API**
- **Distribution agreements that set Google as the default (but not exclusive) search engine on certain browsers**
- **Certain restrictions in syndication agreements with publishers (websites) through which Google provides search and/or advertising (Google’s AdSense offering)**. The Commission found that negotiated search agreements that require Google to be the exclusive search provider on certain sites did violate India’s competition laws. It should be noted, however, that Google has very few of these agreements, and no longer enters into them, so the finding is largely historical. All of the other assertions regarding these agreements (and there were numerous claims involving a number of clauses in a range of different agreements) were rejected by the Commission.

Just like competition authorities in the [US](#), [Canada](#), and Taiwan that have properly focused on consumer welfare in their Google investigations, the CCI found important consumer benefits from these practices that outweigh any inconveniences they may impose on competitors. And, just as in those jurisdictions, all of them were rejected by the Commission.

Still improperly assessing Google’s dominance

The biggest problem with the CCI’s decision is its acceptance — albeit moderated in important ways — of the notion that Google owes a special duty to competitors given its position as an alleged “gateway” to the Internet:

In the present case, 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. (para 202)

As I've [discussed before](#), a proper analysis of the relevant markets in which Google operates would make clear that Google is beset by actual and potential competitors at every turn. Access to consumers by advertisers, competing search services, other competing services, mobile app developers, and the like is readily available. The lines between markets drawn by the CCI are based on superficial distinctions that are of little importance to the actual relevant market.

Consider, for example: Users seeking product information can get it via search, but also via Amazon and Facebook; advertisers can place ad copy and links in front of millions of people on search results pages, and they can also place them in front of millions of people on Facebook and Twitter. Meanwhile, many specialized search competitors like Yelp receive most of their traffic from direct navigation and from their mobile apps. In short, the assumption of market dominance made by the CCI (and so many others these days) is based on a [stilted conception](#) of the relevant market, as Google is far from the only channel through which competitors can reach consumers.

The importance of innovation in the CCI's decision

Of course, it's undeniable that Google is an *important* mechanism by which competitors reach consumers. And, crucially, nowhere did the CCI adopt Google's critics' and competitors' frequently asserted position that Google is, in effect, an "*essential facility*" requiring extremely demanding limitations on its ability to control its product when doing so might impede its rivals.

So, while the CCI defines the relevant markets and adopts legal conclusions that confer *special importance* on Google's operation of its general search results pages, it stops short of demanding that Google treat competitors on *equal* terms to its own offerings, as would typically be required of essential facilities (or their close cousin, public utilities).

Significantly, the Commission weighs the imposition of even these "special responsibilities" against the effects of such duties on innovation, particularly with respect to product design.

The CCI should be commended for recognizing that any obligation imposed by antitrust law on a dominant company to refrain from impeding its competitors' access to markets must stop short of requiring the company to stop innovating, even when its product innovations might make life difficult for its competitors.

Of course, *some* product design choices can be, on net, anticompetitive. But innovation generally benefits consumers, and it should be impeded only where doing so clearly results in net *consumer* harm. Thus:

[T]he Commission is cognizant of the fact that any intervention in technology markets has to be carefully crafted lest it stifles innovation and denies consumers the benefits that such innovation can offer. This can have a detrimental effect on economic welfare and economic growth, particularly in countries relying on high

growth such as India.... [P]roduct design is an important and integral dimension of competition and any undue intervention in designs of SERP [Search Engine Results Pages] may affect legitimate product improvements resulting in consumer harm. (paras 203-04).

As a consequence of this cautious approach, the CCI refused to accede to its staff's findings of liability based on Google's treatment of its vertical search results without considering how Google's incorporation of these specialized results improved its product for consumers. Thus, for example:

The Commission is of opinion that requiring Google to show third-party maps may cause a delay in response time ("latency") because these maps reside on third-party servers.... Further, requiring Google to show third-party maps may break the connection between Google's local results and the map.... That being so, the Commission is of the view that **no case of contravention of the provisions of the Act is made out in Google showing its own maps along with local search results. The Commission also holds that the same consideration would apply for not showing any other specialised result designs from third parties.** (para 224 (emphasis added))

The CCI's laudable and refreshing focus on consumer welfare

Even where the CCI determined that Google's current practices violate India's antitrust laws (essentially only with respect to Google Flights), it imposed a remedy that does not demand alteration of the overall structure of Google's search results, nor its algorithmic placement of those results. In fact, the most telling indication that India's treatment of product design innovation embodies a consumer-centric approach markedly different from that pushed by Google's competitors (and adopted by the EU) is its remedy.

Following its finding that

[p]rominent 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 (para 420),

the CCI determined that the appropriate remedy for this defect was:

So far as the contravention noted by the Commission in respect of Flight Commercial Unit is concerned, the Commission directs Google to **display a**

disclaimer in the commercial flight unit box indicating clearly that the “search flights” link placed at the bottom leads to Google’s Flights page, and not the results aggregated by any other third party service provider, **so that users are not misled.** (para 422 (emphasis added))

Indeed, what is most notable — and laudable — about the CCI’s decision is that both the alleged problem, as well as the proposed remedy, are laser-focused on the effect on consumers — not the welfare of competitors.

Where the EU’s recent [Google Shopping decision](#) considers that this sort of non-neutral presentation of Google search results harms competitors and demands equal treatment by Google of rivals seeking access to Google’s search results page, the CCI sees instead that non-neutral presentation of results could be confusing to consumers. It does not demand that Google open its doors to competitors, but rather that it more clearly identify when its product design prioritizes Google’s own content rather than determine priority based on its familiar organic search results algorithm.

This distinction is significant. For all the language in the decision asserting Google’s dominance and suggesting possible impediments to competition, the CCI does not, in fact, view Google’s design of its search results pages as a contrivance intended to exclude competitors from accessing markets.

The CCI’s remedy suggests that it has no problem with Google maintaining control over its search results pages and determining what results, and in what order, to serve to consumers. Its sole concern, rather, is that Google not get a leg up *at the expense of consumers* by misleading them into thinking that its product design is something that it is not.

Rather than dictate how Google should innovate or force it to perpetuate an outdated design in the name of preserving access by competitors bent on maintaining the status quo, the Commission embraces the consumer benefits of Google’s evolving products, and seeks to impose only a narrowly targeted tweak aimed directly at the quality of consumers’ interactions with Google’s products.

Conclusion

As some [press accounts](#) of the CCI’s decision trumpet, the Commission did impose liability on Google for abuse of a dominant position. But its similarity with the EU’s abuse of dominance finding ends there. The CCI rejected many more claims than it adopted, and it carefully tailored its remedy to the welfare of consumers, not the lamentations of competitors. Unlike the EU, the CCI’s finding of a violation is tempered by its concern for avoiding harmful constraints on innovation and product design, and its remedy makes this clear. Whatever the defects of India’s decision, it offers a welcome return to consumer-centric antitrust.

[View Article](#)