

## **GOOGLE'S TRYST WITH ANTITRUST: COMPARATIVE PERSPECTIVES FROM THE EU AND THE US THROUGH A LEGAL AND ECONOMIC LENS**

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### **ABSTRACT**

We live in a world where technology fuelled multisided platforms currently run the economy. These platforms operate on complex business models, showcase unique characteristics that enable them to amass significant market power, and impact consumer welfare. Google is one such platform causing ripples in the economy with its ever-improving Google Search service that holds global market dominance in online search markets and is increasingly coming under the scrutiny of regulators across the globe to prevent the abuse of such dominance. The article undertakes a composite, critical and comparative analysis of the treatment of Google's anticompetitive conduct in the European Union (EU) and the United States of America (USA) through a legal and economic lens. The comparative analysis of EU and the US assumes significance in the light of the two jurisdictions leading way in the global advancement of competition law, technology, and legal treatment of big tech giants such as Google.

### **I. OVERVIEW**

Extensive Internet infiltration and technology powered digital markets have led to the rapid emergence of multisided platforms popularly referred to as 'Matchmakers,' that connect different groups of customers with each other through technology (Evans & Schmalensee, 2016). Because of their unique business model and characteristics multisided platforms have drawn considerable interest amongst regulators, investors, academicians, economists and consumers.

One such emblematic example causing ripples in online search markets and impacting all aspects of our lives is 'Google' that connects advertisers with users of the search engine. Not only does Google influence how users locate and consume information, but also make information providers (third party websites, advertisers etc.) accessible to users. Google's influence is such that the 'tech giant' is said to be a 'gatekeeper to the Internet' and is the most popular search engine (Elia, 2017). Naturally Google has faced litigation in both EU and US mainly on account of antitrust considerations. This article is a modest attempt to examine Google's alleged anticompetitive conduct in Europe and the US.

### **II. JUST GOOGLE IT: INTRODUCING THE INTERNET'S GATEKEEPER**

The primary operation of Google LLC is its Google Search service, a web search engine developed in 1998 and which has seen many innovative features, the most prominent of them being the introduction of Universal Search in 2007. Customarily, Google's search engine offered horizontal or organic search results (general search results) displaying websites indexed to the platform as simple blue links (Yun, 2018). Universal Search offered advanced results for a user's query by combining horizontal and vertical search results (specialized search results) to create a blended search results page. Central to the Universal Search is the appearance of thematic results to a search query in the

form of a separate display box called the Google 'OneBox'. It usually appears on the top or the right corner and is designed to initiate user interaction with Universal's specialized search results (Yun, 2018).

Google's Universal Search (Google Search) lies at the heart of antitrust allegations against Google LLC across jurisdictions. It currently has a significant market share in the online search industry, both general and specialised search markets. The general search market caters to a wider range of queries while the specialised market search caters to queries specific to a commercial sector such as shopping (Amazon) and travel booking (Booking.com). In the general search market Google is dominant with some competition from Microsoft (Bing) and in the specialized search market it faces much limited competition from specialised search providers most of whom rely on Google to generate traffic to their websites (Competition and Markets Authority, 2020).

Google search has established its niche in the online search market by offering a superior quality service and a seamless user experience through innovative advancements in its technology. The innovative technological advances have made Google search a multisided platform that essentially connects three economic agents – users, indexed websites and advertisers. Users can freely access its content but in doing so they do provide personalized information to the platform. Websites can also index themselves for free on the platform, in exchange for providing their content to users. This is done through Spiderbots (a software developed by Google), which is programmed to scan the Internet (termed as crawling), index new websites and update already indexed websites and rank the results (Herz, 2014). Advertisers are the key players in its revenue-generating model, who pay for the service that a search engine provides. Notably Google offers two prominent advertising services, Adwords and Adsense. In the former, advertisers can bid for an ad space on the platform through an auction mechanism, while in the latter the websites can sell ad space to advertisers who pay each time a visitor clicks on the ads displayed on their website.

Each of the customer groups of the platform, users, indexed websites and advertiser generate strong indirect network effects, which further act as a catalyst for Google's business model. As more users make search queries through the platform and more websites are indexed to it, more advertisers are incentivized to buy ad spaces on the platforms and websites thus enhancing the platform's revenue, which in turn incentivizes the platform to improve user experience (improved quality and relevance of search results) to attract more users. There are also direct network effects: every time a query is entered on the platform with specific inputs, Google's self-learning algorithms are able to utilize user's digital footprints to tailor the search experience to user's needs and preferences. Similarly, advertisers benefit from access to Google's large pool of users, and by personalising an ad to the user's specific search keywords.

### **III. TRACING GOOGLE'S CASE TRAJECTORY IN THE EU AND THE US**

The EU and US competition policy frameworks are the model systems of competition law enforcement and policy (Marcos, 2017). In both jurisdictions Google has a dominant position because of many of its online services, principally Google Search. This tool acts as a gateway to all other information on the Internet, and the service has an estimated 80-90% market share in both the EU and the US (Markovits, 2016).

In 2010, the European Commission (EC), the proactive executive wing of the EU started investigating Google. This led to the three notable antitrust lawsuits against the firm. The central issue was whether Google was using its dominant position in the general search market as a lever to enhance its power in related markets. In each of the cases, Google's anticompetitive behaviour and abuse of dominant market position was found to be in violation of Article 101, 102 of Treaty on the Functioning of European Union (TFEU) and Article 54 of the European Economic Agreement (EEA) which was heavily penalised.

In 2011, a year later the Federal Trade Commission, which is the civil antitrust enforcement agency of the US, commenced its investigations against Google for allegations of 'search bias' (Markovits, 2016). However, the Commission brought no formal charges against the firm. There is divided academic opinion on anti-competitive allegations faced by Google and the legal treatment Google received in the two jurisdictions. The European Commission is often criticized for 'abusing the US tech companies' and it is worth considering the validity of such criticism (Hirst et. al., 2016).

## 1. EUROPEAN UNION (EU)

### A. *Google Comparison Shopping Service*

The first landmark ruling against the tech giant resulted from a probe in 2010 into Google, for allegedly giving preferential treatment to its own shopping services in contrast to its competitors on Google Search, which is dominant in the search engine providers market (European Commission, 2017).

Google Search is responsible for indexing and ranking websites based on the user query inputs while Google Shopping is a vertical search service for various products listed on the website. The European Commission (EC) considered that this was an 'economic activity' within the EU legal framework because, despite offering free services to one side of the users (consumers searching for websites), Google exchanges user data on the platform for gain (currency), and utilizes the platform for advertisements and competes for new users with other search engines based on quality of service offered (Butta, 2018).

Based on the market inquiry, the commission delineated two separate but inter-related relevant product markets, a market for general online search services and a market for specialised search services of comparison-shopping (European Commission, 2017). The commission determined the relevant geographic market to be national because it applies throughout one jurisdiction, the European Economic Area (EEA), i.e. all 31 European countries where Google holds over 90% market share in general search services (European Commission, 2017).

The Commission held Google to be dominant in the relevant market, the EEA, and found that Google abused its dominant position in favour of its own comparison-shopping service by assigning it favourable positioning and displaying it prominently in a consumer's search results. Google designed its algorithms in a manner that assigned lower ranks to the competitors of Google shopping displaying them in less visible positions on search results page, thereby adversely affecting its rival services (European Commission, 2017). This was regarded as an unlawful advantage gained by Google. The Commission also noted that owing to the dominant market position held by Google search, the competitors could not recoup the loss of traffic from Google through any other search engine (European Commission, 2017).

Therefore, the investigation resulted in the imposition of a heavy fine of € 2.43 billion and an order to immediately cease anticompetitive conduct. The Commission also acknowledged the pivotal role played by Google in influencing consumer choice and thereby consumer welfare, imposing barriers to entry for new firms and thus harming innovation, and finally inhibiting existing firms from competing fairly in the market (European Commission, 2017).

Google advanced several arguments to establish that there was no foreclosure of competition or direct harm to consumers. First, it claimed that the amount of traffic directed to a particular website was not affected by the position of that website on the search engine's results (European Commission, 2017).

Second, the firm attempted to establish that Google's comparison-shopping service was not a separate Google product but merely an improvised version of Google Adwords service (European Commission, 2017). Third, the firm also claimed that competitors were not at an unfair advantage as they were free to access the premium page locations by listing their services on Google shopping (European Commission, 2017). Lastly, Google argued that it did not differentiate in listing its own shopping services and rival shopping services or their product ads by holding them to the same relevance standards (European Commission, 2017).

The Commission was not persuaded by any of these arguments because the Commission's market inquiry found evidence to the contrary (European Commission, 2017). Google appealed against the decision which was recently rejected by the General Court of the European Union (General Court of European Union, 2021).

## ***B. Google Android***

This decision followed a probe by the Commission into Google's anticompetitive practices in its use of Android Mobile Operating System. There were in particular three allegations against Google. First, the unlawful tying of Google's proprietary products (Google Search and Google Chrome) with the Android mobile operating system; second, unlawful offering of financial incentives to device manufacturers and mobile network operators to exclusively pre-install Google's applications on their devices; third, use of unlawful Anti-Fragmentation Agreements to prevent the sale of devices running on alternative Android Systems (European Commission, 2019).

The Commission identified three separate relevant product markets namely market for general internet search services, market for licensable smart mobile operating systems and market for app stores for Android mobile operating systems (European Commission, 2019). The relevant geographic market was the EEA where Google holds a market share of 90% in all three relevant product markets (European Commission, 2019). Each of these markets is characterized by high barriers to entry and Google was found to have abused its dominant position in these markets using the following three separate types of anticompetitive practices.

First, Google required device manufacturers to preinstall Google Chrome and Google search on their devices by tying them with Google Android. The Commission found that these preinstalled apps offered a commercial advantage to Google by creating a 'status quo bias' amongst consumers using Google Search, as they were less likely to switch to alternative applications due to high switching costs. This further strengthened its dominant position by limiting the ability of rivals to compete effectively as both users and manufacturers (network effects) had little incentive to pre-install and download rival applications respectively (European Commission, 2019).

Second, Google was found to have offered attractive financial incentives to device manufacturers for pre-installing Google Search across their Android devices to the exclusion of rival search engines (European Commission, 2019). Third, Google entered into Anti-Fragmentation agreements with device manufacturers, which contractually obligated them from not using any other Android forks (Android being an open source operating system, Google Android is one such system) (European Commission, 2019). Violation of this contract would result in denial of all Google services to device manufacturers.

The Commission imposed a record breaking fine of € 4.34 billion on the tech giant (European Commission, 2018). The European Commission adopted a similarly stringent approach in infamous Microsoft Case in the early 2000's on similar issues. Google advanced technical arguments to justify each of the allegations against it. It countered the accusation of unlawful tying as being necessary to monetize its heavy investments into Google Android. Second, Google argued that the financial

incentives for pre-installation of Google Search were necessary to ensure production of devices for Android ecosystems. Third, Google argued that its restriction on usage of android forks was to prevent fragmentation of the android ecosystem. However, the commission dismissed all these arguments for being unfounded.

### **C. Google AdSense**

Google AdSense case of 2016 followed the Commission's inquiry into Google's alleged anticompetitive conduct. The Case concerned alleged leveraging of its dominant market position in the online advertising market, through its product Google AdSense, by engaging in exclusionary agreements (European Commission, 2016). Google AdSense operates as an online advertising software which provides an intermediary service connecting website owners with advertisers. Both Google and the website owner receive commission based on the number of clicks directed towards the advertisements.

The Commission regarded the relevant product market as the market for online search advertising intermediation and the relevant geographic market as the EEA where Google held a giant market share exceeding 85% (European Commission, 2019). The Commission found Google to be engaging in anticompetitive conduct by imposing restrictive supply obligations and relaxed exclusivity strategies on the third party website owners referred to as 'direct partners' of Google AdSense (European Commission, 2019). These were implemented through three types of contractual obligations:

exclusivity requirements, premium placement guarantees and authorizing changes to rival's adverts (European Commission, 2019). Firstly, Google imposed an obligation on its direct partners to exclusively use its product i.e. Google AdSense for advertising barring them from using rival advertising services through an outright prohibition (European Commission, 2019). Secondly, in the subsequent years, when the firm relaxed its requirements it allowed the direct partners to avail rival advertising services conditioned upon reserving premium locations on their websites exclusively for Google Ads (European Commission, 2019). Thirdly, it further obligated them to acquire prior approvals from Google before making any alterations to rivals' adverts (European Commission, 2019).

Google was found to have thereby abused its dominant position in the market for intermediary advertising services to prevent consumers (website owners) from availing rival's services through exclusionary market tactics. Such practices stifled innovation, harmed competition and limited consumer choice. Google was fined € 1.49 billion bringing its total of fines paid to the European Union to over € 8 billion (European Commission, 2019).

Although there is lack of availability of official case documents, scholars attribute Google's behaviour towards the need of the firm to sustain its platform styled business model with 'relationship specific investments' in return of offering its services free of charge to one side of the platform, thus enhancing consumer welfare (Portuese, 2019). However, the Commission, in its decision, states that Google was unable to provide evidence of creating any efficiency in the market (European Commission, 2019).

## **2. UNITED STATES**

In stark contrast to the rigorous scrutiny of Google's conduct by the European Commission, the Federal Trade Commission has adopted a milder approach. In 2011 the Commission conducted a detailed investigation into allegations against Google for Search Bias through its Universal Search option (Federal Trade Commission, 2013). Similar to the Google shopping case in the EU, Google was accused of vertically integrating its own content such as maps, shopping comparisons, flight search results etc. into its organic search results at the expense of rival vertical websites.

Google demoted rival websites by manipulating its algorithms, which led to foreclosing competition by reducing user's access to other vertical websites (Federal Trade Commission, 2013).

In essence, the investigation focused on three concerns: (i) favouring its own content while demoting the rivals' content; (ii) scraping of data from third party websites without compensation; and (iii) contractually binding third party websites to exclusively use Google's Adwords advertising platform (Federal Trade Commission, 2013). Despite evidence supporting these claims, the Federal Trade Commission did not resort to any enforcement action by entering into a settlement whereby Google agreed to change certain business practices. The Commission believed that Google adjusted its algorithms to improve the quality of its service and ultimately user experience, and not to violate antitrust provisions or to restrict competition (Rubin, 2019). Any negative effects on competition resulting from algorithmic changes, such as demotion and loss of traffic experienced by vertical websites, were only a by-product of legitimate business practice (Rubin, 2019).

#### **IV. EU and US Approaches Compared**

Here we offer a legal analysis followed by an economic analysis.

##### **1. LEGAL ANALYSIS**

###### ***A. Objectives and Approach***

The EU focuses on anticompetitive effects of a firm's actions, whereas the EU focuses on economic benefits and pro-competitive justifications. The EU takes into account economic benefits and procompetitive justifications on in respect of anticompetitive dealings such as cartels. Further consumer welfare trumps total welfare policy objective in the EU. On the other hand US approach is to protect the market as a whole (inclusive of consumers and firms) (Yi, 2016).

The European Court of Justice places a 'special responsibility' upon dominant undertakings (Michelin v Commission of the European Communities, 1983). This concept of special responsibility, which is unique to the European jurisprudence, implies that a dominant undertaking should not engage in any anticompetitive conduct that negatively impacts trade in the integrated European market while being entitled to compete on merits. The framing of this responsibility is referred to as an 'effects-based approach' (Furman et. al., 2019). It also indicates that there is low tolerance for anticompetitive behaviour from an undertaking with significant market power in the EU. What may constitute as lawful behaviour when performed by a non-dominant undertaking, may be regarded as unlawful when undertaken by a dominant firm (Yi, 2016).

There is a special approach adopted by the American jurisprudence in dealing with dominant undertakings i.e., the rule of reason approach, which has been rejected in EU jurisprudence. Under this rule the American courts define the lawfulness of an offence of monopolization by determining its economic benefits and weighing the pro-competitive benefits against the anti-competitive effects. The rule can also be utilized towards permitting certain anticompetitive conducts by a dominant firm if there was a commercial necessity, such as non-compete clauses (Dieny, 2006).

American standard on abuse of monopoly is harder to satisfy than the EU standard (Fox, 2014). The cases also suggest that, in dealing with the tech giant, EU adopted an outcome-focused antitrust approach while US adopted a non-interventionist approach (Fox, 2014). The EU approach of placing a 'special responsibility on dominant firms' has not been favoured and instead it adopts a total welfare policy that facilitates ease of doing business for the firms.

## ***B. Applicable Provisions***

Article 102 of the Treaty on the Functioning of the European Union prohibits abuse of dominant position in the market if doing so could affect the state of trade within the entire European market (Treaty on the Functioning of the European Union, 2007). It also provides a non-exhaustive list of abuses, leaving scope for more abuses to be added by courts in future litigation. However, certain specific requirements need to be met to constitute a violation of Article 102, the most prominent being that a business firm or organization must be classified as occupying a dominant position in the market and that it is engaged in abusive conduct (European Commission, 2009). The effects of abusive conduct on trade would have to be considered as well. The burden of proving an objective justification of its behaviour through demonstrable market evidence countering the allegations of abusive conduct lies with the defendant. It then falls on the Commission to weigh the benefits of the conduct against its restrictive effects and to analyse whether the arguments and evidence relied on by the incumbents prevail (European Commission, 2009). Thus dominance in itself is not unlawful under Article 102 of the Treaty, but its abuse is.

Investigating the charges levied against Google, the European Commission found that Google had, time and again, engaged in anticompetitive behaviour to the detriment of consumer welfare. The firm had leveraged its dominant position in the general search market to favour its own comparable shopping product, entered into exclusionary contracts for its advertising product and tied its products with its android mobile operating software thus foreclosing competition and limiting consumer choice. In levying heavy penalties on Google on several occasions and demanding a change in practice, the Commission has reiterated that while a dominant firm 'is entitled to compete on the merits,' it also has 'a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market' (European Commission, 2009). Thus going by the effects based approach, the Commission did not require evidence that there was actual harm caused but that harm was likely to be caused. Accordingly, in each of the cases, Google was unable to justify its behaviour through an efficiency defence (a defence that prevailed in the US) and the EC held that the anticompetitive effects of Google's conduct on consumer welfare outweighed any positive effects of product innovations cited by the firm in its defence.

In the US, alongside with the investigative powers of the Federal Trade Commission, the Sherman Act and the Robinson-Patman Act (amendment to the Clayton Act) operate as the governing legal instruments in antitrust cases. Section 2 of the Sherman Act is applicable to 'monopolization', as termed in American jurisprudence. Monopolization is understood in the broadest sense and such an act by a firm is a criminal offense. This means that for the action to be considered illegal, there must be evidence that a company monopolized or made attempts to monopolize (Yi, 2016).

The Department of Justice defines monopoly power to include high share of their relevant market, attempts to monopolize or to erect barriers of entry in the market that enables the firm to enjoy substantial market power over an appreciable period (The United States Department of Justice, 2008).

In order to satisfy the requirement of attempts to monopolize the market, it needs to be established that '(i) the defendant has engaged in predatory or anticompetitive conduct with (ii) a specific intent to monopolize and (iii) a dangerous probability of achieving monopoly power' (The United States Department of Justice, 2008). Here, intention can be proved by establishing unfair or predatory conduct and the ability of a dominant company to affect market competition indicates the dangerous probability of achieving monopoly power (Spectrum Sports, Inc. v. McQuillan, 1993). Market competition could be affected through barriers to entry, which could be erected through dominant firm's practices as well as consumer preferences of regulatory environment (creating natural monopolies) (Bhattacharjea et. al., 2019). Further, in American law it is not unlawful to merely possess monopoly power or to harm competitors through fair competition, known as 'competition on

merits', without harming consumers (United States v. Microsoft Corp, 2001). Thus, on being alleged of anticompetitive conduct, the defendant can prove competition on merits by advancing precompetitive justifications of their behaviour, which shifts the burden on the plaintiff to rebut the justification (United States v. Microsoft Corp, 2001).

In 2013, the Federal Trade Commission concluded its two-year long probe into Google and concluded that the firm lacked the required intent to result in actively endangering competition on its search engine. It stated that the firm displayed its own products to ensure better user experience, and any potential negative impact upon competitors was 'incidental' (Lundqvist, 2014).

This was, according to the Commission, 'competition on the merits', indicating that it was a common competitive process that the US law itself encourages (Lundqvist, 2014). However, it is worth considering whether Google could be held liable under the American legal framework for monopolization if taken to court. As outlined earlier, Google enjoys an extremely high market share in the American economy, which could indicate a 'dangerous probability' of monopolization. Moreover, the quantitative evidence that suggests that Google's self-favouritism has negatively impacted competitors deterring entry and driving out firms thus highlighting its 'intent' (Yi, 2016).

Literature also suggests that while the American courts generally rule in favour of innovation (changes in product design as in the case of Google) at the expense of competition, there is a possibility that Google's procompetitive justifications would not outweigh the anticompetitive effects employing the disproportionality test (Slawski, 2017).

While both jurisdictions require the establishment of a dominant position as a precondition of liability for abuse of dominance, there is a difference in the requirement of market share. In the EU a firm is unlikely to be dominant when its market share is below 40% while the percentage is 50% in the US. However, as discussed in Section 3.2 calculation of market power based only on market share for multisided platforms has been widely criticised in view of their unique features that contribute to their market power.

### ***C. Enforcement and Sanctions***

As described in Section 4.1, when it comes to enforcement, the European Commission enjoys both investigative as well as administrative powers. This power of direct enforcement enables the Commission to launch an investigation into anticompetitive conduct, on its own or on a complaint, and to take enforcement action (Whish & Bailey, 2012). The Federal Trade Commission on the other hand only enjoys investigative authority and enforcement must be through legal action against anticompetitive conduct (Bergh, 2017).

As regards sanctions in the EU heavy fines may be levied on undertakings which have been found to abuse their dominant position. It has been found that such fines could constitute 10% of a firm's annual turnover for infringement of competition law provisions and 1% of annual turnover for failing to comply with the European Commission's orders during the course of investigations (Bergh, 2017). This shows that the Commission imposes heavy fines on tech giants (based on a percentage of turnover as opposed to a maximum limit), such as Google. In the US, these fines can go only as high as 1 million dollars for individuals and 100 million dollars for firms (Bergh, 2017). The difference in calculation of fines could be a cause of concern, especially for firms with presence in both jurisdictions, as they could be fined or treated differently in different jurisdictions on the same abusive conduct.

## 2. ECONOMIC ANALYSIS

While Google Search provides free services to one side of the market, it earns high revenue through advertising and large volumes of user data it is able to collect (European Data Protection Supervisor, 2014). Google incurs negligible marginal costs and is thus able to offer its services for free to one side, which in turn enables it to attract large number of users who further attract large number of advertisers. Google thus capitalizes on these network effects while innovating and offering unmatched user experience, one that locks in users and prevents them from effectively multi-homing. Its exclusionary market tactics, coupled with deep pockets, have created high artificial barriers to entry and it currently stands unrivalled in the search market. In the Google Shopping and Google AdSense cases, the Commission was applauded for realizing Google's strategy of leveraging its market position in Google search market to benefit its comparison-shopping service market and to deter entry of competitors in the online search advertising market (Baker, 1989; European Commission, 2017).

The Google Android case drew significant attention not only for the heavy fine imposed but also for the technicalities of the decision. Proponents of Google Android's practices argue that the decision failed to take into account Google's innovation of curating a superior product than its rivals, which attracted customers and application programmers (Khurana, 2018). Google benefitted from network effects and applications barriers to entry, which made Google Android attractive to consumers since it offered an array of applications running on it (Khurana, 2018). Further, it is said that there was no proven causal link between anticompetitive conduct and consumer harm (Portuese, 2019).

Harm was merely illustrated as a consequence of reduced consumer choice due to driving out rival applications when it should have been counterbalanced with the enhanced choice made available by the introduction of Google Android as a main competitor of Apple iOS (Portuese, 2019). However, as the Commission rightly pointed out, non-licensable mobile operating systems such as Apple iOS or Blackberry at best exhibited 'indirect competitive constraints' to Google Android which is licensable (European Commission, 2019). Further Google largely exploited barrier to entry, which was created in the first place due to the pre-installation contractual mandate of programmers leaving Google applications with no choice but to program for Playstore to reach widespread network of users.

Finally, the case strongly highlights a welcome move by the European Commission towards 'Precautionary Antitrust' in dealing with the tech giants (Golier & Treich, 2003). Competition in digital markets is marked with lack of knowledge due to uncertain levels of innovation, demonstrable consumer harm and internal workings of the digital ecosystem (Craig, 2019). This sets the foundation for applying precautionary principle by authorities taking regulatory action as opposed to following the traditional approach.

This principle relies on shifting the burden of proof to the incumbent (Craig, 2019) and intervening ex ante (regulatory measures such as interim relief) even in the absence of demonstrable consumer harm to prevent future anti-competitive behaviour (Vestager, 2017). This spirit of precautionary antitrust was also reinforced in the Digital Competition Report, which recognizes that highly concentrated digital markets are characterized by externalities such as strong network effects and high barriers to entry which are not corrected by the markets themselves (European Commission et. al., 2019). It recommends that regulatory intervention may want to "err on the side of disallowing potentially anticompetitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct" (European Commission et. al., 2019). The report illustrates this recommendation with examples of situations when a dominant platform leverages its position in one market to expand into others and when it engages in self-preferencing, thus hinting towards Google's conduct (European Commission et. al., 2019). On the contrary, the traditional approach is set on intervening ex-post, once the consumer harm has been established, with a presumption of innocence in favour of the incumbent.

Joining forces with the advocates of Google's conduct in the EU is the US Federal Trade Commission with its rather short statement on its probe into Google's self-favouritism. The allegations in this case were similar to those in Google Shopping decided by the EU.

In a unanimous decision, the Federal Trade Commission concluded its investigation into Google's anticompetitive conduct with mild reprimand and no enforcement action against the firm.

In agreeing with this decision most American scholars peg the need to safeguard technological innovation through minimal intervention. This approach seeks to avert an antitrust analysis that attempts to weigh the product innovations against anticompetitive effects it brings forth. Such an analysis is said to lead to incorrect results due to lack of a criterion that can be used to measure the "right amount of innovation that would maximize social gains and minimize competitive injury" (Manne & Wright, 2010). Further in undertaking such an analysis, antitrust jurisprudence wrongfully assumes that competition in the industry is only possible with access to the dominant innovation (Manne & Wright, 2010).

Moreover, a compelling argument suggests that, notwithstanding anticompetitive accusations directed at Google, the onus lies largely on the shoulders of both competitors and customers. According to a particular perspective on the matter of Google Search's alleged exclusionary practices, regulatory authorities are said to adopt a 'naive foreclosure analysis,' examining any form of exclusion. However, the emphasis should instead be on assessing 'substantial foreclosure'—the kind that hinders competitors from attaining a minimally viable scale. (Wright, 2012) As per this theory, there is only place for one search to ever appear in the first place and even in absence of any search bias it is possible that a large number of competitors would be left out from being displayed on the first, second or third search results (Manne & Rineheart, 2013). Hence, it becomes evident that in the absence of Google's proprietary content or any exclusionary practices (i.e., if all search results were shifted up by one place), the relative standing of Google's competitors would stay unaltered. Consequently, this minimizes the overall impact of the foreclosure (Manne & Rineheart, 2013).

The argument of 'competition on merits' seems to be in same as Google's classic defence of 'competition is a click away' for consumers (Wisner, 2012). At initial glance on the statement, it appears that consumers only face minimal switching costs, primarily involving locating and clicking an alternative to Google. This implies low information costs, seemingly opening the market to new entrants. Yet, upon closer examination, it may not be accurate to dismiss the potential influence of strong network effects exhibited by the firm in shaping consumer decisions. Due to strong network effects, consumers are locked-in on the user experience. The platform runs on self-improving algorithms and with every switch there are less chances of finding an accurate search result leading to demand side economies of scale (Herz, 2014). Therefore, it makes the market less attractive for new entrants (creating barriers to entry) and is also detrimental to individual user experience. Further the users may not always be able to determine when or whether it is advantageous to make the switch to another search engine, such asymmetric information may lead to high information costs in switching (Patterson, 2013).

Additionally, Google's competitors and critics wildly criticized the Federal Trade Commission's decision for not focusing on Google's conduct, instead of focusing on intent (Manne & Rineheart, 2013). Even though the Commission found that due to algorithmic alterations search results could lead to harming competitors and competition, it stated that the underlying intention of Google was only to offer improved and informative search results to users and not to infringe competition. As regards allegations of Google's exclusionary conduct in search results, the Commission did not spend any time in discussing why this allegation is unsubstantiated and whether search bias actually constitutes a refusal to deal or a form of exclusion. Another criticism concerns the need to prevent

Google from heading towards “unassailable monopoly” because of the overwhelming amount of data it collects and utilizes towards creating unmatched barriers to competition (Harbour & Koslov, 2010). Lastly, the US addressed Google’s antitrust issues by adopting an Error-Cost Approach, which is the antithesis of the ‘precautionary principle’ adopted by the EU. It is rooted in the common practice of the US Supreme Court to avoid false positive errors of over-detering welfare enhancing innovations in cases of monopolization because of its belief that a monopoly will be self-corrected by the economic system (Wright, 2012). Thus, American approach is not to prosecute monopolies assuming that the cost to consumers of wrongfully sanctioning a non-predatory firm are much higher than not sanctioning a monopoly for its conduct (Wright, 2012).

In the light of this discussion, it can be said that in both EU and US, Google’s defence centred on economic arguments of consumer welfare and efficiency that were clothed in Chicago school thinking. While the EU adopted a post-Chicago approach in deciding against Google, the defence prevailed in the US. As noted by a post-Chicago economist, both schools of thought concur on consumer welfare and allocative efficiency being the central goals of competition laws but differ in their approaches towards achieving the goal (Posner, 1979). The Chicago school rests on neoclassical assumptions of rational profit maximizing buyers and sellers and believes in market forces correcting monopolies (Khurana, 2018). However the Post-Chicago theorists are sceptical of monopolies and thus in favour of regulatory intervention to safeguard consumer welfare. Their analysis of pricing strategies adopted by firms in dynamic markets diverges from the Chicago thinking. They believe that a conglomerate (firm with presence in multiple markets, like Google) would engage in predatory price wars in one market to drive away competition in other markets. Further, firms also heavily invest in economies of scale, which strategically deters entry of new firms in the market due to high pre-entry costs (Khurana, 2018). This school of thought rightly captures the unique features and functioning of multisided platforms.

## V. CONCLUSION

Google leverages its dominant position in the search market to foreclose competitors and harm consumers. It benefits from a synergy of showcasing strong network effects, operating on intricate pricing strategies, and being powered by access to user data because of its technological advancements. While the tech giant, an American corporation, is heavily scrutinized by the European Commission and the ripple effects of its conduct are felt across several jurisdictions. Naturally, when a service acts as the ‘primary access point to the rest of the internet’ for users around the globe, it can instinctively be assumed to amass unparalleled power across multiple markets and impact consumers (Furhman et. al., 2019). Undoubtedly, Google’s market power has an unprecedented influence on competition and consumer welfare as compared to any other tech company and has rightly attracted the attention of European regulators as well as policy makers.

Despite having similar goals of competition policy, the two jurisdictions are influenced by different schools of thinking and implement their legislations accordingly. The American system is more attuned to acknowledging the welfare of consumers within the monopolies while the European system focuses on recognizing the long-term anti-competitive effects to consumers in concentrated markets. The European and American jurisdictions have adopted different approaches in dealing with Google’s anticompetitive conduct on the same issues. The cases highlight the insufficiency of current legal frameworks in undertaking a competition analysis of multisided platforms. This has resulted into opening of a Pandora’s box of discourse highlighting the need for dynamic market definitions and measures of market power, rethinking the available antitrust tools in undertaking competition analysis and most importantly balancing consumer welfare, innovation, and competition in a digital economy. The approach adopted in the two jurisdictions further posits a dilemma for the regulators across the globe. Given the uncertainty brought forth by big tech giants, should enforcement lean towards a

discretionary regime where consumer welfare prevails over innovation (harm is prevented before it is caused) or should it pave way for innovation even if comes at the expense of consumer welfare?

As more and more users spend time online, tech giants are becoming increasingly powerful. Their innovative products and services require innovative remedies and uniform application of regulation to outlaw competitive conduct that harms competition and compromises the welfare of consumers in the long run. Therefore, there is a strong case to be made for a uniform approach that can be tailored to suit the social, legal, economic, and political environment of any particular jurisdiction.

## REFERENCES

1. Baker, J., 1989. Recent Developments in Economics That Challenge Chicago School Views, *Antitrust Law Journal* 58, No. 2 (1989): 645–55.  
[https://www-jstor-org.du.idm.oclc.org/stable/40841261?seq=1#metadata\\_info\\_tab\\_contents](https://www-jstor-org.du.idm.oclc.org/stable/40841261?seq=1#metadata_info_tab_contents)
2. Bergh, R., 2017 *Comparative Competition Law and Economics*, Edward Elgar Publishing.
3. Bergqvist, C., & Rubin, J., 2019. Google and Transatlantic Abyss, University of Copenhagen Faculty of Law Research Paper No. 2019-73. <http://dx.doi.org/10.2139/ssrn.3354766>
4. Bhattacharjea, A., De, O. & Gouri, G. Competition Law and Competition Policy in India: How the Competition Commission has Dealt with Anticompetitive Restraints by Government Entities. *Rev Ind Organ* 54, 221–250 (2019). <https://doi.org/10.1007/s11151018-9641-0>
5. Buttà, A., 2018. Google Search (Shopping): An Overview of the European Commission's Antitrust Case, *Italian Antitrust Review* 2, no. 1 (2018). <https://doi.org/10.12870/iar-12872>
6. Competition and Markets Authority, 2020. Online Platforms and Digital Advertising, Market Study – Final Report.  
[https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_July\\_2020\\_.pdf](https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf).
7. Craig, E., 2019. Vestager considers shifting burden of proof for big tech, *Global Competition Review*. <https://globalcompetitionreview.com/article/1210348/vestagerconsiders-shifting-burden-of-proof-for-big-tech>.
8. Dieny, E., 2016. The CFI Reaffirms the Absence of a Rule of Reason in EC Competition Law, *International Business Law Journal*, No. 5, 681-682.
9. Elia, N., 2017. Innovative Product, Innovative Remedy: Essential Facility as a Compromise for the Antitrust Charges against Google's OneBox in the United States and the European Union, 31 *TEMP. INT'L & COMP. L.J.* 465.
10. European Commission, 2008. Antitrust: Consumer Welfare at Heart of Commission Fight Against Abuses by Dominant Undertakings,  
[https://www.bing.com/ck/a?!&&p=39cd43cfef8e675fJmltdHM9MTcwMjE2NjQwMCZpZ3VpZD0zNjU3NWY1NC1kMTA1LTlTY1MjgtMWVjYS00YzE2ZDBiNzY0NTkmaW5zaWQ9NTIwNQ&ptn=3&ver=2&hsh=3&fclid=36575f54-d105-6528-1eca-4c16d0b76459&psq=Antitrust%3a+Consumer+Welfare+at+Heart+of+Commission+Fight+Against+Abuses+by+Dominant+Undertakings%2c+Press+Release+\(Dec.+3%2c+2008\)&u=a1aHR0cHM6Ly9lYy5ldXJvcGEuZXUvY29tbWlzc2lvbi9wcmVzc2Nvcn5lci9hcGkvZmlsZXMvZG9jdW1lbnQvcHJpbnQvZW4vaXBfMDhfMTg3Ny9JUF8wOF8xODc3X0VOLnBkZg&ntb=1](https://www.bing.com/ck/a?!&&p=39cd43cfef8e675fJmltdHM9MTcwMjE2NjQwMCZpZ3VpZD0zNjU3NWY1NC1kMTA1LTlTY1MjgtMWVjYS00YzE2ZDBiNzY0NTkmaW5zaWQ9NTIwNQ&ptn=3&ver=2&hsh=3&fclid=36575f54-d105-6528-1eca-4c16d0b76459&psq=Antitrust%3a+Consumer+Welfare+at+Heart+of+Commission+Fight+Against+Abuses+by+Dominant+Undertakings%2c+Press+Release+(Dec.+3%2c+2008)&u=a1aHR0cHM6Ly9lYy5ldXJvcGEuZXUvY29tbWlzc2lvbi9wcmVzc2Nvcn5lci9hcGkvZmlsZXMvZG9jdW1lbnQvcHJpbnQvZW4vaXBfMDhfMTg3Ny9JUF8wOF8xODc3X0VOLnBkZg&ntb=1)
11. European Commission, 2009. Communication from the Commission-Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, O.J. (C 45) 3, 9-10.

12. European Commission, 2016. Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_2532](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2532)
13. European Commission, 2017. Google Search (Shopping): Commission Decision, 39740 (2017). [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39740](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740)
14. European Commission, 2018. Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_4581](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581)
15. European Commission, 2019. Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_1770](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770)
16. European Commission, 2019. Google Android: Summary of Commission Decision, 40099 (2019). [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019X\\_C1128\(02\)&from = EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019X_C1128(02)&from=EN)
17. European Commission, Directorate-General for Competition, Montjoye, Y., Schweitzer, H., Crémer, J. (2019). *Competition policy for the digital era*, Publications Office. <https://data.europa.eu/doi/10.2763/407537>
18. European Data Protection Supervisor, 2014. Privacy and competitiveness in the age of big data, Preliminary Opinion. [https://edps.europa.eu/sites/edp/files/publication/14-0326\\_competition\\_law\\_big\\_data\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/14-0326_competition_law_big_data_en.pdf)
19. Evans, D., & Schmalensee, R., 2016. *Matchmakers: The New Economics of Multisided Platforms*, Harvard Business Review Press.
20. Federal Trade Commission, 2013. Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search. <https://www.ftc.gov/news-events/pressreleases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>
21. Fox, E. 2014. Monopolization and Abuse of Dominance: Why Europe Is Different, *The Antitrust Bulletin*, Vol. 59, No. 1, 142-143.
22. Furman, J., 2019, Report of the Digital Competition Expert Panel: Unlocking Digital Competition (Furman Report). [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)
23. General Court of European Union, 2021. The General Court largely dismisses Google's action against the decision of the Commission finding that Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services. Press Release No. 197/ 21, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf>
24. Gollier, C., & Treich, N., 2003 Decision-Making Under Scientific Uncertainty: The Economics of the Precautionary Principle, *Journal of Risk and Uncertainty*. <https://www.semanticscholar.org/paper/Decision-Making-Under-ScientificUncertainty%3A-The-Gollier-Treich/a5c4d8313e284f36298c017ee31785932aea789a>
25. Harbour, P., & Koslov, T., 2010. Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets, *Antitrust Law Journal*, Volume 76, No.1.
26. Herz, M., 2014. Google Search And The Law On Dominance In The EU: An Assessment Of The Compatibility Of Current Methodology With Multi-Sided Platforms In Online Search.

- <https://ssrn.com/abstract=2497932> or <http://dx.doi.org/10.2139/ssrn.2497932>
27. Hirst, N., Scola, N., Romm, T., 2016. Europe's Android case sharpens divide with US. <http://www.politico.eu/article/europes-android-case-sharpens-divide-with-us/>
  28. Khurana, R., 2018. The Economic Illiteracy of the Google Antitrust Case, Institute for Research in Economic and Fiscal Issues. <https://en.irefeurope.org/Publications/Online-Articles/article/The-Economic-Illiteracy-of-the-Google-Antitrust-Case>
  29. Lundqvist, B., 2014. Standardization under EU competition rules and US antitrust laws: The rise and limits of self-regulation. Edward Elgar Publishing. <https://www.bing.com/ck/a?!&&p=ccf43289e85adc85JmltdHM9MTcwMjE2NjQwMCZpZ3VpZD0zNjU3NWY1NC1kMTA1LTY1MjgtMWVjYS00YzE2ZDBiNzY0NTkmaW5zaWQ9NTIwNg&pptn=3&ver=2&hsh=3&fclid=36575f54-d105-6528-1eca-4c16d0b76459&psq=Lundqvist%2c+B.%2c+2014.+Standardization+under+EU+competitio n+rules+and+US+antitrust+laws%3a+The+rise+and+limits+of+selfregulation.+Edward+Elgar+Publishing.&u=a1aHR0cHM6Ly93d3cuc2VtYW50aWNzY2hv bGFyLm9yZy9wYXBlci9TdGFuZGFyZGl6YXRpb24tVW5kZXItRXUtQ29tcGV0aXRpb24tU nVsZXMtYW5kLVVzLUx1bmRxdmldC85MDEzMDEyZDU1NzQ3YzA1ZTQ1NmY2ZGY4 ZDkyNThlOWM2NTlkOGFk&ntb=1>
  30. Manne, G., & Rineheart, W., 2013. The Market Realities that Undermined the FTC's Antitrust Case Against Google, Harvard Journal of Law and Technology.
  31. Manne, G., & Wright, J., 2010. Innovation and the Limits of Antitrust, Journal of Competition Law and Economics.
  32. Marcos, F., 2017. The Prohibition of Single-Firm Market Abuses: US Monopolisation Versus EU Abuse of Dominance, International Company and Commercial Law Review, Vol. 28, No. 9, 338 (2017).
  33. Markovits, R., 2016. Economics and the Interpretation and Application of U.S. and E.U. Antitrust Law, The Antitrust Bulletin, 61(1), 3-83, (2016). <https://doi.org/10.1177/0003603X15625126>;
  34. NV Nederlandsche BandenIndustrie Michelin v Commission of the European Communities, 1983. C-322/81, EU:C:1983:313.
  35. Patterson, M., 2013. Google and Search Engine Market Power, Harvard Journal of Law and Technology. <https://jolt.law.harvard.edu/assets/misc/Patterson.pdf>
  36. Portuese, A., 2019 "Google AdSense for Search: Fines Always Come in Threes," Competition Policy International. <https://www.competitionpolicyinternational.com/googleadsense-for-search-fines-always-come-in-threes/>
  37. Posner, R., 1979. The Chicago School of Antitrust Analysis, 127 U. Pa. L. Rev. 925. [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4863&context=penn\\_law\\_rev](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4863&context=penn_law_rev)
  38. Slawski, B., 2017. Google Updates Their One Box, Go Fish Digital. <https://gofishdigital.com/google-updates-their-one-box-patent/>
  39. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)
  40. The United States Department of Justice, 2008. Competition And Monopoly: Single-Firm Conduct Under Section 2 Of The Sherman Act, U.S. Dep't Of Justice 21-22 (Sept. 2008). <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf>
  41. Treaty on the Functioning of the European Union, Article 102 (1957). <https://eurlex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E102>
  42. United States v. Microsoft Corp., 253 F.3d 34, 55 (D.C. Cir. 2001)

43. Vestager, 2017. Applying precautionary measures in antitrust cases, Question for written answer E-004559-17 to the Commission. [https://www.europarl.europa.eu/doceo/document/E-8-2017-004559\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/E-8-2017-004559_EN.pdf);
44. Whish, R., & Bailey, D., 2012. *Competition Law*, 7th ed. Oxford: Oxford University Press.
45. Wright, J., 2012. Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust, *Antitrust Law Journal*, Volume 78, No.1.
46. Wright, J., 2012. Moving Beyond Naive Foreclosure Analysis, *George Mason Law Review*.
47. Yi, A., 2016. Tying Conduct Under Article 102 TFEU: Can Intervention Against Google Be Justified, *European Competition Law Review*, Vol. 37, No. 10, 406.
48. Yun, J., 2018. Understanding Google's Search Platform and The Implications for Antitrust Analysis, *Journal of Competition Law & Economics*, 14(2), 311–329. doi:10.1093/joclec/nhy009