EXPLORING THE VICES OF SEARCH BIAS IN DIGITAL MARKETS – AN ANTITRUST ANALYSIS IN LIGHT OF DIFFERENT JURISDICTIONAL PRACTICES AND DEVELOPMENTS

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ABSTRACT

The rising reliance on search engines and digital platforms in recent years, specifically in this pandemic era, has posed daunting challenges for both consumers and competitors of such platforms in a way that was unforeseen by antitrust authorities across the globe. Search engines and online marketplaces, which possess significant network effects and data, indulge in self-preferencing practices such as search result manipulation, to place their own products/services at the very top of their search results. This practice occasionally places existing competitors in vertical markets at a competitive disadvantage to the platform's own products/services, by diverting customer traffic and revenue away from them. It not only affects existing players, but also acts as an entry barrier to potential competitors of the platform's products/services. With no alternative platform to turn to or the ability to create one, such competitors in the long run may face elimination, thereby reducing choices for customers in the market. This paper presents the views of the author on the issue of search bias under antitrust law and presents an analysis of the legal position and developments in this area, in jurisdictions such as the European Union and the United States of America. This paper further analyses the position in India and advocates for stronger enforcement, coupled with the introduction of a digital markets' regulation under the Competition Act, 2002, to effectively deal with the menace of anticompetitive self-preferencing through search ranking manipulation.

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I. INTRODUCTION

The rising reliance on search engines and digital platforms in recent years, to meet our everyday needs, has posed a number of challenges for both consumers and competitors of such platforms in a way that was unforeseen by antitrust authorities across the globe. The exclusionary and predatory conduct of such website owners, who are either dominant or hold significant market power, has also led to an undeniable ripple effect on upstream and downstream market players, who are reliant on these websites for their survival in the digital marketspace. In some cases, where digital platforms are concerned, the peculiar problems associated with multi-sided markets,[1] have also thrust antitrust enforcers into unchartered territory.

Several antitrust authorities across the world have indeed made laudable and well-intentioned attempts to introduce guidance notes, competition tools, and studies to navigate the growing cornucopia of issues that arise in digital markets. However, there is little doubt about the fact that it is difficult to truly encapsulate all possible issues that may arise in such a dynamic market and make them fit into the predefined boxes that current antitrust statutes provide.[2] Current antitrust laws do not appear to provide concrete remedies which may solve the issues posed by these technological platforms, and the calls for 'breaking up Big Tech' are often hollow and fail to take into account practical issues such as data privacy issues and network externalities.[3] If new laws and enforcement are to be effective, the genesis of the rise of such digital media players must be traced and accordingly curtailed at the first whiff of serious anticompetitive breaches. This is not to say that antitrust authorities should necessarily act as gatekeepers into various technological markets. The same is likely to nip innovation in the bud. However, swift enforcement and the ability to detect and penalize anticompetitive technological platforms in such fast, developing markets is the need of the hour.

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[1]Digital platform providers, especially business-to-consumer ["**B2C**"] platforms, tend to connect suppliers/ sellers/ service providers with end-consumers, thus providing services to both suppliers of a product or service on one side and to consumers on the other. B2C platforms thereby deal with two relevant markets simultaneously and the consequent antitrust issues arising from such multi-sided markets require deeper scrutiny from competition authorities.

[2]John M. Newman, 'Antitrust in Digital Markets' (2019) 72 VLR 1497 <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2019/10/11172710/Antitrust-in-Digital-Markets-1.pdf> accessed 4 November 2020.

[3]Benedict Evans, 'Would Breaking Up 'Big Tech' Work? What Would?' (*Benedict Evans,* 10 August 2020) <https://www.ben-evans.com/benedictevans/2020/8/10/would-breaking-up-big-tech-work> accessed 4 November 2020.

Apart from traditional factors such as deep funding sources which inevitably set the scene for possible monopolization, there are some factors,[4] that have allowed several tech companies to grow in size, assert their market power, exclude competitors, and reduce competition with impunity across multiple relevant markets. Such factors,[5] include network effects, possession of large amounts of data, self-preferencing, tying, exclusive dealing arrangements, and other vertical restrictions. Strategic mergers/acquisitions,[6] with tech companies operating in the same, similar, or complementary relevant markets, and/or mergers with major upstream or downstream counterparts have also emerged as glaring practices that further consolidate the monopoly powers of such platforms across multiple connected markets.

Of the factors mentioned above, network effects,[7] data, and self-preferencing pose unique problems in tech markets, creating an unholy trinity of issues that plague competition on these platforms as we know them today. Network effects and data collection together, arguably, create the ultimate digital honey trap which locks in,[8] customers and providers alike into a self-reinforcing, seemingly endless positive feedback loop.[9] Many would argue that the creation of network effects and the accrual of data are natural outcomes of such markets and are bound to continue even if the tech companies are forced to structurally split up or divest. This poses a daunting challenge to antitrust authorities who seek to curb any anticompetitive behaviour that these platforms may indulge in.

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[4]OECD, 'Abuse of Dominance in Digital Markets' (2020) <http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf> accessed 23 December 2020.

[5]ibid.

[6]Mark Glick and Catherine Ruetschlin, 'Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook' (October 2019) Institute for New Economic Thinking Working Paper No. 104 <https://econ.utah.edu/antitrust-conference/session_material/Tech%20Acquisitions%20and%20Competition%20Doctrine.pdf> accessed 7 November 2020.

[7]'Network effects' refers to the phenomenon where the value of a product/service increases with an increase in the number of users of the said product/service. For example, as more consumers flock to a particular platform, the platform is likely to attract more sellers/suppliers and vice-versa. See Catherine Tucker, 'Network Effects and Market Power: What Have We Learned in the Last Decade?' (2018) <http://sites.bu.edu/tpri/files/2018/07/tucker-network-effects-antitrust2018.pdf> accessed 31 October 2020.

[8]ibid.

[9]Timothy F. Bresnahan, 'Network Effects and Microsoft' (2001) Stanford Institute for Economic Policy Research Discussion Paper No. 00-51 <https://siepr.stanford.edu/sites/default/files/publications/00-51_0.pdf> accessed 5 November 2020.

In contrast to network effects and access to data, self-preferencing not only raises entry barriers but is an actual, conscious tool used by entities to leverage their dominant position,[10] to enter another relevant market or strengthen their dominance in a connected relevant market and eliminate competitors from the aforesaid market. Self-preferencing can manifest itself in several ways – through search bias, higher discounts and lower prices to affiliates, imposition of less favourable terms in vertical arrangements, among others. Anticompetitive self-preferencing of an already dominant platform is frequently viewed as an abuse of dominant position under contemporary competition analysis in jurisdictions such as the European Union ["**EU**"] and India.[11] Given the evolving nature of digital markets, anticompetitive self-preferencing by large digital monopolies should also be interpreted as a violation of the anti-monopoly provisions in other major jurisdictions such as the United States ["**US**"], where such wide interpretations are yet to be conclusively made, often out of an apprehension that it may stifle innovation and reduce efficiencies.[12] However, antitrust authorities in the US, of late, appear to have widened the lens through which they look at self-preferencing and, in particular, search bias practices by platforms such as Google and Amazon.[13] It would be interesting to see how the authorities proceed against them in the changing politico-legal climate of the US, which has long influenced attitudes towards antitrust enforcement.

In recent years, the debate about how far self-preferencing should be considered a violation of antitrust laws has raged on across different jurisdictions, with some arguing that there exist *bona fide* business justifications and that the right to promote one's own products/services should not be curtailed. Still, others believe that the conduct of such platforms, while affecting competitors on occasion, are free and do not ultimately harm consumers, and fail

[10]'Self-Preferencing and EU Competition Law' (*Digital Freedom Fund*, May 2020) <https://digitalfreedomfund.org/wp-content/uploads/2020/05/5_DFF-Factsheet-Self-preferencing-and-EU-competition-law.pdf > accessed 5 November 2020.

[11]*Google Search (Shopping)* (Case COMP/AT.39740) Commission Decision [2017] OJ C9/11; *In Re: Matrimony.com Limited v Google LLC and Ors* 2018 SCC OnLine CCI 1.

[12]Eleanor M. Fox, 'A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU' (*Prepared Statement before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 19 December, 2018) <https://www.judiciary.senate.gov/imo/media/doc/Fox%20Testimony.pdf> accessed 5 November 2020.

[13]Dianne Bartz, 'Big Tech's Market Dominance Spurs Numerous US Antitrust Probes' *Reuters* (Washington, 20 October 2020) <https://www.reuters.com/article/us-tech-antitrust-bigtech-factbox-idUSKBN2751TK> accessed 5 November 2020.

the test of the restrictively interpreted consumer welfare standard.[14] But the reality is more nuanced than that. Self-preferencing, combined with the twin factors of network externalities and data possession, pose immediate short-term and long-term threats to competition in the relevant market as well as to consumers.

In this article, the author specifically explores the concept of self-preferencing through search result manipulation and discusses how it may harm existing competition and potential competition in relevant markets where the platform's own products/services compete, and how such conduct eventually harms consumers. Subsequently, the author analyses how certain jurisdictions (principally India, the EU, and the US) have viewed search bias under their respective antitrust laws. Finally, the author suggests the way forward for enforcers in India.

II. SELF-PREFERENCING THROUGH SEARCH BIAS – HOW CAN IT BE ANTICOMPETITIVE?

Perhaps the form of self-preferencing that has gained the most prominence in recent times is the concept of 'search bias'. Search bias, as the term suggests, refers to the practice of ranking,[15] or positioning one's own products or services, or the products and services belonging to affiliated parties, in the first few spots or pages of search results. Manipulating algorithms to produce search results that favour the platform's own preferred products or services has, for many years, been justified under the garb of promoting one's own business. Search engines go a step further to argue that consumers are not affected since search services are, in any case, free and all other choices are displayed, even if they are not prominently placed in the very first set of search results. The dilemma that this puts antitrust authorities in, is this – if consumers truly are provided with all choices possible and if non-affiliated businesses are not entirely blocked out from the search results, is self-preferencing not a reasonable business decision,[16] as opposed to the demon that antitrust critics make it out to be?

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[14]Geoffrey A. Manne, 'Why US Antitrust Law Should Not Emulate European Competition Policy' (*Prepared Statement before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 19 December 2018) <https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf> accessed 5 November 2020.

[15]Andrew Langford, 'Monopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention?' (2013) 88 ILJ 1559 <http://ilj.law.indiana.edu/articles/19-Langford1.pdf> accessed 8 November 2020.

[16]Maurits Dolmans and Tobias Pesch, 'Should We Disrupt Antitrust Law?', (*Cleary Gottlieb Steen & Hamilton LLP*, 15 July 2019) <https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf> accessed 5 November 2020.

In as early as 2011, the Office of Fair Trading ["**OFT**"], United Kingdom ["**UK**"] came out with a report,[17] in which it recognized a traditional consumer's tendency to click on the first few search results of a search engine. This idea was also validated in 2017 when the Competition Markets Authority ["**CMA**"], UK,[18] came out with a report succinctly summarizing how consumer behaviour plays a strong role in the amount of traffic that a website receives, when reflected in the search results of a search engine. The CMA had noted that consumers, on an average, disproportionately click on only the top few search results. This, in effect, ensures that only those websites which dominate the first few pages of search results receive maximum traffic, customers, and revenue, whether they may be on search engines or on online marketplaces. From a pure business standpoint, allowing one's services or products to appear in the first few pages of search results makes perfect sense. It is, after all, an approach that is specifically tailored keeping in mind this exact facet of consumer behaviour.

How this kind of deliberate preferential placement is detrimental to competition is of course crucial for antitrust authorities to examine on a case to case basis. The three ways in which search result manipulation by dominant entities/monopolies maybe anticompetitive and the stakeholders that are affected by such practices are as follows –

A. Existing competitors

The immediate impact of self-preferencing through search bias is, of course, felt by existing competitors in the specific relevant market in which the platform itself is trying to compete, by favouring its own products or services. Once a firm gains enough market power and market shares to become dominant/a monopoly in the appropriate relevant market in the digital space, self-preferencing can allow it to leverage its dominant position to either enter or strengthen the position of its own products/services in another relevant market. For instance, a search engine such as Google, which enjoys a virtual monopoly in most jurisdictions in the market for general search services, may utilize its position as a dominant platform, to increase

[17]Steffen Huck, Jidong Zhou and London Economics, 'Consumer Behavioural Biases in Competition A Survey' (*London Economics*, May 2011) <https://londoneconomics.co.uk/wp-content/uploads/2012/06/Consumer-behavioural-biases-in-competition-OFT1.pdf> accessed 5 November 2020.

[18]Competition and Markets Authority, 'Online Search: Consumer and Firm Behaviour' (7 April 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/607077/online-search-literature-review-7-april-2017.pdf> accessed 4 November 2020.

the visibility of one of its online services at the very top of all search results.[19] This, in turn, is likely to cause massive financial setbacks to its competitors in the relevant market for the aforesaid online services.[20] If existing competitors do not receive the opportunity to fairly compete against the services provided by the dominant platform due to search result manipulation, there is a strong likelihood that many such competitors, in the absence of strong funding sources, shall eventually be unable to sustain themselves over an extended period of time and will have no other alternate platform to turn to. A platform like Google enjoys the full benefits of network effects, and the competitors of its products/services will not be able to take advantage of Google's massive network if they decide to switch platforms. Ultimately, they shall be eliminated.

B. Potential competitors

Undoubtedly, in high tech markets, there are several factors that may contribute to the existence of major entry barriers and market foreclosure. Network effects, high capital costs, regional requirements, a high level of required innovation, among others, often contribute to the creation of entry barriers.[21] However, by indulging in self-preferencing practices such as search result manipulation, platforms may effectively create a huge impediment to the entry of new players who may seek to enter the digital space. An example of such a practice is the one adopted by online marketplaces in different jurisdictions. As discussed earlier, numerous marketplaces manipulate their search algorithms in such a way that only their own inventory or the products sold by their own affiliates are prominently displayed in the first few pages of search results. This makes it practically impossible for new sellers or smaller sellers to find their footing on the platform and they are, thus, either unable to access the relevant market or unable to survive in it. Further, due to the existence of network effects, lack of data reserves, and high capital costs, it is nearly impossible for most sellers to create an alternate platform for themselves that could rival the dominant marketplace. Search bias, combined with these other factors, therefore has an adverse impact on potential competition as well.

C. Consumers

The impact on consumers, as a consequence of search bias, may be of two kinds – immediate and long-term. One possible immediate concern that emanates from search bias practices is

[19]Christian Ahlborn and others, 'Shaping Competition Policy in the Era of Digitisation' (Shaping Competition Policy in the Era of Digitisation conference, Brussels, 17 January 2019).

[20]*Google Shopping Case* (n 11).

[21]Section 19, The Competition Act 2002 (Act 12 of 2003).

that consumers may be deprived of a superior product or service simply because the search engine has demoted it in the search results to prop up its own competing product or service.[22] However, the long-term effect of such a practice also merits antitrust scrutiny. Once a large chunk of competitors is eliminated and new competitors are unable to break the deadlock to enter the market, consumers will be left with fewer choices and platforms will be in a position to adopt exploitative policies.[23]

III. A SNAPSHOT OF THE RELEVANT ANTITRUST LAWS AND THE OUTLOOK OF ENFORCERS ON SEARCH BIAS IN THE EU AND US

Multiple jurisdictions have looked into or are now looking into the issue of search bias as a possible anticompetitive practice adopted by search engines and online marketplaces. Some antitrust enforcers have taken an aggressive stance against it, while some others are now looking at it through a new lens beyond the narrow confines of past interpretations and statutory restrictions. Enforcers and legislators in the EU and the US have viewed search bias issues in the following manner –

A. European Union

Any discussion about search bias would be remiss without discussing the EU's staunch crusade against such practices. The EU has traditionally taken an all-round approach to competition enforcement, protecting not just consumer welfare but also the welfare of competitors.[24] However, the EU's stance is often seen as overly regulatory and has left it open to criticism from antitrust practitioners from several other parts of the world.[25] Nonetheless, the EU's stance vis-à-vis search bias so far has been necessary, especially in light of the growing dominance of certain digital platforms and the near extinction of other competitors in such markets.

Despite nuanced variations in their interpretations, it is almost unanimously agreed across jurisdictions such as the US,[26] EU,[27] and India,[28] that merely being dominant/a monopoly is

[22]Ahlborn and others (n 19).

[23]*Google Shopping Case* (n 11).

[24]Kati Suominen, 'On the Rise: Europe's Competition Policy Challenges to Technology Companies' (*Centre for Strategic & International Studies*, 26 October 2020) <https://www.csis.org/analysis/rise-europes-competition-policy-challenges-technology-companies> accessed 8 November 2020.

[25]ibid.

[26]*Verizon Communications, Inc. v Law Offices of Curtis v Trinko LLP* 540 U.S. 398 (2004).

not sufficient to warrant penalties under antitrust statutes. The monopolist or dominant player must indulge in some form of anticompetitive conduct or abuse to merit antitrust penalties.

In the EU, this provision is specifically laid down in Article 102 of the Treaty on the Functioning of the European Union ["**TFEU**"]. Article 102 prohibits 'any abuse' by one or more undertakings of their dominant position and further enlists a non-exhaustive list of specific abuses such as the imposition of unfair pricing and trading conditions, discriminatory transactions that place trading partners at a competitive disadvantage, limitation of markets, production or technical development to the detriment of consumers, and imposition of unconnected supplementary obligations in contracts. In the *Google Search (Shopping)* case,[29] the European Commission ["**EC**"] construed Google's restrictive search bias practices to be an 'abuse' of its dominant position in the relevant market under Article 102 of the TFEU.

The *Google Search (Shopping*) case is, in many ways, the first major case where an antitrust authority has heavily penalized a dominant online entity for indulging in search result manipulation and, perhaps, rightfully so. The EC was of the opinion that Google, which was a dominant player in the market for general search services, had manipulated the search results in such a way that its own comparison-shopping services occupied the first few spots in the results.[30] Competing comparison-shopping services were pushed down in the search results as a consequence and lost a significant amount of traffic that they would have otherwise received had they not been demoted. The EC noted that Google was unable to show any objective justification for its conduct and had the potential to foreclose the competing shopping services.[31]

Recently, the EU has also taken measures to ramp up its laws, to deal with the menace of anticompetitive self-preferencing and other anticompetitive activities by tech companies. The Digital Services Act ["**DSA**"],[32] proposed by the EU aims at introducing ex-ante regulation of

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[27]Massimiliano Vatiero, 'Power in the Market: On the Dominant Position' <https://ec.europa.eu/competition/antitrust/art82/005.pdf> accessed 5 November 2020.

[28]*Competition Commission of India v Coordination Committee of Artists and Ors* (2017) 5 SCC 17.

[29]*Google Shopping Case* (n 11).

[30]ibid.

[31]ibid.

[32]Commission, 'Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> accessed 6 November 2020.

large internet platforms which act as digital 'gatekeepers' to such markets on account of the significant network effects enjoyed by them. The DSA may potentially pave the way for setting certain prescriptive rules which may prohibit or 'blacklist' self-preferencing practices by digital platforms. Further, the DSA also proposes that the new ex-ante regulation framework would provide for flexible and tailor-made remedies (for example, data access obligations and interoperability requirements) which, after prior assessment, may be applied to these digital platforms to curtail their ability to carry out anti-competitive practices in the market.[33]

In conjunction with the DSA, the EU has also proposed a New Competition Tool ["**NCT**"],[34] which envisages the imposition of behavioural and structural remedies upon dominant companies engaging in anti-competitive unilateral conduct prior to a finding of infringement under Article 102. The NCT, much like the DSA, also proposes ex-ante intervention,[35] before the market is foreclosed, taking into consideration the fact that digital markets evolve quickly and network effects grow stronger over time.

The ramifications of the DSA and the NCT, if approved, shall be considerable and is likely to face even more pushback from tech companies than it is now. There are apprehensions about how ex-ante regulation may launch a severe blow to innovation in the market. However, if a balanced approach is taken to the issue at hand, introducing new rules that regulate self-preferencing and enforcing the same prior to an Article 102 violation, may be exactly what such markets need to prevent the unwarranted growth of digital mammoths that are accountable to none.

B. United States

In sharp contrast to its transatlantic counterpart, antitrust authorities in the US are yet to render any decision in relation to the emerging anticompetitive menace of search bias. In

[33]Niombo Lomba and Tatjana Evas, 'Digital Services Act: European Added Value Assessment' (October 2020) <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654180/EPRS_STU(2020)654180_EN.pdf> accessed 8 November 2020.

[34]Commission, 'Single Market – new complementary tool to strengthen competition enforcement' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed 6 November 2020.

[35]Marc Wiggers, Marc Custers and Robin Struijlaart, 'Commission's New Tools for Policing Digital Markets Are Shaping Up Gradually, But Slowly' (*Kluwer Competition Law Blog*, 30 October 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/10/30/commissions-new-tools-for-policing-digital-markets-are-shaping-up-gradually-but-slowly/> accessed 6 November 2020.

2013, the Federal Trade Commission ["**FTC**"] had closed its antitrust investigation against Google for its alleged search bias practices. Ironically, the FTC in its statement,[36] regarding Google's search practices noted that Google's algorithm and design caused the demotion of competing comparison-shopping services to a subsequent page, which weakened them and led to a significant loss of traffic. Despite such an observation, the FTC ultimately treated it as a product design that significantly improved the quality of search results for Google's consumers.[37]

This decision of the FTC to close the investigation against Google in 2013 may in hindsight be considered myopic. The FTC's decision in 2013 to drop the investigation against Google is perhaps a reflection of its age-old reliance on the narrowly construed consumer welfare standard and an amplification of its fear of causing a chilling effect on innovation. It did not, unfortunately, holistically review the effect on competition in the market. Even from a consumer welfare perspective, the FTC had failed to look at the ultimate effect that reduced competition would have on Google's users. However, the times have changed since 2013 and there has been a drastic shift in the attitude of enforcers towards these giant tech companies.

The past year has witnessed a remarkable resurgence of antitrust activity in the US vis-à-vis major technological companies, popularly referred to as GAFA (Google, Amazon, Facebook, Apple) in antitrust circles. Both federal antitrust enforcers such as the FTC and the Department of Justice ["**DOJ**"], as well as the Offices of the Attorney Generals of several states in the US, have initiated proceedings against the GAFA companies.

The DOJ's recent antitrust complaint against Google before the United States District Court of Columbia,[38] filed along with the Attorney Generals of multiple states, encapsulates the very essence of Google's monopoly power in the markets for general search services, search advertising, and general search text advertising in the US. Perhaps, the most telling part of the complaint, that captures the extent of Google's market power, is the one that points out that the word 'Google' is used almost synonymously as a verb with internet searching.

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[36]'Statement of the Federal Trade Commission regarding Google's Search Practices' (*Federal Trade Commission*, 3 January 2013) <https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf> accessed 6 November 2020.

[37]ibid 3.

[38]'Justice Department Sues Monopolist Google for Violating Antitrust Laws' (*US Department of Justice*, 20 October 2020) <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> accessed 6 November 2020.

The recent Investigation Report of the House Subcommittee on Antitrust, Commercial and Administrative Law, 2020 ["**Subcommittee Report**"],[39] has also recognized the overwhelming dominance of Google in the market for search services in the US, accounting for up to 87%,[40] of all general search enquiries. The Subcommittee Report has noted that Google occasionally manipulates its algorithms to place its own services over its superior vertical competitors in search results, thereby siphoning off a large amount of internet traffic as well as revenue from other businesses. The Subcommittee Report cites the example of Froogle,[41] to show how Google often props up its own sub-par services at the very top of the search results, although the very same services would not have met Subcommittee Report for search ranking had they been supplied by another provider. It is clear from the Subcommittee Report that Google's enormous hold over the market has placed it in a position to act as a judge, jury, and executioner to any market player which may attempt to compete with one of Google's own services in a different relevant market.

Interestingly, this huge flurry of antitrust activity in the digital space has not only come from the enforcers' side in the US but also from that of the legislators. For years, federal antimonopoly laws have derived their powers from the provisions of the Sherman Antitrust Act, 1890, a statute that has seen little to no change in the past century and is often criticized for not being able to adequately address the issues in innovative markets.[42] In the state of New York, the Donnelly Act, 1893, is equally criticized as a relic of the past,[43] which notably does not include provisions penalizing single-firm conduct and monopolization. However, recently, Senator Gianaris introduced a new Assembly Bill,[44] in the New York State Senate,

[39]Subcommittee on Antitrust, Commercial and Administrative Law, 'Investigation of Competition in Digital Markets' (*House Judiciary Committee*, 6 October 2020) <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf> accessed 6 November 2020.

[40]ibid 177.

[41]ibid 190.

[42]Harry First and Eleanor Fox, 'Big Tech and Antitrust – Calling Big Tech to Account under US Law' (*House Judiciary Committee*, August 2020) <https://judiciary.house.gov/uploadedfiles/submission_from_harry_first_and_eleanor_fox.pdf> accessed 6 November 2020.

[43]Gordon Schnell and Sam Rikkers, 'A Call to Albany: It's Time to Amend the Donnelly Act', *New York Law Journal* (New York, 12 November 2008) <https://constantinecannon.com/wp-content/uploads/2017/09/11122008schnellrikkerartdon.pdf> accessed 5 November 2020.

[44]'Senate Bill S8700A' (2020) <https://www.nysenate.gov/legislation/bills/2019/s8700/amendment/a> accessed 1 November 2020.

aptly titled the 'Twenty-First Century Anti-Trust Act', which seeks to cure this glaring deficiency in the Donnelly Act.

Should the Assembly Bill be passed, New York State authorities would be able to penalize market players, including tech platforms, for monopolization under State laws. Surprisingly, a provision in the Assembly Bill makes it unlawful to abuse one's dominant position,[45] in addition to making it unlawful to monopolize, attempt to monopolize, or conspire to monopolize.[46] The proposed provision notably also envisages penalizing more than one person holding a dominant position in the relevant market for abuse – a concept known as 'collective dominance' that is recognised under EU laws, but till date has not been recognized under US law or Indian law, for that matter.

The introduction of abuse of dominance provisions, a concept that is prevalent in both Europe and India, is likely to make it harder for tech companies to escape the net of antitrust scrutiny by claiming that they do not meet the unusually high market-share based standards against which monopolies are judged in the US. This is because, traditionally, the thresholds for adjudicating on abuse of dominance cases are far lower than those for monopolization in the US.[47] In the EU, authorities have considered firms to be dominant even in cases where the market share of the firm is below 50% as long as they illustrate enough market power to manipulate and/or control the market in their favour.[48] Further, there is an inherent presumption of dominance where firms hold market shares of at least 50%,[49] which is not the case in the US where the threshold is much higher.

If the Assembly Bill is approved, it may open the floodgates for more antitrust action against tech companies under the wider abuse of dominance provisions proposed by it – including action against self-preferencing practices such as search ranking manipulation. The Assembly Bill has naturally drawn criticism from many who prefer a hands-off approach to antitrust

[45]ibid.

[46]Grant Petrosyan, 'New York Could Lead the Nation into 21st Century Antitrust Enforcement' (*Constantine Cannon*, 16 September 2020) <https://constantinecannon.com/2020/09/16/new-york-could-lead-the-nation-into-21st-century-antitrust-enforcement/> accessed 6 November 2020.

[47]James Keyte, 'Why the Atlantic Divide on Monopoly / Dominance Law and Enforcement is so Difficult to Bridge' (*Antitrust*, 2018) <https://www.antitrustinstitute.org/wp-content/uploads/2018/12/fall18-keyte.pdf> accessed 6 November 2020.

[48]Case T-219/99 *British Airways Plc. v Commission of European Communities* [2003] ECR II-05917.

[49]Case C-62/86 *AKZO BV Chemie v Commission of European Communities* [1991] ECR I-03359.

enforcement in a bid to prevent the chilling of innovation and competition.[50] The criticisms, however, do not hold water in a market where tech companies have hidden behind the shield of innovation for so long that entry into the market by equally efficacious potential competitors is no longer possible.

It is pertinent to note that 'abuse' and 'dominant position' remain undefined in the Assembly Bill and the implications of this proposed provision remain wide open to interpretation. It would be premature to ascribe the same parameters of interpretation to these provisions as are traditionally applied in the EU. How this proposed law would affect antitrust enforcement against tech platforms and their self-preferencing practices remains to be seen.

IV. HOW HAVE INDIAN COMPETITION AUTHORITIES DEALT WITH THE ISSUE OF SEARCH BIAS?

Under the Competition Act, 2002, in India, Section 4 specifically states that no enterprise or group shall abuse its dominant position. Section 4 incorporates all of the abusive practices outlined in Article 102 of TFEU, and in addition, recognizes leveraging as well as the denial of market access as anti-competitive abuses. Perhaps the most relevant and interesting provision under Indian competition law, which could be considered in search bias cases, is Section 4(2)(c) which classifies "practices resulting in denial of market access in any manner" as abuse. The Supreme Court of India,[51] has interpreted the words "in any manner" in this particular Section, to truly and literally mean – "in any possible manner". Such a wide interpretation has left it open to competition authorities in India to expand the traditional definitions of abuse to include self-preferencing through 'search bias', which may deny non-affiliated competitors access to the relevant market.

In 2018, similar to the *Google Search (Shopping)* case,[52] in the EU, the Competition Commission of India ["**CCI**"], in the case of *In Re: Matrimony.com Limited and Google LLC*,[53] had found Google guilty of abusing its dominant position by prominently placing its own Commercial Flights Unit above the blue link results, thereby diverting traffic from other

[50]Shaoul Sussman, 'Could New York's 21st Century Antitrust Act Usher a New Chapter in the History of Anti-Monopoly Legislation?' (*Competition Policy International,* 20 September 2020) <https://www.competitionpolicyinternational.com/could-new-yorks-21st-century-antitrust-act-usher-a-new-chapter-in-the-history-of-anti-monopoly-legislation/> accessed 6 November 2020.

[51]*Competition Commission of India v Fast Way Transmission Pvt. Ltd. and Ors* (2018) 4 SCC 316.

[52]*Google Shopping Case* (n 11).

[53]*In Re: Matrimony.com Limited v Google LLC and Ors* 2018 SCC OnLine CCI 1.

online flight services. The case is now pending in appeal before the National Company Law Appellate Tribunal.

The *Google* case,[54] decided by the CCI is perhaps the first of its kind in India, signalling the way forward for more enforcement on self-preferencing in the digital space. The CCI's sudden but welcome proactivity regarding digital markets is also apparent from its recent Market Study on E-commerce in India ["**Market Study**"],[55] where it has recognized search bias as a possible antitrust issue. Noticeably, the Market Study delves into details about the source of search rankings, recognizing and distinguishing between algorithmic ranking and paid rankings for advertisement. However, as the CCI has rightly observed, sellers or service providers often found the search ranking criteria of such platforms to be rather opaque.[56] In the Market Study, the CCI went on to recommend platforms to make the criteria for search rankings transparent, subject to the protection of their intellectual property and algorithm, and to clearly reveal if the payment of any sum to the platform is likely to allow an entity to gain a favourable spot in the search results.

Carrying forward the torch of its recent activity in the digital space, the CCI has also recently directed an investigation,[57] against e-commerce giants Amazon and Flipkart in India on several grounds including allegations of search bias.

However, while these market studies and investigations are certainly baby steps in CCI's effort to become more receptive to the changing digital environment, they are not enough. Over the years, the CCI has fallen into a familiar pattern of minimal enforcement where large foreign investment is at stake, leaving it open to criticisms of being toothless.[58] Much like competition authorities in many developing and underdeveloped countries, the CCI has shown a reluctance to coming down heavily on potential investors and entrants in innovative sectors, and this tendency is perhaps best underpinned by the fact that the CCI does not seem to block any combination at all. Even the cases with conditional clearance granted in Phase II

[54]ibid.

[55]Competition Commission of India, 'Market Study on E-Commerce in India' (8 January 2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 6 November 2020.

[56]ibid 15.

[57]*Delhi Vyapar Mahasangh v Flipkart Internet Private Limited and Anr* 2020 SCC OnLine CCI 3.

[58]Arjun Srinivas, 'Why Antitrust is a Jumbo Indian Problem' *Mint* (Bengaluru, 3 August 2020) <https://www.livemint.com/news/india/why-antitrust-is-a-jumbo-indian-problem-11596375452543.html> accessed 6 November 2020.

are few and far between. Enforcement from the CCI's side needs to be more assertive if major issues like self-preferencing are to be curbed and it is the need of the hour for new regulations to be brought in to regulate innovative markets, like the EU and US are attempting to introduce.

That said, there is a fine line between strong antitrust enforcement and protectionism. Antitrust authorities, while formulating such regulations, must ensure that the lines between the two are not blurred in a way that would stifle innovation and foreign investment entirely. Antitrust enforcement should be strong, but reasonable, and should not turn into a witch-hunt against all and sundry in the digital space. The key lies in finding the perfect balance.

V. CONCLUSION: THE WAY FORWARD FOR INDIAN ENFORCERS

The age-old tussle between the appropriateness of active antitrust intervention into new markets vis-à-vis the possible impact on innovation and efficiency has once again left proponents of different schools of antitrust policy divided. Nevertheless, it is clear that once the veil is lifted, the arguments for preserving efficiency and allowing a new market to flourish are far outweighed by the glaring consequences of the exclusionary practices of several digital mammoths. Digital platforms cannot be permitted to flout antitrust laws merely because innovation is essential. If anything, antitrust laws must step in where necessary to foster innovation.

In a market afflicted by COVID-19, with more individuals working remotely and avoiding stepping out of their homes, digital platforms have become indispensable. In such a situation, antitrust authorities in India have a greater responsibility to ensure that these markets remain competitive. It is imperative for antitrust authorities in India to tailor and evolve their approach towards digital markets. It is the author's opinion that merely declaring such platforms as essential facilities and mandating platform neutrality may not be sufficient. Active enforcement is the need of the hour, as is the formulation of new laws and regulations that specifically deal with the issues arising in digital markets.

India may consider introducing a new digital markets regulation under Section 64 of the Competition Act, 2002, which would consider ex-ante intervention like the DSA and NCT or a provision similar to the 'attempt to monopolize' provision under the Sherman Antitrust Act, 1890. This may permit the CCI to intervene at an earlier stage to scrutinize anti-competitive activities such as search bias practices, which may potentially foreclose the market and lead to an abuse of dominance in the long run. Current laws only allow the CCI to address the abuse once the damage is done. However, owing to the huge network effects and data dumps

that such digital platforms enjoy, it may be too late to break the deadlock once the abusive conduct has already pushed other market players out of the picture. The CCI may need to prohibit practices such as anti-competitive self-preferencing outright and impose appropriate behavioural remedies at an early stage, if such practices are to be curbed. While some cases may warrant behavioural remedies such as access and interoperability requirements,[59] (i.e., providing competitors with access to relevant data, essential facilities and/or certain functionalities which shall enable them to effectively compete with the platform[60]), remedies may need to be specifically tailored by the CCI on a case to case basis to resolve the issue of self-preferencing. Structural remedies such as divestitures may not be appropriate at early stages. They are likely to fail to address the issues posed by network effects and data ownership and, therefore, should only be taken as a last resort.

However, the author would like to caution that, such a regulation may have implications on data privacy of individuals and there would be a need to harmonize any potential regulation with the data protections laws of India, to ensure that one does not prejudice the operation of the other. Since certain remedies may potentially involve the transfer or division of sensitive personal data of the users of such platforms or access to such data, this harmonization of competition laws with data protection laws becomes of utmost relevance.

India's data privacy regime at present, is severely lacking in many ways, with the Personal Data Protection Bill, 2019 ["**PDP Bill**"], still pending in Parliament. Section 26 of the PDP Bill notably includes provisions granting the right to data portability, which shall undoubtedly be significant in increasing the agency of individuals to transfer their data across online providers. However, this provision is likely to be nuanced in its application and would not be sufficient in itself to curb anti-competitive activities. In certain, but not all circumstances, the CCI may need to enforce data-sharing orders,[61] which could raise privacy issues for consumers whose information may be shared with the competitors of the platform concerned. Thus, if antitrust regulation of digital markets is to become a success, it would be necessary for all relevant authorities dealing with competition law and privacy laws to take

[59]Elettra Bietti, 'Explainer: Competition, Data and Interoperability in Digital Markets' (*Privacy International*, 20 August 2020) <https://privacyinternational.org/explainer/4130/explainer-competition-data-and-interoperability-digital-markets> accessed 8 November 2020.

[60]ibid.

[61]Sunny Seon Kang, 'Don't Blame Privacy for Big Tech's Monopoly on Information' (*Just Security*, 18 September 2020) <https://www.justsecurity.org/72439/dont-blame-privacy-for-big-techs-monopoly-on-information/> accessed 8 November 2020.

stock of each other to iron out any potential conflicts. Further, depending on the facts and circumstances of the case, the CCI may even need to ensure that adequate technological safeguards are implemented to enforce data de-identification,[62] in its remedy packages.

The menace of anti-competitive self-preferencing and in particular search bias may, therefore, only be curbed if the CCI implements a regulation that takes a holistic view of the peculiar characteristics of digital markets, available technologies and the privacy interests of the consumers whom Competition Act, 2002 seeks to protect. This, coupled with vigilant but balanced enforcement practices, should help India move one step closer towards the free flow of competition in digital markets. However, the author would like to re-emphasise that such a regulation and its consequent enforcement should not be used as a shield for subtle implementation of digitally protectionist policies.

[62]ibid.