To

The Secretary
Competition Commission of India
9th Floor, Office Block- 1
Kidwai Nagar (East)
New Delhi - 110023

2nd September, 2024

Subject: Panel Discussion on "US vs. Google (2024): Implications for the Global Antitrust"

Dear **Sir/ Ma'am,**

We are elated to inform that we had organized a panel discussion titled, **"US vs. Google (2024): Implication for the Global Antitrust"** on 20th August, 2024.

Some of the panelists at the conference included:

1. **Shinawat Horayangkura**, **PhD,** Director, Consumer Product Market Structure Division, Trade Competition Commission of Thailand
2. **Dr. Aurelein Portuese,** Research Professor, George Washington University
3. **Mr. Tim Cowen**, Chair (Antitrust Practice), Preiskel & Co LLP
4. **Sumit Jain**, Founding Director, CCLE

Please find attached the memorandum of the discussion along with the minutes.

We would be happy to discuss more on the topic and will be looking forward to meeting you in person.

Best Regards,
Sumit Jain
Founding Director
Centre for Competition Law and Economics
www.icle.in
Contact: +91 93226 83349; +91 81072 87270
Email ID: centrecomplaw@gmail.com; contact@icle.in

Memorandum of the conference conducted by CCLE on the 'US vs. Google (2024): Implications for the Global Antitrust'

Key Takeaways:

1. The United States Department of Justice (DOJ) along with the majority of the states filed a case against Google Inc. alleging violation of section 2 of the Sherman Act. The District Court of Columbia after conducting a trial under the due procedure held that Google Inc. is a monopolist in two relevant markets, i.e. general search services and general search text Ads, and it is acting in violation of section 2 of the Sherman Act. The judgment was pronounced on 5th August, 2024.

2. Based on a detailed analysis, it emerges that Revenue Sharing Agreements (RSAs) lie at the core of the antitrust issue. Even though RSAs may not look initially problematic, it is the ultimate impact on competition which matters. When revenues are shared by a dominant, or monopolistic firm having an 80-90% market share with its rivals, further competition scrutiny may be warranted. Wherever the economic incentives given by the dominant firm to a competitor through contractual arrangements are so huge that it lets the system freeze in, the antitrust problem is exacerbated.

3. The RSAs and default setting problem somewhat go hand in hand. Whenever a dominant entity adopts any of these to entrench its own position, it results in competition concerns. In fact, there may be some synchrony between revenue sharing, default setting and exclusivity clauses in monopolistic cases.

4. In the Asian context, the default setting where the user is given a monopolist's search engine and browser on an electronic device to use still remains a major issue. Even though the EU missed the revenue-sharing aspect while enacting the DMA, it remains the biggest influence.

5. The question of **legal culture** is conspicuous. In the EU, enforcement of competition law is seen as a culmination of public law, administrative law and public order. Once a firm reaches dominance, there's a perceived obligation that it has to treat its competitors, suppliers and distributors neutrally. In the US, it's about feeling the antitrust injury through a private contract.

6. The question of remedy to keep the market competitive in this case has to look into all the aspects, i.e. stopping the revenue sharing, banning the default settings, exclusivity clause and changing the terms of the user interface with Google Inc. It is important that remedies ultimately find a place in the contractual arrangements. The question of user interface is important because it is access to user data which lies at the core of keeping the marketplace competitive and it is these access points which are getting foreclosed for rivals through various RSAs. A creation of third-party-interface between Google and users can also be looked into.

7. Another aspect is separating, or quarantining the search engine services so that it doesn't interface with Google's other technology products. A similar strategy was used in AT&T case. The process should ultimately involve identifying the harm, stopping it, preventing its recurrence and ensuring competition is enabled.

8. As far as India is concerned, there are multiple aspects. We are on the lines of having an ex-ante law on the lines of the DMA. Even though the current ex-post competition legal framework is sufficient to the extent of identifying the anti-competitive conduct, the interventions haven't been on time. The question of antitrust damages is not even raised. India should look into RSAs and how Indian manufacturers/ distributors are related to Google.

9. To achieve the desired ends in India, administrative and prosecutorial/ adjudicatory systems serve their own purpose. While administrative processes could run faster in certain cases, it is the injunction system which may be preferred in others to get a faster remedy. What is, however, certain is that it is the court system which allows a discovery process to take place which, indeed, is a must for such a detailed judgment to be passed.

Minutes of the Discussion-

Panellist 1: What are the core issues involved in the case?

Panellist 3: Google has signed multiple Revenue Sharing Agreements (RSA) with various mobile handset makers and Apple. What do these agreements do? One of the witnesses during the hearing disclosed that Google shares 36% of the search advertising revenue, i.e. $20bn, with Apple per year. This revenue gives a huge incentive to Apple to promote Google search and search Ads over rivals. Apple has deleted pretty much all data from all its devices on the grounds of privacy, except Google, simply because Google's search Ads run on the basis of Apple users. The Judge has said there isn't much competition in search, well it's very difficult to have competition in search. Apple did build its own search capability as per its internal documents show, though it was actually beneficial for Apple to be in its own current position as Google built a huge advertising system to fund it. As per the EU, the capital cost involved in this process is around $1bn per month, the US vs. Google puts the figure slightly less. But there's obviously an exclusionary effect on Apple from building its search engine, there is an exclusionary effect on the installation of Bing or any other search engine on Apple devices because of the RSA. The RSA also contains a default clause. All other agreements are similar where they promote Google search products on the basis of revenue share and default setting. People who follow EU competition law will find great similarities in this case with the Google Android case. The reason I have been focusing on the revenue sharing aspect is because it incentivises Apple to promote Google at the cost of rivals. Therefore, even if you ban the default, Apple would still have the incentive to promote Google as it gets 36% of the revenues back which come off Apple's devices. That's the fundamental problem. This is the point that even the Court raises that Google keeps on increasing the prices of its advertisements as it doesn't face any competition. So when it comes to remedies, the classic way to resolve the antitrust problems is to stop the problem. The problem is the revenue share and default status. It also needs to be made sure that the problem doesn't arise in the future. There should be an opportunity for the market to correct itself when new entrants come in including Apple to do the search. As a footnote, the ACCC has already held the default agreements between Google and various telecom providers such as Telstra and Optus need to be amended and they have said that they have got undertakings which are gonna banish the default. My problem is that if you don't tackle the revenue-sharing agreement then you haven't really tackled the antitrust problem. That's what really the Court has found in this case. They have found Google having a monopolistic position in search text Ads; it doesn't really matter how you define the market; for the US it's anyway a narrow market. Google raises prices using its

monopolising power and the mechanism it's using to exclude competition is revenue sharing and default setting.

Panellist 1: I would request you to take a step back and inform us about the petitioners involved, bare facts and what were the relevant markets involved in the case.

Panellist 2: All of what Tim has said about revenue sharing is totally fine in a market - we see revenue sharing for different settings - unless you have a monopolistic position. The main question is why are we not allowing revenue sharing, or default setting or exclusivity conditions. Well, it's because of the very dominant position. Monopoly in itself isn't wrong under antitrust, be it the US antitrust or EU competition law. It is sustaining that monopoly and taking monopolistic rents which is problematic. It is when you cement/ entrench your dominance through revenue sharing, default settings and exclusive agreements when the problem arises. Of course, Google had some good arguments to make. For instance, on the counterfactual, it said that when people were given Bing as the default search engine on Windows, they switched to Google. The point is simple if your product is bad, people at one point of time will switch off. But then there is the question of brand royalty. This is what even the judgment holds. The role of poor quality products by competitors also ultimately helps Google but what's really problematic is revenue sharing on the part of Google. We have heard a lot about killer acquisitions which simply means the financial power to buy out competitors. The revenue sharing in essence is the same where you buy out competition. This is what the judgment even holds - you incentivise Apple not to launch its search engine. I agree with Tim that revenue sharing has to stop as it is the most problematic thing. As far as default and exclusivity clauses are concerned, I think we are going towards screen choices, i.e. the EU way. The screen choices have their own problem - how many you will have, 3, 4, 5? The ruling is very well written and articulated. It's a landmark case as if we have very few monopolisation cases in the US. The last one we had was with Microsoft. The new era of digital markets informs us that you can have default settings, you can have exclusive settings but you cannot revenue share that deters competition. One thing Microsoft mentions is unbundling. This case is less about the technical solution and more about the financial solution. The ruling doesn't discuss the remedy but you can read between the lines. It is not only the default setting, exclusivity clause or user interface which needs to be changed, it is the financial and revenue sharing setting

which has to be looked into. This is in line with what we read on killer acquisitions that you cannot simply buy your way out of competition.

Panellist 1: The EU has the DMA which applies competition rules on an ex-ante basis, while the US enforces the conventional antitrust law. How do you see this ruling playing out on emerging Asian economies?

Panellist 4: I agree with Tim and Aurelien. I think the default setting is an issue here in Asia. This is important because it has to be seen from how long the default option has been practised. I think this has contributed to the monopolistic power of Google. The Court might see Apple as a competitor in the market but if Google starts seeing Apple as a Partner, what will happen? Apple has ultimately not released its search engine, right? I think Google has some good points to defend. But I still think the default setting is the most important choice architect here. People value pre-installation and default. Google might say there is no counterfactual, but other studies show a high resonating effect of the default setting with users. DMA has quite a bearing on how we see competition in digital markets in Asia. This case will also impact on how jurisdictions enforce competition law.

Panellist 1: In the UK, we already have the DMCC. What has happened in this judgment is that the Court has applied the extant legal framework, i.e. ex-post, and held that section 2 of the Sherman Act has been violated. Do you see this judgment playing out in the discussion between ex-ante vs. ex-post competition rule?

Panellist 3: Before I answer that, I would like to come back to a couple of points. What does a Google machine do? It converts consumer data into advertisement dollars. How does it do that? It takes all your data, from browsing history to all the data which interfaces with Google products, and as it is said in the judgment - the 'magic' of Google comes from consumer interaction and feedback. This is important because when you look at the remedy, you just not look at the revenue-sharing agreement, you also have to look at how Google interfaces with the end users. You simply have to stop the default option. There will have to be a third-party interface. Unless you create this third-party interface, you will be stuck in old-school dominance. The reason why Google is so effective when it comes to its ability to monetise user data is

because it knows exactly what you are looking for - hairdresser, washing machine etc. Anybody who wants to compete with Google on Ads has to know what you are interested in - that's what exactly is foreclosed through these Agreements and that's what allows Google to increase prices. In *Microsoft*, we did opt for choice screens but that didn't work terribly well. I know even the DMA opts for a choice screen. The problem is that the choice screen is just one part. What matters is the interface, i.e. it starts from the first page you land on. For instance, if you go to an Apple store, it could create a search engine result page and use Google's relevance engine at the backend. An access remedy would enable you to do that. The reason I mention that is because the remedy is different in law from a finding of liability. People often say here is the problem and here is the solution. So if a harm has been caused, you mirror the harm by reversing it. The corollary to this is that the default setting is a problem so you ban the default setting and that's the solution. But that's not the solution because it's not really addressing what the harm is. The harm is the foreclosure of end-user data through the RSA. You need to basically put in a mechanism - that's what DMCC tries to do - in place which allows a third party to access user data. The reason that's possible in a US court setting is because the Court has the power to impose remedies and one of the things the DOJ has asked for is equitable remedy. Equity provides them with a very wide discretion. There is a new case that the FTC has filed against Google related to the App Store. This case is interesting because the FTC has said that look, we have an injunction against you which means we can impose interoperability remedies and other remedies on you under US law. So you identify the harm, stop the harm, prevent its recurrence and then you do something which enables the competition. The harm is not to the individual or any competitor, it is to the competitive process. So there needs to be a mechanism in this case to redress the market structure in this case. Is DMCC able to do that? It has to go through a process for that. There is a designation process involved. It is intended to address the problem of scale and scope and network externalities which big platforms have. It does have provisions for conduct requirements which are basically behavioural remedies and it provides for undertaking pro-competitive activities which are structural remedies. We have had both these options in our law for a very long time. We know that the great reward for success is that you create a monopoly in the capital. In the capitalist system, you end up with a monopoly and you need to break them up because that's not in the public interest. That happens pretty frequently. I am in the telecom's world. I have lived through the AT&T break up and dismembering of the company into a series of Bell operating companies and then it was reformed into a slightly different structure. Here in Europe we liberalised telecommunications and separated out different functions and capabilities and allowed businesses to operate. This way, we have a good remedy in place to address the problem. We have a precedent known as BT open reach which basically separates the monopolistic component from non-monopolistic. This is

exactly where we are in Google's case. What we have done in local access and long distance and systems integration and computing is that those are all layers on top of the underlying telecoms monopoly which is separated out. As I say, there has been a long history in the US - the breakup of AT&T in 1984, preceded by the 1956 decree which required quarantine of AT&T so that it couldn't do computing business. You could apply the same approach if you are a US court to a browser or search engine. So there is plenty of precedence for a much broader set of remedies. The hearing is likely to be on the 6th September, 2024.

Panellist 1: What are the possible remedies which the DOJ might ask in the Court and what are possible grounds on which Google might challenge the ruling?

Panellist 2: I think it's a comparative perspective between the US and Europe. This kind of ruling can also apply across the world. It's kind of interesting to see the legal culture - for instance, Tim mentioned the Google Shopping case in the EU - which is very different. When you read the case in the EU, you really have the feeling that it's a public law, it's administrative law, it's public order. For instance, the Google Shopping case refers to the Essential Facility Doctrine and says Google as a super dominant entity has to act responsibly, it has to behave almost like a public utility, it has to be non-discriminatory. There's a sense that you have reached such a dominant position that you have to treat your competitors, suppliers and distributors in a neutral way - that's what we mean by search neutrality or platform neutrality. In the US ruling, it's very different. You could still feel the antitrust injury - the harm of looking at the contract. It's a very contractual private law type of reasoning. What you see in the EU is meant to be a public ruling for all types of companies and all types of interactions of Google - with its suppliers and competitors. The US ruling is perhaps, because of the common law and subsequent legal culture, limited to Google, Apple and Samsung's kind ruling. It doesn't mean that it won't have a greater effect. It's very interesting to see that we try to regulate this type of conduct in two different legal cultures and the outcome is the same. It raises a key question as to why the issue of revenue sharing wasn't raised in the EU before - be it the Google shopping case or Google Android case or AdTech case. It's kind of an elephant in the room.

Panellist 3: I have been working with the people who are affected by this. The reason why revenue sharing has become dramatically exclusionary is because of the amount of profit that's generated. In Apple's case, it gets 36% of Google Ads revenue. That's a big number. That's $20bn per year. But it's an even bigger impact - as it's written in the judgment - on its economic incentives when you realise when you look at the

revenue share in 2020-22, that amounted to 17.5% of Apple's net profit. That's more than what Apple makes off Mac computers. So the incentive on Apple is enormous because of the relative impact on its bottom line of income from Google which has even increased in 2024 on an absolute basis. This is something we have not seen before because of the process. As far as the difference between the EU and common law is concerned, the difference in the US is that they are taking a court process. There is a common history and culture between the EU and the US so the common law is based on Roman law. What we are talking here about is a tort which is a civil wrong. Antitrust everywhere is a tort. It is the history of antitrust which gave rise to the modern administrative system proposed by the Austrians and Germans to police the tort law. It simply means regulating the harm occurring from trade which only occurs when there is a monopoly. It is only when you have a monopoly that you harm others and the community. It is true that the philosophical base is different in the EU and the US. In the states, they have a prosecutorial system, the EU has an administrative system. In the UK, too, there is an administrative system. Though, I believe the prosecutorial system is more effective to get to the truth because we not only discover the revenue sharing but its impact on other people.

Panellist 2: That's true. In the Google Shopping case, if not failure, it's a big miss. So is the case with Google Android case. It's really important that we go to the bottom of the case. For instance, sometimes we are concerned with the algorithm and search ranking. It takes us nowhere. The discovery is important. This is how sometimes the common law system or court-driven system is better than the administrative system where we just rely on prima facie evidence. This ruling is well articulated because there was a discovery process in place.

Panellist 1: You have raised an interesting point related to the legal culture. How would this play out in an Asian context? Sometimes it is said that we are a group of emerging economies. Secondly, violation of competition law is a public wrong. It's not an *in personam* offence, it's an *in rem* offence, right? How would Asian jurisdictions look into this.

Panellist 4: One great advice for India is that we live in a world of populism. We don't like court systems because we want things fast and it grabs headlines. I think India is also based on a common law system. In order to have a strong finding that you could have a lasting effect, it's important for the Indian courts to let the discovery process take place and see what are those RSAs and how are Indian manufacturers/ distributors related to Google. It's important not to transplant the EU or the US case to India and look at the

practice. In the US, they haven't copied from the EU and started from scratch. The UK is finding some inspiration from the US. One has to relook at the entire case as even though the wrong is public, the harm is private. Unfortunately, India is trying to draw some political mileage when it comes to regulation around Big Tech. Recently, there were some elections round the corner. We need to disconnect what we want politically as compared to finding the rule of law. That's the biggest challenge of today's regulation of digital markets. Everything has become political. It should be rule-based, discovery-based. At the end of the day, it may not be the most timely interventions, like ex-ante regulations, but it may be the most meaningful and impactful for consumers. Choice screens really don't make a difference. Breaking up RSAs would do.

Panellist 3: I have a point of difference. I am not convinced that the court process is slower than the administrative process. In fact, it's the opposite. The basic problem here is the information control disadvantage. People who are harmed don't understand the 'why'. There needs to be an investigation. The administrative system takes time because it doesn't do discovery, it asks questions. In the US, people who are litigators are skilled people who have law degrees and understand it's in the interest of the party responding to a question to not respond in full. In the EU and the UK, the system is reliant on questionnaires where we don't get to know the full picture. In the US we have a specialised Assistant Attorney General who looks into the aspect of public interest which is a sub-division in the Attorney General's office. In the UK and India, on the contrary, you just have the Attorney General's office which is simply given more powers to look into the public interest aspect. The US also has the FTC which is an administrative body. So you have both in the US - a political/quasi-political system and a prosecutor. Basically, you could have both. One thing which comes out of this conversation is that yes, the EU did act slightly quickly and missed how RSAs operate because of a lack of full discovery.

Panellist 4: In Thailand, or in Asian countries I have heard, we are trying to apply ex-ante regulations in the near future to help prevent anti-competitive conduct. We believed what was believed in the EU that ex-post might be too late to recover the market. In Thailand, we have both criminal courts and administrative sides. Thailand's perspective is not very long. But the administrative process is faster here than the criminal judiciary side because we can make the decision ourselves.

Panellist 1: In India, we are on the lines of having an ex-ante law on the lines of the DMA. We call it the Digital Competition Bill. The research conducted at CCLE showed that the current ex-post competition

legal framework is sufficient to the extent of identifying the anti-competitive conduct, i.e. bundling, tying, self-preferencing and cross-utilisation of data, however, one prime question which remains unanswered is how timely the interventions are made. What is more worrying is the question about the quantification of antitrust damages. The legal provision for awarding compensation under Indian competition law is virtually dead. We have not even a single decision looking into the same for the last 15 years.

Panellist 3: If you want a quick result, you should apply for an injunction. The fastest mechanism to get the same is through a Court. The reason it's always faster than the administrative process is because it's very difficult to appeal the Court's decision in the UK. The practice decision here is that you have to grant an injunction within three days. It can be vacated on a later date but that happens everyday in every commercial court of the country. When I used the injunction, I meant an equitable injunction from a Court. This is different from any interim measure under an administrative act because any administrative act has to involve gathering of evidence and weighing of evidence which takes too long. The fundamental problem with the administrative process based on the Brussels system is that it doesn't have an equitable remedy. The last time this remedy was used in ECJ was in the 1970s. If I were to move quickly in India, I would move the Courts for an interim injunction.

Panellist 2: The last interim injunction case in the EU was in the Broadcom case in 2019 when interim measures were revived. If it is about going quick, DMA suggests some compliance measures and any non-compliance has to be challenged in Court which takes years. You have to go to court first or in the end. Ultimately, you have to go to the Court even if you take the administrative route and it will take time. So there is merit in you going to the Court in the very first place. US vs. Google (2024) is a very well-written judgment and it is also a good opportunity to understand US antitrust in the 21st century, which is almost 20 years after *Microsoft*. It's good to have new fairies like potential competition barriers and economies of scale that haven't been discussed sufficiently in US federal courts under section 2 of the Sherman Act and more generally I think it's a well balanced decision. The question is about the remedies. Remedies need to be found in the contractual arrangements and also taming financial power so that you simply cannot use it to buy out competition. Revenue sharing is quite problematic. Default setting may or may not be problematic depending on your market share. If you are having 10% market share, the default setting may not be a problem, but if you have a 80% market share, default setting is certainly problematic. When we talk about revenue sharing, it remains to be seen that as a remedy will not allow revenue sharing at all, or some commission would still be allowed. Would revenue sharing, due to monopolistic position, be per se

illegal? Or revenue sharing, say 1% instead of 36%, would be looked into as an option? We will be looking into all the options given that Google is a verb now.

Panellist 3: I don't think revenue sharing would be per se illegal. It all depends on the impact on the incentives of the other party. For instance, if I start selling coffee in my law firm and I start deriving commission out of the coffee sale, that hardly is going to be a problem because coffee sale hardly has an impact on my success as a law firm. On the contrary, in this case, Apple was developing a search engine and made all the investments required. Probably, it was best placed to invent a search engine from scratch. But it was foreclosed from doing so because it did a financial analysis suggesting that it will make more money in a contractual arrangement with Google. In such circumstances, revenue sharing is problematic because it contributes to the bottom line, i.e. to generate profits. Where do we go from here? Tim Wu, former adviser to the White House, did an article last week in the NYT suggesting that we create a segment, i.e. separate search engine or separate browser. There have been further reports suggesting that the DOJ is currently considering a break up which I think is entirely reasonable because if you have a separated/ quarantined search engine which remedies the position going forward. There is a AT&T precedent to that effect where you can quarantine an activity and can make a determination in equity. It's important to have these discussions publicly because I think the authorities are listening and they have got things wrong in the past. Previous decisions of break ups haven't worked really well. Getting it correct right now would be a politically important legacy for any of the authorities dealing with it. This isn't just about the DOJ, but there is a parallel case going in the EU on AdTech, parallel case in the CMA, in the ACCC. The ACCC decision is clearly defective and I hope they have the self-confidence to go back and correct it. The US hopefully gets it right. It is going to affect the entire generation, not just AdTech. We buy pretty much everything online, so every consumer purchase is affected.

Panellist 4: What we have discussed today is important and more discussion needs to follow. We discussed the revenue sharing problem today. When monopolistic behaviour could incentivise the competitor not to compete, it could be problematic. The purpose of competition law is to ensure that people have choices and there are competitors in the market. Coming back to the default option, I think it's the starting point of the problem because people don't feel the issue at the beginning and that makes the problem even worse. When you combine this with revenue sharing, which means the monopoly getting more power in the market and making that effect hit the consumer and other businesses in a negative way. The question of remedy will come in the future and we can discuss it later on.

Panellist 1: Thank you so much. What I think lies at the core of this entire conversation is that RSAs and default settings lie at the core of the dispute. What we were also able to discuss is what could be an effective remedy - is that on the administrative side or the judicial end? Aurelien also brought in the point of legal culture which is also very important and remains to be seen how this plays out in Asian context. We know that remedies are yet to be proposed in this case and this conversation is certainly ongoing. We also don't know whether Google is going to appeal against this decision, and if yes, on what grounds? I would like to thank all the panellists for agreeing to be a part of this panel and have this interesting conversation. I am hopeful that this furthers the conversation on antitrust jurisprudence, be it in the US, or the EU, or the Asian context. Thank you so much once again!
