Centre for Competition Law and Economics

(A non-profit initiative u/s 8, The Companies Act, 2013)

To

The Secretary
Ministry of Corporate Affairs
Government of India
A Wing, Shastri Bhawan
Rajendra Prasad Road
New Delhi - 110001

25th November, 2024

Subject: Panel Discussion on "Competition in Digital Markets: A Look at the US AdTech trial"

Dear Sir/ Ma'am,

We are elated to inform that we had organized a panel discussion titled, "Competition in Digital Markets: A Look at the US AdTech trial" on 15th November, 2024.

Some of the panelists at the conference included:

1. **Giuseppe Colangelo**, Associate Professor of Law and Economics, University of Basilicata
2. **Thomas Höppner**, Partner (Competition Law), Hausfeld
3. **Joseph V. Coniglio**, Director, Antitrust and Innovation Policy, ITIF
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,
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Memorandum of the conference conducted by CCLE on the "Competition in Digital Markets: A Look at the US AdTech trial"

Key Takeaways:

1. The AdTech trial in the US happens at a time when there is heightened scrutiny of competition concerns in digital markets across the globe. The EU has already responded with the Digital Markets Act (DMA) and one of the other US district courts has found a case of monopolization in the search engine market.

2. The US AdTech trial is just one of the many competition cases which are ongoing in the AdTech industry across the globe. There are cases pending in Australia, the UK, the EU, Germany and India among others. The contented practices are more or less the same - tying, self-preferencing, refusal to deal, leveraging, usage of first party data, maintaining opacity, selective disclosure of data among many others.

3. The AdTech case is about three main conducts - a) Google's acquisition of digital advertising tools allow it to have a reinforcing position in the market, b) alleged tying between Google Publishers at the servers and Ad Exchange and c) limitation around real-time bidding allocation made by Google for publishing inventory and manipulating auction.

4. The legal standards in jurisdictions, though, differ. Any antitrust enforcer has to duly account for the same while conducting investigation and arriving at its conclusion.

5. There are some similarities and differences in the EU and the US antitrust law. For instance, in this case tying can be one of the allegations where the outcome in the US and the EU might be the same. This, however, may not be the case for other allegations such as refusal to deal or manipulating bidding. On the balance between pro-competitive and anti-competitive effects, the position is much clearer in the US as compared to the EU.

6. The decision by the French competition authority is the only decision which is currently available as on this market. It might be helpful to understand the evolution of advertising technologies, the "last look" approach and other key factual aspects of the case.

7. There is also a view that Google's search business is connected with its AdTech intervention. The intervention in AdTech has never been a huge success. The cash cow for Google really is search advertising. But Google intervenes in AdTech to ultimately establish control on the

open web and what happens on the publisher side. This is to make sure that the gap between search advertising and non-search advertising remains. In theory, the interests of advertisers and publishers are in contrast and you cannot have the same intermediary.

8. One view is that the difference between open web and closed web is immaterial from the point of advertising as advertisers want to be there wherever consumers are. Under US law, refusal to deal allegations would only hold water when prior dealings could be shown. This is something which may be missing in this case.

9. One of the guiding matrices when it comes to arriving at a conclusion could be economical assessment of the facts of the antitrust case. This economic assessment should be in conjunction with the antitrust policy goals, evidence obtained and weighing of submissions made by the parties. The ultimate goal is to address market failure which is happening on a singular or on a continuous basis. The law might sometimes also seek to ensure plurality and diversity in the market.

10. Some of the possible remedies which are available with antitrust enforcers include application of ex-ante rules, banning favoring and ensuring transparency in the market. Depending on the involvement of the company, conflict of interest in the supply chain might have to be removed. This would fall under structural remedy.

Minutes of the discussion:

Moderator: The AdTech trial recently concluded in the US district Court. The case is initiated by the Department of Justice, combined with State Attorney Generals. What is the background of the case?

Panelist 1: This is a pretty crucial case in digital markets because the conduct at stake has been within the focus of several antitrust authorities. The case is mainly about three main conducts - Google's acquisition of digital advertising tools allow it to have a reinforced position in the market, tie-in allegation between the publisher at the server and the exchange and Google's real-time bidding limitation on publishing inventory and manipulation of its auction mechanism. A usual discussion about the relevant market would also follow. On one side, Google would claim that the market has been overly narrowly defined, on the other the DOJ and the other attorney general would suggest that a relevant market should be defined according to the competitive dynamics. This is going to be the usual tango that we witness in any litigation for clear reason, because, if you enlarge the market, the risk of dominance is going to be lowered down. But it is interesting, to look at the main practice that has been raised by the DOJ, to compare the challenge that antitrust enforcers may face within the US antitrust framework compared with the European antitrust framework. At least for one allegation, the European framework would be more friendly to antitrust enforcers than the US.

Moderator: Thank you so much. I think this is really helpful. Apart from the allegations raised, there comes the question of supply chain. There is DFP as a publisher ad server, then there is Ad Exchange as the SSP and so on and so forth. How is this case coming up in a background where multiple cases are going on across the globe including one in India, search engine judgment already against Google with a remedial position yet to be taken?

Panelist 2: Thank you for the invitation. For transparency, I'm representing complainants against Google and other digital gatekeepers in various cases including AdTech. These are my personal views. It's important to understand the background of this case to understand the hype. Digital advertising is the lifeblood of the Internet. It's funding the majority of services we have there. Due to the convergence of classic media to digital media, digital advertising is increasingly determining every field of media as a main source of their funding. Therefore, it has increasing importance for all sorts of information which we can imagine. Within online advertising, however, we've got only three main models of established and working ad formats. We've got search-based advertising, non-search-based advertising sometimes referred to as display advertising and classified ads. While these constitute separate markets, they all have links between. These links primarily relate to the overarching decision of advertisers where to put their spending. The online advertising industry is in the hands of just two or three large companies, i.e. Google, Facebook, and increasingly Amazon. The three of them are accumulating two-thirds of the global ad spend. Amazon is champion retail

media, which is a subcategory of search-based advertising. Facebook is the leading provider of display advertising in social media. Google, of course, is the leading provider of search-based advertising, but also very strong in video advertising with YouTube and as a standalone business unit, the intermediation of advertising services in the open web. Now, interestingly, these three really grew side by side. They grew over the last years with phenomenal rates, while the rest of the market shrunk. We see that the share of classical media in the advertising space is decreasing. They find it more difficult to fund themselves, and press publishers and others are closing down. One of the reasons is that while these big companies, Amazon, Google, and Facebook, have platforms that are so broad in reach that they are able to monetize them themselves. Thus, they are called owned and operated platforms. They don't need anyone else to sell their ads. In the open web, when we talk about normal, average-sized, small and medium-sized publishers, they don't have that reach. They are not in a position to reach out to thousands of advertisers and convince them to buy ads on their website. They need support to reduce transaction costs. So they need others that bundle their demand and the other side's supply to get advertisers and publishers together. Because of that economic necessity, over the years, an industry developed that helped to match publishers and advertisers referred to as the ad tech stack. This ad tech stack consists of several layers of connected but separate services that are used to bring publishers and advertisers together. Across the board, while at every level you've got different players, there's one player dominant, and that is Google. Through a line of acquisitions that is explained in the DOJ case, it has become the - by far - leading publisher ad server that bundles all the publishers. It's also the leading supply ad network. In Europe, we call them DSPs. The US refers to them as ad networks. An Ad exchange, or what Europe would call the supply-side platform with its service ad, is something which Google would want to enter for a rational reason. The cash cow is search advertising and never has intermediation in the ad tech field been a huge profit driver for Google. It's actually a comparatively smaller part of their revenue. But what matters to Google is to control what's happening in the open web and on the publisher's side because they are all potential competitors in the advertising field. Whoever controls what targeting abilities other publishers have, controls the distance between the advantages of search-based advertising and non-search-based advertising for advertisers, and thereby is able to keep any competitors at distance. I think this is the primary motive, and that's the close link between search dominance and the intermediation in the online advertising sphere which has to be kept in mind. There are other important links why control of the ad tech intermediation services indirectly boosts Google's search power. One is that Google was able to use the unique must-have inventory of search and YouTube as a key selling point for advertisers to say that if you want to advertise on our must-have platforms, you also need to use our ad tech solutions. Conversely, Google was arguing to publishers that we are bundling via Google Ads the majority of advertisers anyway. So if you want to reach them, you need to go through our ad tech tools. This is where you've got the tying claims that the DOJ has also picked. Importantly, the DOJ case is only the latest one amongst the group of investigations. We've got ones in Australia, France, the UK and Germany. The European

Commission obviously is having its own big ad tech case as well. All of them kind of identified the same concerns. The Ad tech stack and its control show clear problems. If you want media plurality, you would want small publishers that don't operate huge platforms and thereby control opinions. Currently, there is immense conflict of interest. It's simply not understandable how one and the same company can intermediate at the same time for publishers and for advertisers. Because in theory, they want to have the highest price for inventory if they're intermediating for publishers, while they want the lowest price if they are intermediating for advertisers. The conflict of interest is also that you can't have a dominant player in search advertising and YouTube video advertising at the same time controlling what everyone else in the open web can do or cannot do in display advertising and thereby controlling any disruptions that may challenge you in your core market. There's a huge amount of self-preferencing and leveraging going on, conduct that strengthens one position by using the other position and heightens up the grip that Google already has in the ecosystem to the detriment of everyone else.

Moderator: Thank you. How are you seeing this case both from a global perspective and specifically from a US law perspective? We all know that recently the presidential elections happened. How will that play out?

Panelist 3: Thank you for hosting me. Starting with the DOJ case, there are going to be some problems in the case. Firstly, if you look at the threshold issue of monopoly power, the DOJ really relies on two arguments. First, that there are three distinct sub markets that you need to analyze, as opposed to one broader platform market. Also that the commerce in those markets is limited to what's known as open web display advertising, which excludes closed ad ecosystems like Meta and Amazon, non-web advertising such as an in-app mobile, and then also non-display ads such as in-stream video or native. My point is even if you assume that the DOJ can really get around that first problem and define these three specific sub markets around ad networks, ad server, and ad exchanges, each of those subsequent limitations, whether it's open web or display, they may be relevant in certain circumstances for certain customers, but I don't think the DOJ can show that they're all true as a general matter in each of these three sub markets. I'll further explain this. So take the ad network market and Google's ads product. It may very well be the case that a number of advertisers have a distinct need to place display ads on the web. But I think it's very hard to say, a priori, that the distinction between open and closed ecosystems matters, right? I mean, advertisers just want to be where the customers are, wherever that is. That's increasingly on these large so-called closed platforms like Meta and Amazon, who, as Thomas noted, have a huge amount of online digital ad revenue and their own ad tech suites. Look at the ad server market as a next example and Google's DoubleClick for Publishers product. Even if you want to focus on those publishers who really only sell display ads on open exchanges, again, I think the idea of categorically excluding non-web ads is misplaced. It was a data trial that showed that for years, advertisers have allocated over

half of their display ad spend to mobile in-app ads alone. So again, maybe there are some small publishers here who really do rely on web advertising, but the DOJ did not expressly define customer-specific markets along those lines. So I think that's going to be a problem. When it comes to the Ad exchange market, first you have the problem as to why non-display ads are categorically excluded, like industry video. In general, display ads have been declining in the market and booting as a source of Google revenues. Even if you accept the DOJ's market definition, there are a lot of rival exchanges and Google's share has never really gotten anywhere near monopoly power under US law. So I think that's going to be very tough for the DOJ to show monopoly power there. But now even looking at the conduct, even assuming that the DOJ could show that Google has monopoly power in any of these markets, I think it's really unlikely the court is going to find that Google engaged in any competitive conduct. Again, starting with the ad network market, that's sort of the buyer side, if you go through the DOJ's conduct allegations here, it's not really clear that any involved direct any competitive effects. I really think this claim is sort of more derivative on the ad server and ad exchange claims. You'd have some extra causation burden, I think on the DOJ to show that those sorts of harms, if they're proven, sort of filtered back into the ad network. Going to the ad server claim, I actually think you also have causation issues when it comes to the bucket that Giuseppe described involving the acquisitions of DoubleClick and others showing that they were ultimately anti-competitive in helping Google to maintain or acquire monopoly power in the ad server market. Both of these transactions were approved at the time they were proposed, and it's really hard to show as a matter of sort of evidence. If the deals had not gone through, there would have been all this competition between Google and these products that would have occurred. If you look at the so-called tying claim of AdX and DFP, which we can debate whether it is actually tying, there needs to be under US law sufficient market power in the tying product market. And here we're talking about AdX, which again, I think is a problem when you look at actually AdX share over the years. Sort of reaching that threshold, I think it's going to be difficult to show. Finally, the vast majority of the DOJ's case is really focused on alleged anti-competitive conduct, whether it's Google refusing to share certain technology or make certain technology available or engaging in certain product design decisions that have any competitive effects in the ad exchange market. Again, under US law, not only does Google not have any general refusal to deal or share technology without a prior course of dealing, which the DOJ has really not shown, but also with respect to product design decisions. If you go through some of the allegations that the DOJ is putting forward, among the thousands of innovations Google's made, they focused on a handful. You know, I think some of them didn't even really have any effect on the market at all. Some of them, I think very clearly, only harmed competitors as opposed to advertisers or publishers. Some of them weren't anti-competitive when you look at the whole market, as opposed to just maybe one side of the market. This is really the key point, Google is going to be able to show pro-competitive justifications for why it engaged in these behaviors. Under Fourth Circuit law, I think that's really going to be sufficient to escape

liability for these types of behaviors. I don't think the court's going to engage in any sort of balancing, let's say, between harms and benefits for this type of behavior.

Moderator: Thank you so much. A couple of interesting points have been raised. So one core issue, which I see coming up in the US trial is whether Google at the very first place has some sort of monopolistic power or not. It would be helpful if you can compare what we mean by this monopolistic power versus the dominant position. Because as far as the EU law and Indian law is concerned, the standard to have an AOD allegation investigated is dominance. However, when we talk about US law, its monopolistic power. It would be helpful if you can also shed some light on the supply chain. For instance, an advertiser can very well directly buy a publishing space from a relevant publisher. So why do we need the intermediary in the very first place?

Panelist 1: Yes, thanks. Let me rephrase your question in terms of comparison between EU and US because Joseph also focused on the standard that is going to be applied in the US to the main practice, the tie-in and the refusal to deal. These are standards that are not necessarily going to deal in the EU, especially when it comes to the refusal to deal. There is a huge room of comparison between the main jurisdiction between EU and US. In general terms, I agree with Joseph about the challenges that US antitrust enforcers are going to face, especially when it comes to specific types of conduct. I mean, there are similarities, but also significant differences between EU and US. When it comes to, for instance, the tie-in allegation, I would see there are huge similarities between EU and US. In the case of the US, one of the main challenges would be that whether there is a tie-in that means to demonstrate that we have two separate markets. Again, this is a usual discussion that we may find also in other litigation when you have the company that is going to at least attempt to demonstrate that actually you are not talking about a separate product but this is just an integrated product. Of course, if it is an integrated product, you do not have the tie-in allegation and that's one of the challenges that you may find both in EU and US. Related to the tie-in conduct, as Joseph mentioned, there is also the challenge of evaluating the balance between pro-competitive benefits on one side and restraints on the other side. That in US is straightforward after the Ohio versus American Express case, especially when it comes to transaction platforms. And in the Google AdTech business, we are talking about a two-sided transaction platform. I would say that even in the EU, we do not have these straightforward judgments (28:03) that impose to consider the platform as a whole in terms of the assessment of effect. At the same time, if you look at the recent notice about the relevant market definition, we mentioned among the features that you may take into account the fact that in order to consider the market as a whole, the fact that the market is running a transaction. Overall, I would say that even if the market is defining on one side, it would be fair to take into account the potential of the counterbalance effect. So when it comes, I would say, to the tie-in conduct, I see a similar approach in the EU and US. The main difference is about the other allegation, the one that is related to the real-time bidding limitation and the manipulation of auction

mechanisms because in the US, they have Trinco. And so it is pretty well known that there is no room for the essential possibility doctrine in the US. There is no duty to share in the US. The only exception is the Aspen skin case and we are not within the Aspen skin scenario. So that will be a huge challenge for US antitrust enforcers. If you look at the EU, it will be pretty the opposite because in EU, we do not only have the essential possibility doctrine, but actually what we crafted 40 years ago as an exceptional circumstance, now, I would say, are not exceptional at all. I mean, the EU is the jurisdiction that is relying significantly on refusal to deal. It is easy to impose a refusal to deal in Europe. The way in which you have to satisfy the requirement, the requirement has been significantly withered down over the years. So in the case of stake, it would be easier in the EU to claim that Google has a duty to share in comparison to the US In the US I find it extremely difficult. Even if you look at other cases, the one that involves Apple recently, the company stated that Apple has no duty to share. Then you may discuss the terms and condition of the anti-steering, but in the US it's difficult to say that you have a duty to share.

In the EU it is pretty much the opposite. So when it comes to this jurisdiction, this is not just the matter of dominant position monopolization and attempt to monopolize. Of course, there are differences between these two standards because I would say that the European one is the more static one. We are not necessarily checking the way in which a player becomes dominant, but once they become dominant, the European antitrust law puts on that player a special responsibility. The US does not share this point of view. Pretty the opposite. If you become dominant because of your merits, again, quoting Trinco, this is the fair reward of a fair success. And so they have a different approach, I would say more dynamic. That's the reason why they also look at the attempt to monopolize. But also when you look at the practice, we may see that in this case, we may witness a completely different approach. As I mentioned at the very beginning and I'm concluding, this case, at least when it comes to refusal to deal, would be easier to handle if you were an antitrust enforcer in the EU rather than US The tie-in allegation is pretty the same. So if you win this allegation in the US, you may win this, you have the very same chance to win also in the EU. I would say this is not the case when it comes to complaining about the refusal to deal.

Moderator: Thank you so much. One can clearly see that there are substantial differences, how even competition law is sort of seen in the US and the EU. I also see a paper which you have written on the French competition authority case. Even if this divide on legal position has to be addressed, I just want to understand it better, that even from assessing the factual position, for instance, Joseph mentioned that the market share which Google has and all the three relevant markets which the DOJ has defined would be put into question. The French competition authority has sort of got some data on that. Obviously, we understand that the market share which a certain company has in the European region would be very fundamentally different to the US However, there is another factor which is basically the evolution of the ad technology, I would like to bring in. For instance

this French competition authority decision talks about how advertising technologies have evolved over the time. For instance, initially we have cascading, then we have dynamic allocation, then we sort of went to header bidding, then we again came to exchange between dynamic allocation, then we came to UPR, which is unified pricing rules. How can the US could benefit even, let us say, on this evolution of technology, which I suppose would pretty much be the same for the US?

Panelist 2: Thank you. To start off with, I'm grateful that Joseph pointed out the position of Google on behalf of ITAF that, of course, Google is funding. And it's not surprising. All of ITIF's recent papers were anti any campaign, anti any enforcement. So, that you have an issue with the Google ad tech case is not a surprise, probably no matter how they've drafted it. But ITIF's points are not convincing. And if I had the time, I would take them all one on one. But let's start with the basic assumption that the open web display advertising categorization was somehow made up. Now, you can look at any study that has been carried out, you can look at any marketing site, and it's crystal clear that display advertising has been there for a very long time, certainly longer than this DOJ complaint. And the distinction between open web and on an operator has also been there for a very long time. So, the idea that the DOJ made this is just kind of ridiculous. It's equally ridiculous to assume that there is just one kind of online advertising market, or that there's just one intermediation market, basically a platform, a two side platform that bundles all publishers on one hand, minus all advertisers on the other end. And that this single market does all the work. There are so many different services involved in this process that aren't interchangeable at all. There are players that only provide one of those services and would never think of providing anyone any other service. Look at the DSPs, the demand side platforms, of course, like Amazon bundled many advertisers, but not with the view to then go to the open web and tell them there, but for their own business, because they want to bundle a lot of advertisers and while they are at it, boost their own platform sales. But the same company is not also active on the side of the publisher bundling any publishers. If you look at the ad server side, the companies that are competing on the demand side are simply not there. So, it's simply not reflecting the market economy and reality. And the second point, the market definition was wrong and the court would have a problem. It's typical Google lobbying. They could lose their case. There may be weaknesses in the US law with a strange focus on everything is the refusal to deal, which it is not. In Europe, we've had this case now for 10 years standing, if they had done the refusal to deal doctrine and the abuse of dominance cases in the highest court, then certainly not. You can't read any conduct under the realm of the refusal to deal. I don't grant a discount on refusal to deal. I charge too much of a price. It could be said refusal to deal with a lower price. So, you can squeeze everything in it, but it's simply not reflecting how the law has evolved. Of course, even in the US, the distinction between tying and refusing to deal, and allegation that it's all about refusal to deal, squeeze it into Trinco, knowing that that is the highest threshold for a very particular case, doesn't apply here. It's just kind of trying to squeeze the law in your direction, but it's not reflected. And it's not in line with the facts of the case. The same applies for the

allegations that this is increasing efficiency, and that there are product design advances. If you look at the evidence given, even Google admitted that some of the design changes they made were totally counterproductive to their own customers. Their advertisers would, of course, benefit if their bids would also be split on other ad exchanges, not just AdX. But they limited it to AdX nonetheless, because they knew it's not efficient, but it's helping them to strengthen their own position. I don't think that the court will fall for that. Even if it was all true - US law has come to a point that it can't maneuver and even deal with such core infringements and not competition on the merits at all - this would only provide arguments for an ex-ante legislation. If our laws are equally limited, they need to turn to ex-ante legislation to deal with this very profound conflict of interest here in these very serious allegations. What unites all antitrust laws is the common sense that you have to compete on the merits. And that's the principle in Europe and elsewhere as well. I think we can all agree that manipulating auctions is not competition on the merits. We can all agree that being selective, favoring, leveraging, tying, holding back data to others and not telling people about it, being opaque, not being transparent, hiding emails, and all these sorts of things is not competition on the merits. If you look at that, it is really defining the case. I'm pretty sure the law and the lawyers and the judges will have to find a solution on how to deal with it. We can't just rely on old case law and try to squeeze it in there. That's a defense I can understand, but it's not convincing and it's not helping our economy.

Coming back to your question on the supply chain and the evolution of technology. What you described as an evolution of technology is a cat and mouse game of Google. Now, all the amendments you said were in reaction to attempts by publishers to be able to use more supply side platforms. In particular, header bidding was one of those solutions that would have enabled publishers to use different supply side platforms in parallel and not just Google. But Google obviously didn't like that because it doesn't like competition, so it made measures to prevent header bidding. And then the publishers reacted to that and Google reacted back and it changed one and another and one and another. But that is not an evolution of technology; it's an evolution of Google's abuse of dominance.

Regarding the supply chain, I think it's pretty clear that if you have a website and you want to sell inventory on it, you have a bit of a problem if you want to do that with direct sales. Now, that would mean you would have to chase up thousands of potential advertisers that may be potentially interested in your inventory. But the time that would take, then your website probably wouldn't have any content because they have no time left rather than chasing up advertisers. So it's pretty clear that it's totally inefficient trying to sell your inventory on your own. You need someone that does that for you. And that's the job of the ad server. That's why these exist. But what is not given, on the other hand, is that advertisers have the same chance. If you are an average sized advertiser, you will not be able to talk to thousands of publications. Think about the thousands of millions of deals they would

have to conclude. It's totally inefficient. So obviously, all advertisers have a demand, have a need to bundle that to put that to another intermediary that does that on their behalf. And that works very well. And if you talk about efficiency, yes, there is efficiency. Bundling supply and bundling demand is an efficient solution. Does it mean it has to be in the hands of one and the same company? No, certainly not. It should be in different hands because of the conflict of interest I pointed out earlier on. If you look at marketing and the way websites are advertised and the way advertisers want to get to websites in a way that actually reaches the right people, then there is no way around AdTech. But there needs to be a variety. AdTech ultimately needs to work, and needs to be fair. The best way to get that is competition in the ad tech stack.

Moderator: Thank you so much. I'm very interested in how this technology has evolved. There is one specific question which the French competition watchdog has highlighted. It says that before header bidding got implemented, Google used "last look" approach, where the DFP, which is double click for publishers, gave prior access to the ad exchange and it got to know the bid price by other SSPs in advance and AdX could simply just bid by a penny more to make sure it wins the bid. In the words of French competition authority, this is simply anti-competitive. It also said that it leads to loss of revenues for publishers, because had this not been the case, AdX would have been forced to bid higher because it would simply not be aware of what are the bids placed by other SSPs. I just want to understand this from you better, that this is an argument which is applicable in the US around product design, right? If you can sort of highlight what is the legal position in the US and how this specific aspect would be differently interpreted in the US law as compared to the EU. It is intriguing that in the French case, Google filed commitment and settlement applications. They did not even challenge the remedies which they voluntarily took.

Moderator: There's a question from Anas. How ex-ante measures could be used to address dominance in the market specifically in the context of AdX.

Panelist 3: Thank you. I will certainly get to "last look", but I do want to respond if I made a couple of points that Thomas made. First, I never said that the distinctions between open versus closed or web versus non-web or display versus non-display were not relevant or understandable within the market. What I suggested was, that the idea of a sort of a fallacy of composition, that putting them all together as part of this open web display advertising criteria of market definition, was something, as I think evidence of trial made clear, really was sort of constructed for this case. And the reason it's relevant is because, in part, the DOJ didn't put forward any good quantitative evidence, which is the sort of evidence we like to see when we define relevant markets of substitution, hypothetical monopolist tests. And instead, they relied on sort of qualitative factors that are sometimes used in antitrust law. And one of those factors is industry recognition. So again, that's, I think, particularly why it's relevant that so many testimonies suggest that this test was not

recognized by the industry. Again, it makes it particularly relevant for the market definition point. So with respect to the market generally, I think it's also helpful to look beyond market shares also at direct evidence to see what we can see about whether the ad exchange market, the ad server market, the ad network market are actually working. And I think there is some good evidence here that, we should, that we need to take account of. So first, output expansion. US display ad spending has increased over the last 10 years from about $18 billion to $137 billion, right? That certainly doesn't sound like a monopoly type of pricing or dynamic from my perspective. That sounds like a rapidly expanding healthy market. Also, when you look at pricing and ad servers, especially publishers, Google's pricing, and I think it will be shown at trial, is very much in line with a lot of competitors, in some cases lower, in some cases maybe higher. But again, certainly not the sort of monopoly pricing dynamics that we would expect to see if these markets are monopolies. Similar thing with the ad exchange market. I think according to the DOJ's own analysis, revenues for open web display ads have increased, doubled, frankly, over a period of four years. So that direct evidence is very helpful in understanding exactly whether the practice is healthy or not, rather than getting boiled into discussing ad nauseam, these terms of open web display advertising, et cetera, for a more formalistic analysis. So with respect to the sum of the conduct here, you know, there's only actually one claim the DOJ is even alleging and that's tying, and that is AdX to DFP allegation. All the other claims involving AdX leveraging behavior, whether it's restricting Google ads, advertiser demand to AdX, whether it's dynamic allocation bidding, restricting that to AdX, or the last look, DOJ is not alleging they're tying, right? So there's not really any attempt there to sort of fit this all into Trinco. Those are clearly allegations that involve basically not tying, but saying that Google needs to make certain technology available to its competitors. Clearly, it's a case for refusal to deal, and under US law, there are very high standards that apply. That is the law for the court regardless of whether one likes it or not. With respect to last look, I guess what I would point out here is, the DOJ's theory for this claim, and for folks who don't know, this is this idea that AdX sort of has a last chance to beat the header bid, an integration, a product design decision that Google made. You know, again, under US law, there was no prior course of dealing here. That's going to harm, that's going to hurt the refusal to deal claim under Trinco. With Google creating open bidding which basically made it easier to compare exchanges within the ad server itself. Ultimately, this, I think, became moot with respect to Google having a last look advantage. On the pro-competitive justification side, publishers benefited from this because they had a chance to get more revenues using the last look bid. So that's a strong pro-competitive justification that I think you need to account for. With respect to the some of the other product design decision, we can certainly go through conduct by conduct, but I think one of the things that Thomas mentioned was Project Poirot, and this idea of Google moving certain bids away, DV 360 bids specifically, away from other exchanges, based on concerns that they did not have sufficiently clear second price auctions, and moving them over to AdX. You know, advertisers like this, advertisers opted into this, it wasn't required. They like this product, very few of them opted out, and it increased revenues for them by one estimate more than 10%. Again, a product

design decision that Google made in response to changes that were going on in the industry, and something that benefited its platform. So, I think more generally, the idea that you mentioned, Sumit, of looking at this as a course of conduct, I'm actually skeptical that there is any sort of course of conduct claim that DOJ could bring, even if all these independent allegations failed, this idea that there was sort of a monopoly brought theory. I'm not sure you can do that under the Fourth Circuit, but I think that really does tell sort of a clear story about what's going on here, whether it's the move from waterfall to real-time bidding, header bidding, and then ultimately going to the first price auctions, what you see is Google trying to respond to these changes in a way that makes sense for its platform, right? And again, happy to go through specific conduct here. If, you know, there are certain allegations that are worth discussing the specific facts on, but I think that's really what this case is ultimately all about.

Moderator: That's really interesting. I also got a chance to sort of go through the transcript of the trial, which has happened. And what I personally feel is that when you talk about the sort of pro-competitive effects of the product design, right, which is sort of moving from header bidding to the UPR or a lot of, let us say, EBDA or various other technology, I feel that this was something which should have been better highlighted by Google during the trial stage. This is what I personally think. It would be helpful for the panelists to give closing remarks.

Panelist 1: Thank you. I have a couple of thoughts. First of all, I'm not interested in the outcome of the case. So, usually, I do not care whether the antitrust enforcer wins or the company wins. What is relevant is what we are witnessing around the world. That, from my perspective, is not necessarily welcome. That means we have several practices at stake. These practices are usually pretty similar across different litigation. Somehow, there are allegations of self-preferencing, opacity, selective disclosure of information and the usage of first-party data. So, several practices are pretty similar, but we have different standards. When we are going to assess them under antitrust rules, we have to take into account the different standards. What I find troublesome, from my perspective, is that the limits that some jurisdictions face in addressing some conducts are pushing these jurisdictions to change the law. There could be benefits; there could be side effects if you change the law. It seems to me, I do not agree with, that Europe is coming closer to a formal rule-based approach, even in the antitrust investigation, lowering the room of economic analysis. You may agree or disagree with the specific outcome of the case, but undermining the economic analysis, in my opinion, is a huge mistake that is not justified because, for instance, you are unable to win one case, there are so many other cases that you are able to win. And the trend that I see in Europe, at least when it comes to antitrust enforcers, not necessarily the court of justice, I don't see this trend in the US so far. But what could be troublesome is whether we decide to sacrifice any economic assessment just because we want to score a win in some specific case. Again, it seems to me that in Europe, this trend is gaining traction. Very recently, the Advocate General had an interview in which she complained

about the fact that actually economics is just complicating the antitrust investigation. I respectfully disagree. I mean, maybe the investigation is more complicated, but because the assessment of some practices are more complicated. I hope that we are not going to see that to justify a specific outcome; we are undermining the economic approach. We may discuss how to make it more workable, the economic approach, but going back to a situation and a scenario in which we just enforce rules, no matter the economic effect or no matter the theory of harm that would not be the best way to go forward in antitrust assessment in EU and US.

Moderator: Thank you so much. Thomas, you are representing the petitioners in this case. If you can shed some light that hypothetically speaking if contravention is proved, what could be the remedial action which could be taken in the case? You can also answer the question from Anas which is how ex-ante rules could be enforced in the AdTech market to address competition concerns. We know there is full discourse on ex-ante rules.

Panelist 2: Yes, thank you. I would like to make clear that if you look at the trial document, it's apparent that the case is about monopolization as much as it is about tying. It's a combination of several actions, both standalone and mutually reinforcing. The idea that this is just about a tying case narrowly defined and then somehow being squeezed under Trinko is just not in line with the case. Ex-ante is, of course, something always that's on the agenda and also to fix issues that antitrust may not be able to fix. In particular, if there are permanent market failures, not just one-off market failures, that you need more attention. And I think AdTech is so important, digital advertising in general, that it's one of those areas that would justify such supervision by specific regulation or maybe regulator. There are various tools that could be used to make them more of a level playing field. You could impose bans on favoring, create more transparency at the very least and take out conflicts of interest. As far as studies which are currently available, it is clear that the control which Google exercises on various aspects of digital technology, it's difficult to address them with just behavioral remedies. In such a case, removing conflict of interest is the best idea which leads to structural measures. Both in the US and in Europe, such structural measures are contemplated. In AdTech, I think they particularly make a lot of sense. If you operate at the same time on the publisher side and on the advertiser side, somehow the outcome can't be ideal. So we will have to talk about structural measures in this field in any event. What I would like to say at last, I think this case is striking, because around the globe, there is agreement among those authorities that really looked at it, that there is a market failure that needs to be fixed. It's now upon the national competition authorities and the legal regimes to find proper solutions that bring these market failures to an end, open up the market and create more diversity again, in the important field of online media.

Panelist 3: I want to conclude by getting into some of these international cases and the election in the United States which you mentioned. Firstly, this case was brought by the Biden administration, as part of its broader, what we call here neo-Brandeisian agenda. And you know, this agenda, I think, for all practical purposes is at an end, given the recent election in the United States. Now, to be sure, the Trump administration did bring the Google search case, which the DOJ did win in district court and is now in its remedy phase. Google will appeal, of course. And, you know, like the search case, as Thomas mentioned, the AdTech case could have a potential breakup, and specifically forcing Google to divest the entirety of its ad manager suite. But I do think there's a real chance that given a Trump administration, we don't see those sorts of structural remedies be pursued. Personally, I think that would be a good thing. You know, for remedies under US law, and I think just generally good and sound economics, there has to be some causal connection between the remedy and resolving the anti-competitive conduct at issue. In my view, divesting the ad manager from the rest of Google's businesses, search, Chrome, Android, doesn't make any sense in this regard. There is no allegation in the DOJ case, or my understanding of the European case as well, that Google is, for example, leveraging its search business to benefit its ad manager, or leveraging its Android business to benefit ad manager, or leveraging Chrome to benefit ad manager, or vice versa. So a structural remedy, sort of therefore cleaving off the ad manager suite, doesn't seem to be really about remedying any competitive conduct, as much as it is just disgorgement of Google's ad tech business, which, again, I don't think is an appropriate remedy in this type of case. There has to be something behind just saying conflict of interest, and of course the whole point of a platform, of course, is to connect both sides of the platform, right? So that's kind of what you do with the platform. So with respect to the international landscape, I agree with the panelists that this is obviously a big trend that we're seeing is a push towards ex-ante digital regulation. Europe, and including countries like India, with its digital competition bill, which ITIF has commented on publicly. The key point I think I want to emphasize here is that ex-ante regulation, also major ex-post changes to law, should only be pursued if there is some sort of market failure that you can't really address with your current law enforcement tools. And in that vein, you know, again, I think it's clear that the Ad tech space, especially when you look at the ad exchange part, you know, there isn't a lot of general evidence, I think, of market failure. So, as I mentioned in the US, you've had rapid output expansion, I mean, tremendous output expansion over the last 10 years, to 18 billion to 137 billion. I mean, that's not, that to me is not consistent with market failure. And again, when, you know, obviously the metrics will differ depending on which jurisdiction you're in, but a lot of the countries we're seeing look towards digital regulation still nascent in developing digital advertising markets. And that's another reason I think that regulation can often be premature and not appropriate. So, but also, I think my takeaway, even if you do have market failure, again, you need to show that the regulation is going to make things better relative to, let's say, enforcement of your ex-post laws. I think the Ad Tech case, frankly, is a great example of the DOJ trying to resolve the problems it sees using ex-post tools, just like Europe is doing and other jurisdictions without having to go through ex-ante regulation. I think

certainly it's the best practice, you know, and India, I believe, is in the same boat currently investigating Google ad tech in response to a third-party complaint. So, I certainly I think it's the best practice before doing any sort of heavy-handed regulation is to go through these sorts of ex-post antitrust enforcement to see if those can first remedy the issues before doing something like ex-ante regulation, which we all know, especially in digital contexts, can have a lot of unintended and harmful consequences.

Moderator: Thanks very much. I would like to thank all the panelists. Thank you so much, Giuseppe, Thomas, and Joseph for agreeing to be a part of this panel and dedicating very precious time to speak on this very important area of law. I think we have discussed various aspects, starting from the difference between how competition law is seen in the EU versus the US, the legal standards, which are sort of different, the whole conversation around competition concerns in the big tech space, and last but not the least, I think Joseph very correctly pointed out how sort of political administration also has a bearing on how these cases are taken forward. I hope at CCLE that, you know, ultimately the outcome is something which is pro-competitive for every stakeholder, including the respondent in this case. And since the trial has just been concluded and the parties have just filed their proposed finding of facts, I think a lot has to happen. We also look forward to the remedial phase, which is there in the search market case where the verdict is already out. This conversation is ongoing and a lot is yet to settle. I would again like to thank all the panelists for agreeing to speak on this. Thank you so much.