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Google's Antitrust Cases
Competition Analysis in New Economy
Markets

by

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Google's Antitrust Cases Competition Analysis in New Economy Markets

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I. Introduction

Today, global economic performance largely depends on digital ecosystems. E-commerce, cloud, social media, sharing economy are the main products of the modern innovative economic systems which are constantly raising new regulatory questions. Meanwhile the United States has an unimpeachable dominance in innovation and new technologies, as well as a large and open domestic market, the EU is only recently discovering the importance of empowering the European digital economy and aims to break down its highly fragmented cross-border online economic environment. As global economy is rapidly becoming digital, Europe's effort to create and invest in common digital market is understandable.

The comprehensive investigations launched by the European Commission into the role of social network, search engine, or sharing economy internet platforms, which are new generation technologies dominated by American firms; or the recent decision of the Court of Justice of the European Union declaring that the Commission's US Safe Harbor Decision is invalid¹ might be considered as part of an anti-American protectionist policy. However, these measures could rather be seen as part of a broader trend to foster European enterprises in technology developments.

In any case, today the European Commission is concerned with a market where European citizens are afforded the same capacity to innovate that have the American technology giants: After a five-years investigation and unsuccessful efforts of bringing the case to an end by a negotiated settlement, the Commission formally accused Google of abusing its dominance in web searches.²

Through presenting Google's antitrust cases in the United States and in the European Union, this paper aims to assess the following: First, the new challenges that competition authorities are facing in the process of enforcing competition law regarding businesses operating in digital economy markets, focusing mainly on the application of competition rules on the prohibition of abusing conduct. The nature of competition in the new economy is relatively different from traditional markets, therefore competition analysis and the application of competition law rules in these markets might be different. Second, under different jurisdiction competition authorities may reach very different conclusion in the applications of competition rules. Though companies in new digital economy are operating in a global level, they are often subject to different competition law systems, drawn up potentially with different mentality and approaches.

¹ Case C-362/14 "Maximilian Schrems v. Data Protection Commissioner" (2015)

² European Commission Press Release IP/15/4780, Antitrust: Commission Sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android, Brussels, 15 April, 2015

http://europa.eu/rapid/press-release_IP-15-4780_en.htm

Chapter 1 introduces Google Inc, with a description of its strong position and of its main internet-based services and products, briefly mentioning also competition concerns resulting from the particularities of Google's position. Chapter 2 and chapter 3 assess antitrust cases against Google in the United States in front of the Federal Trade Commission, and in the European Union in front of the European Commission, presenting Google's alleged anticompetitive business practices and the different approaches of the American and European competition authorities. Chapter 3 analyses also the European Competition procedural background applied by the European Commission and finally, Chapter 4 concludes this paper with a final assessment of the emerged competition concerns concentrating on Google's questioned practices individually.

II. Google's search engine services

1. Google, the leading search engine provider

When Microsoft acquired a 10-year exclusive license to Yahoo's search technologies and notified the operation to the European Commission for regulatory clearance under European Union's Merger control law³, the Commission's preliminary investigation indicated that in the European Economic Area (EEA) Microsoft's and Yahoo's activities in online web-wide algorithmic search and search advertising are very limited, as 90-100% of search users perform searches on Google, and only 20-30% on Microsoft and 10-20% on Yahoo. The investigation illustrated the importance of Google in Europe, generally enjoying market share above 90%, while Microsoft's and Yahoo's combined market shares is generally below 10%, with relatively small share of search users who considers the latter to run their searches.⁴

Arguably, this percentage represents a very large market share, of which existence may indicate Google's market power on the relevant online search and online advertising market, as the ECJ underlined the importance of this factor through its several decisions from the past. Also the European Commission expressed its position as regards Google's dominance concluding that the described market shares level is higher than in many other parts of the world mentioning also the significant barriers to entry and network effects in both markets.⁵

In this market situation, Google's conduct raised competition concerns in relation to the abuse of this dominance, which this thesis will mainly focus on.

Prior to assess these concerns, a short description of the functioning of internet search engines may be useful and a review of the services provided through this system is indispensable.

³ Council Regulation (EC) NO 139/2004 ("EC Merger Regulation")

⁴ Case No. COMP/M.5727-Microsoft/Yahoo! Search Business, http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf. The data indicated shows the probability that users will use a particular search engine within a month in Europe.

⁵ European Commission Memo 13/383, "Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers" 25/04/2013. http://europa.eu/rapid/press-release_MEMO-13-383_en.htm

2. The functioning of internet search engines

Internet search engines are crucial for locating and accessing the huge amount of digital content. Search engines like those operated by Google, Microsoft or Yahoo use algorithms to search for information on the internet through special software application that indexes the web content. The algorithms have their important role to analyze and index web pages, and thus determine the relevant parts of the websites. In search result pages the ranking for any given query of information is determined by these search engine algorithms.⁶ When thus building up a ranking method or developing a website with the goal to rank it high and if the variables in these algorithms are known they can be taken account and the algorithms can be “pleased”. However, by doing this the results may be manipulated.⁷ Further, internet search engine providers update or change their algorithms relatively often simply for innovative purposes. Still, these updates may be considered as a tool of manipulation and may result in demotion of websites considered competitors.⁸

Google’s search ranking system for recommending websites has been questioned and reviewed by both European and American competition authorities in the last few years. Allegations concern the unfair manipulation of search results and basically the way Google abuses its dominant search engine to stifle competition.

3. Google’s online search and online advertising services

As noted, Google, for its general search service, has an important market share in it the European Economic Area (EEA). Beside its general search, Google offers specialized search services as well. Specialized search engine services or vertical internet search services deliver more relevant and specific search results to the users. Examples include Google Shopping, which specializes in the search for products, Google Places, which specializes in the search for local businesses, Google News, which specializes in search for news or Google Flights which specializes in search for air travel directions.⁹ Moreover, Google provides users with sponsored links of advertisers operating also in online search advertising market. Website publishers can display on their own websites advertisements provided by Google ("AdSense for Search") or by rival search engines. Search engines earn money every time a user clicks on these search advertisements.¹⁰ Google operates its AdWords advertising program as well, in which advertisers bid for several keywords related to their business and can choose a short text line (ad) which is shown on Google’s search results when the keywords correspond to the search enquiry of the user. Undertakings shall pay only if users click on their ads and land on their

⁶ Case No. COMP/M.5727-Microsoft/Yahoo! Search Business,

http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf.

⁷ Pepijn J. P. Nielsen: Legal Status of Search Engine Result Manipulation, Tilburg University-Tilburg Institute for Law, Technology, and Society (TILT)

<http://arno.uvt.nl/show.cgi?fid=127401> , p. 10.

⁸ Pepijn J. P. Nielsen: Legal Status of Search Engine Result Manipulation, Tilburg University-Tilburg Institute for Law, Technology, and Society (TILT)

<http://arno.uvt.nl/show.cgi?fid=127401>, p. 9.

⁹ European Commission Press Release IP 13/371 Antitrust: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns 25/04/2013

http://europa.eu/rapid/press-release_IP-13-371_en.htm

¹⁰ European Commission Press Release IP 13/371 Antitrust: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns, 25/04/2013

http://europa.eu/rapid/press-release_IP-13-371_en.htm

website – not when their ad is displayed.¹¹ Due to its profitability, search advertising is an important part of every search engine's business.

Google's search engine thus provides two types of result; the first one is "*unpaid search results*" which are sometimes also referred to as "natural", "organic" or "algorithmic" search results, and the second one is "*paid third party advertisements*" shown at the top and/or at the right side of the Google's search results page often referred as to "paid" search results or "sponsored links".¹² Users, therefore, conducting a search on internet receive on the result page both organic search results provided by the search engine and sponsored links with advertisements referring to their query. Under circumstances, this specificity may lead to prominent market position with important competition concerns.

4. Competition concerns¹³

4.1 Market specificity: two-sided market

As noted above, Google's search engine operates in a two-sided platform, one for internet users, and one for advertisers. This platform has two well distinguishable user groups that provide each other with network benefit: The more online users use Google's online search engine, the more crucial it becomes for advertisers. Obviously, a very high market share resulting from the large preference of this internet search engine by internet users makes largely more attractive the choice of it by advertisers compared to Google's competitors. Basically, Google attracts traffic with its free search functionality and sells the potentiality of this traffic to advertisers to generate its revenue. This specificity represents indirect network effect between the two sides of the platform. The larger the platform is, the more interesting it gets for the advertisers as there are higher chance that users will become purchaser. Indirect network effects thus bring value to both users and advertisers. Subject to the foregoing, when it comes to market definition, it has to be considered that these markets have platforms which operate with two markets strictly linked to each others.

4.2. Market shares

Market definition is used to calculate market shares in the relevant market. Looking at market share, based on views of websites (web traffic), Google has had a strong position in online search and online advertisement with very limited number of competitors, and has been maintaining this position since 2008. This dominance in the relevant market may give raise to competition concerns for allegations of abuse its dominant position relating to, for instance, alleged unfavorable treatment of competing search services companies.

4.3. Market power

Market share must be put in relation to potential competitive constraints in order to determine whether Google actually has market power and can act independently of

¹¹ <http://adwords.google.com>

¹² European Commission Press Release, "Antitrust: Commission probes allegations of antitrust violations by Google" IP/10/1624, 30. 11. 2010.

¹³ Case No. COMP/M.5727-Microsoft/Yahoo! Search Business, http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf.

customers, its competitors and ultimately of consumers. Barriers are clear as far as the entrance of the competitors are concerned: Although the relevant market is a market in which high profits are potentially made and it attracts new businesses, the indirect network effects are strong and therefore as each side of the market grows, it gets more difficult for new entrants to compete.¹⁴

In high-tech markets in particular, network effect may lead to entrenched market position. As it will be assessed, according the European Commission, Google's position seems likely that no web search service will replace it as European users' web search service of choice¹⁵, and it does not seem to be under the threat of potential new entry.

Also the possibility of consumers to switch to another service and the switching cost should be analyzed at both sides of the platform. Concerning Internet search, Internet users and consumers must be well informed and know what to expect from their search query or/and be convinced that the other search engine in question offers the same quality as Google¹⁶. However, this is not the case, especially when internet users have no background information on the subject matter and thus have no information to determine the quality of the results. As it was mentioned before, with regard to advertisers, switching costs are remarkably higher as a result of network effect.

If Google's high market share is coupled with high switching cost especially on the side of advertisers, it suggests that Google has market power and can be perceived as a dominant player in several online markets, including online search and online advertisement.

III. The U.S. Antitrust Experience¹⁷

In June 2011, the Federal Trade Commission (FTC)¹⁸ launched a comprehensive competition investigation into Google's business practices.

At the time when the investigations were launched, press articles, often cited Microsoft's long-running case from the 1990's, which had important consequences on US antitrust policy, as well as on Microsoft's ability to exploit its dominance and particularly on its public image. The press recalled these events as risks that Google might have also faced. However, when it came to the final statement of the FTC

¹⁴ Case No. COMP/M.5727-Microsoft/Yahoo! Search Business,

http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf.

¹⁵ European Commission Press Release IP 13/371 Antitrust: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns 25/04/2013

http://europa.eu/rapid/press-release_IP-13-371_en.htm

¹⁶ Associated Press: "Google's Search Ranking Methods under Scanner" 04/09/2010

<http://gadgets.ndtv.com/internet/news/google-search-ranking-methods-under-scanner-227117>

¹⁷ Unlike in Europe, in the United States antitrust enforcement system is based on criminal law, with financial and custodial penalties against individuals. (The European system is administrative and firms involved in anti-competitive practices may be penalized with fines.) Competition laws are enforced at the federal level by the Antitrust Division of Department of Justice and the Federal Trade Commission. Where antitrust cases can't be settled the courts take the final decision. However, in the United States private enforcement plays a grater role through the U.S. civil court system and in antitrust cases parties can go directly go to the court for redress of damages caused by anti-competitive practices.

EU and US competition policies. Similar objectives, different approaches. The European Parliamentary Research Service 27/03/2014

¹⁸ The Federal Trade Commission (FTC) is an independent agency of the United States government, established in 1914 by the Federal Trade Commission Act.

regarding Google's search practices, it was clear that Google managed to avoid antitrust charges and predicted consequences in the United States.

1. Competition concerns regarding Google's anticompetitive practices

As noted, the FTC was deluged by complaints from companies claiming that Google is using its dominant position to thwart competition:

i.) Complaints mainly concerned allegations that *Google favored its own properties in vertical search results*. According to some vertical websites, Google's *Universal Search Service* has been used to promote Google's own services while discriminating the search rankings of competing website and other vertical search engines.¹⁹ Google's Universal Search Service was introduced in 2007. This system returns more than just the traditional text results. Searching for a query, this service brings information also images, shopping information, video, blog spot and so on about the query.

The introduction of Google's Universal Search, was considered as a kind of modification in its search result page, which helped display Google's vertical search results in response to certain types of queries and consequently demoted competitors' websites.

Public complaints were drawn from travel sites like Expedia and Trip Advisor, health site Web MD.com and local-business reviews sites Yelp.com and Citysearch.com, among others.²⁰

ii.) Google's above mentioned vertical competitors presented their complaints claiming also that *Google misappropriated competitors' websites content* without consent or compensation in order to improve its own products. This conduct might also be considered harmful to competition as it potentially harms incentives to innovation. In addition, Google was accused of threatening its competitors to delist them entirely from Google's search results when they protested the misappropriation of their content.²¹

iii.) Other allegations that the FTC investigated were that Google placed *unreasonable restrictions* on the ability of *advertisers* to simultaneously advertise on Google and competing search engines. Small businesses thus were unable to use tools provided by third parties to manage advertising campaign on both Google and other competing advertising platforms, a practice known as "*multi-homing*"²²

iv.) Many of Google's critics wanted the Commission to go further in its investigation and regulate the intricacies of Google's search engine algorithm. Complaints charged that *Google manipulated its search algorithms* in order to demote competitors' vertical websites.

As Fairsearch.org, a group representing several Google critics, including Microsoft and Expedia Inc., Kayak.com. and others, clearly summarized: "Google engages in anticompetitive behavior that harms consumers by restricting the ability of other

¹⁹ FTC. Release "Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Market for Devices Like Smart Phones, Games and Tables and in Online Search." 1/03/2013 <http://ftc.gov/opa/2013/01/google.shtm>

²⁰ The Wall Street Journal: Feds to Lunch Probe of Google. June 24, 2011 – Europe Edition <http://online.wsj.com/article/SB10001424052702303339904576403603764717680.html>

²¹ For example, Google allegedly "scraped" the user generated reviews of local restaurants displayed on Yelp, and led consumers believe that these reviews were its own.

Google Press Conference, Opening Remarks of Federal Trade Commission Chairman Jon Leibowitz as Prepared for Delivery, 3/1/2013 <http://ftc.gov/speeches/leibowitz/130103googleleibowitzremarks.pdf>

²² Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc. FTC File Number: 111-0163. 3/1/2013.

<http://ftc.gov/os/2013/01/130103googlesearchstntofcomm.pdf>

companies to compete to put the best products and services in the front of the Internet users who should be allowed to pick winners and losers, not Google.”²³ Basically, Google is, allowed by its market power, potentially able to determine whether a business shall succeed or fail.

2. The FTC’s investigation

According to the FTC’ statement on Google’s anticompetitive practices, the investigation on the above described allegations represented a broad, comprehensive research based on over nine million pages of documents, numerous industry participants’ interviews, key Google executives hearings and staff economics’ empirical analyses.²⁴

The FTC has powers to intervene and challenge business practices if it has reason to believe that such practices violate Section 5 of FTC Act which prohibits the unfair methods of competition, and create a likelihood of significant injury to competition, including monopolization or attempted monopolization actionable under Section 2 of the Sherman Act.²⁵

i.) Search algorithm and search result page modification

To determine if Google violated the above mentioned relating laws, the FTC had to consider whether Google manipulated its search algorithm and search result page in order to impede a competitive threat posed by vertical search engines, and prominently display its own vertical search results.

According to the FTC statement, although Google is a horizontal search engine seeking to cover the Internet as completely as possible, delivering a comprehensive list of results to any query; and vertical search engines are not wholesale substitutes for general purpose search engines, they still present consumers with an alternative to Google for specific categories searches.²⁶

Within this context, the FTC analyzed whether Google changed its search results primarily to exclude actual or potential competitors, or to improve the quality of its search product and overall user experience. The FTC found that evidences were “largely consistent” with the conclusion that Google likely benefited consumers by introducing its vertical content through its Universal Search and had notably positive effect on the quality of its general search results. The FTC refined that Google’s primary goal was to quickly answer and better satisfy its users’ search queries by providing directly relevant

²³ Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google Inc. FTC File Number: 111-0163. 3/1/2013.

<http://ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf>

²⁴ Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google Inc. FTC File Number: 111-0163. 3/1/2013.

<http://ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf>

²⁵ The US Congress passed the Sherman Act as federal statute in 1890 to combat anticompetitive practices, reduce market domination by individual corporations, and preserve unfettered competition as the rule of trade. The Sherman Antitrust Act forms the foundation and the basis for most federal antitrust litigation. The Federal Trade Commission Act (FTCA) from 1914 completed the Sherman Act providing that the FTC could proactively and directly protect consumers rather than only offer indirect protection by protecting business competitors. Section 5 of the FTCA gives broad powers to cope with new threats to the competitive free market. The FTC was subject to several critics discussing the fact that Commission sued Google not under traditional antitrust law (the Sherman Act) but instead by alleging unfair competition under Section 5 of the FTCA.

<http://www.law.cornell.edu/wex/antitrust>

²⁶ Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google Inc. FTC File Number: 111-0163. 3/1/2013.

<http://ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf>

information and any negative impact on potential competitors was incidental to that purpose, describing this effect as a common byproduct of “competition on the merit”.²⁷ The FTC concluded that the introduction of Universal Search as well as additional changes made to Google’s search algorithm – even those that may have had the effect of harming individual competitors – could be plausibly justified as innovations that improved Google’s product and the experience of its users.

ii.) Competing websites’ content misappropriation

The FTC considered whether this conduct could have diminished the incentive of Google’s competitors to invest in bringing new and innovative content and services to the Internet in the future or reduced Google’s own incentive to innovate in the relevant market. Some Commissioners expressed strong concerns about Google’s conduct in this regard.

iii.) Unreasonable restrictions towards advertisers

Advertisers who wish to use a search advertising platform spend considerable time, effort, and resources preparing extensive bids, including keywords, price information, and targeting information. Once an advertiser has entered the information necessary to create a search advertising campaign, the advertising platform sends critical data back to the advertisers that they need to evaluate the effectiveness of, and to further manage, their campaign. Advertising platforms use application programming interfaces, known as APIs, to give advertisers direct access to these advertising platforms so they can develop their own software programs to automatically manage and optimize their advertising campaigns.²⁸

Some FTC Commissioners were concerned that Google’s contractual conditions governing the use of its API made it more difficult for an advertiser to simultaneously manage a campaign on AdWords and on competing ad platforms, and that these restrictions might impair competition in search advertising.²⁹

The FTC’s investigation on unreasonable restrictions suggested that while most large advertisers who were not affected by Google’s contractual restrictions preferred to “multi-home”, multi-homing by small advertisers affected by Google’s restrictions was much less common. Some Commissioners were concerned by the tendency of Google’s restrictions to raise the cost of small businesses and using the power of internet search advertising to grow their businesses.³⁰

iv.) Google’s commitments

In a separate Letter of Commitments to the FTC, Google made important commitments considered significant alteration on the above described practices.

In its letter, Google committed to make available a web based notice form that provides website owners with the option to put out from display on Google’s current Shopping, G+Local, Flights, Hotels and Advisor web pages of content from their websites that has been crawled by Google. When a website owner exercise this option, Google ceases displaying crawled content from the domain name designated by the website owner on

²⁷ Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google Inc. FTC File Number: 111-0163. 3/1/2013.

<http://ftc.gov/os/2013/01/130103googlesearchstntofcomm.pdf>

²⁸ FTC. Release “Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Market for Devices Like Smart Phones, Games and Tables and in Online Search.” 1. 03. 2013.

<http://ftc.gov/opa/2013/01/google.shtm>

²⁹ FTC. Release “Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Market for Devices Like Smart Phones, Games and Tables and in Online Search.” 1. 03. 2013.

<http://ftc.gov/opa/2013/01/google.shtm>

³⁰ Google Press Conference, Opening Remarks Of Federal Trade Commission Chairman Jon Leibowitz As Prepared for Delivery January 3, 2013.

<http://ftc.gov/speeches/leibowitz/130103googleleibowitzremarks.pdf>

google.com domain in the United States. Thus *Google committed to refrain from content appropriation in the future.*³¹

The other important commitment concerned the contractual restriction towards advertisers. *Google agreed to remove from its AdWords API Terms and Conditions the AdWords API Input and Copying Restrictions for all AdWords API licensees with a primary billing address in the United States.* In addition, Google committed not to add any new provision to its AdWords API Terms and Conditions, or adopt new technical requirements in connection with the use of its online advertisement platform that can potentially result in barriers for advertisers to coordinate online advertising campaigns across multiple platforms.³²

In sum, while not everything Google did was beneficial, on balance, as the FTC summarized, the evidences presented did not support the allegations that Google's display of its own vertical content at or near the top of its search results page was product change undertaken without a legitimate business justification. Rather, the display of Google's own content could plausibly be viewed as an improvement in the overall quality of Google's search product. Similarly, the FTC did not find sufficient evidence that Google manipulated its search algorithm to unfairly disadvantage vertical competitors. Although, some vertical websites experienced demotions, in the Federal commission's view it was a consequence of algorithm changes that also could plausibly be viewed as an improvement in the quality of Google's search results.³³

The FTC Chairman Jon Leibowitz commented the case, "some may believe we should have done less" in this case, but also adds: "Some may believe the Commission should have done more, because they are locked in hand-to-hand combat with Google around the world and have the mistaken belief that criticizing us will influence the outcome in other jurisdictions."³⁴ Wouldn't it be a slight aversion to the European approach?

IV. The European Antitrust Fight

The protection of competition is the main objective in both American and European legal systems. However, as it will be described in the following, while the more economic American approach underlines consumer welfare, the European view aims to protect the freedom to compete.

In Europe, Google has been facing similar issues. Aversions, however, to the European approach were reflected in critics accusing the European Commission of relying too much in competitors' complaints rather than on evidence on consumer harm. Although, alleged pressure from competitors to give Google a decisive punishment would lead the European competition authorities to handle the Google-case with a hard-line approach, European officials insist on focusing consumers' interest.³⁵

On the 30th of November 2010, the European Commission officially announced its decision to open an antitrust investigation into allegations that Google abused a

³¹ Commitment Letter from Google Inc. to Chairman Leibowitz, File No. 111-0163
<http://www.ftc.gov/os/2013/01/130103googleletterchairmanleibowitz.pdf>

³² Commitments Letter From Google Inc to Chairman Leibowitz
<http://ftc.gov/os/2013/01/130103googleletterchairmanleibowitz.pdf>

³³ Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc. FTC File Number: 111-0163. January 3, 2013.
<http://ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf>

³⁴ Google Press Conference, Opening Remarks Of Federal Trade Commission Chairman Jon Leibowitz As Prepared for Delivery January 3, 2013.
<http://ftc.gov/speeches/leibowitz/130103googleleibowitzremarks.pdf>

³⁵ The Wall Street Journal: Feds to Lunch Probe of Google. June 24, 2011 – Europe Edition
<http://online.wsj.com/article/SB10001424052702303339904576403603764717680.html>

dominant position in on-line search. Decision based on the violation of European Union competition rules, Article 102 TFEU³⁶, which prohibits the abuse of dominant position within the internal market by an undertaking in so far it may affect trade between Member States. The opening of formal proceedings followed complaints by search service providers about unfavorable treatment of their services in Google's unpaid and sponsored search results with an alleged preferential placement of Google's own services.³⁷

Complaints were made by a price comparison site from the United Kingdom, Foundem, by a French legal search engine ejustice.fr, and by a German shopping site Ciao!, owned by Microsoft. These vertical search engines, thus direct competitors to Google, claimed that their sites were demoted in Google's search results, and that Google had the ability to arbitrarily penalize rivals and systematically favor its own services. Foundem said in its filing of complaint that Google's Universal Search was a "mechanism for automatically inserting its own services into prominent positions within its natural search results and poses an immediate threat to healthy competition and innovation".³⁸ However, before entering in details of the Commission's investigations and competition concerns, I would describe the procedural background of the enforcement focusing on a relatively new instrument of the European Commission for antitrust scrutiny of companies' behavior and, how the flexibility of its use may help to ensure the application of the relevant European competition rules within the internal market.

1. The European Commission, the main body in charge of ensuring the application of European competition rules

1.1. Enforcement of European competition principles

According to Article 105 TFEU, the European Commission shall ensure the application of the principles laid down in Article 101³⁹ and 102. On application by a Member State

³⁶ Art. 102 of the Treaty of the Functioning of the European Union: (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

³⁷ European Commission Press Release, "Antitrust: Commission probes allegations of antitrust violations by Google" IP/10/1624, 30. 11. 2010

http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en

³⁸ BBC News: Google Faces European Competition Inquiry, 24, February, 2010.

<http://news.bbc.co.uk/2/hi/8533551.stm>

³⁹ Art. 101 of the Treaty of the Functioning of the European Union: (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

The Article 103 of the Treaty then empowers the Council, on a proposal from the Commission and after consulting the European Parliament, to set out the appropriate regulations or directives to give effect to the competition principles of the European Union.⁴⁰

1.2. Secondary legislation on enforcement

The first generation of the secondary legislation on the enforcement ensured a strong role for the Commission. Regulation 17/62/EEC, which is no longer in force, established a “quasi-monopoly” for the Commission regarding the enforcement of European competition principles.

The Regulation 1/2003/EC⁴¹, second generation of secondary legislation, however, introduced important changes in the field of the implementation of the rules on competition and established the “European Competition Network”, by laying down the basis of a close cooperation between the Commission and the national competition authorities and national courts. As the Commission Notice on the cooperation within the network of competition authorities states: “The Network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in case where Article 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe.”⁴²

Therefore, an initiation of a proceeding by the Commission for the adoption of a decision relieves the competition authorities of the Member States of their authority to apply the competition rules laid down in the relevant articles of the Treaty.⁴³

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

⁴⁰ Article 103 of the Treaty of the Functioning of the European Union

⁴¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty (in force since 1 May 2004)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:en:PDF>

⁴² Commission Notice on cooperation within the Network of competition authorities. Eur-lex. ID celex 52004xc0427(02)

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(02):EN:NOT)

⁴³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, Article 11 (6)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:en:PDF>

The Council Regulation (EC) No 1/2003 of 16 December 2002 introduced also a more important element as regard the theme of this study: a new form of resolving competition infringement cases, the possibility of undertakings to offer commitments to meet Commission's competition concerns.⁴⁴

1.3. Decision making commitments

The Commission may decide to investigate possible breaches based on its own initiative, as a consequence of a complaint or based on information provided by possible infringers.

At a certain point of a considerable investigative work, the Commission may inform the undertaking concerned in writing of the objections raised against them by sending a Statement of Objections.⁴⁵ This declaration represents a formal step in Commission's antitrust investigation, and often results as a significant alteration to business practices of a dominant company. Therefore, this is an instrument which is efficient in proceedings where the imposition of decision stating that there is an infringement is necessary⁴⁶, or imposition of financial penalties would be appropriate.⁴⁷

Unsurprisingly, applying the option provided by Article 9 of the EU Antitrust Regulation, undertakings try to avoid the point where a SO would be issued in an investigation, but even when a SO is already issued, the companies have the possibility to negotiate a settlement by offering commitments to remedy Commission's concerns.

Article 9 specifies, where the Commission intends to adopt a decision requiring that an infringement be brought to an end, undertaking concerned may offer, voluntarily, commitments to meet the concerns expressed to it by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertaking. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.⁴⁸

i.) The aim

The aim of the introduction of commitment decisions was to make enforceable commitments made in an informal way by the undertakings, as even before the Antitrust Regulation entered in force, the Commission often closed proceedings on suspected infringements through these informal agreements made with undertakings concerned⁴⁹, without, however, disposing with legal basis to ensure their enforcement.

ii.) No decision on infringement

Beside this, with a formal commitment decision the undertakings could be assured that, in case commitments meet the Commission's concerns, the Commission would not take further measures: "Commitment decisions should find that there are no longer grounds

⁴⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, Article 9.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:en:PDF>

⁴⁵ 773/2004 EC

⁴⁶ Article 7 1/2003

⁴⁷ Point 13 of the Preamble of the Regulation determines also the scope of the application of the decision making commitments to cases when a fine would not be appropriate (this therefore exclude commitments in hardcore cartel cases.)

Commission Memo 04/217

http://europa.eu/rapid/press-release_MEMO-04-217_en.htm?locale=en

⁴⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, Article 9.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:en:PDF>

⁴⁹ Commission Memo 04/217

http://europa.eu/rapid/press-release_MEMO-04-217_en.htm?locale=en

for action by the Commission without concluding whether or not there has been or still is an infringement.”⁵⁰ This point can be an important element to the undertaking under investigation, as this formal settlement leads to avoid consequent negative publicity.⁵¹

iii.) Reassessment

According to the Regulation, however, the Commission may, upon request or on its own initiative, reassess the case if any material change takes place in any of the facts, or if undertaking concerned acts contrary to its commitments, or either if decision was based on incomplete, incorrect or misleading information.⁵² It is also possible for the undertaking to ask the Commission to lift a commitment that is no longer appropriate.

iv.) Follow up

In sum, the company to whom the decision is addressed must respect the conditions of the settlement. Otherwise, the Commission can impose a fine on it amounting up to 10% of their turnover, and also periodic penalty payments are possible until it complies with the commitments.⁵³

v.) Legal force

There are, moreover, two other points which are to be mentioned and expressed by the Commission as important effects of a commitment decision: The first is that in spite of the Commission’s decision, according to the shared competence laid down in the Council Regulation, national competition authorities and national courts can still enforce commitments by any means provided for by the national law and can state that there is an infringement. Secondly, as a commitment decision is silent on regarding the breach of EU competition rules, a customer or a competitor seeking private enforcement in national courts still needs to prove the illegality of the former behavior to obtain compensation for damages.⁵⁴

2. Back to Google’s antitrust scrutiny

2.1. The opening of proceedings

In the formal opening of antitrust investigation the Commission drawn up the following:

i.) Whether Google has abused a dominant market position in online search by allegedly lowering the ranking of unpaid search results of competing services which are specialized in providing users with specific online content and by according preferential placement to the results of its own vertical search services in order to shut out competing services.

ii.) Whether Google lowered the “Quality Score” for sponsored links of competing vertical search services. The Quality Score is one of the factors that determine the price paid to Google by advertisers. If two advertisers are using the same key words, the site

⁵⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, Preamble (13)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:en:PDF>

⁵¹ Commission Memo 04/217

http://europa.eu/rapid/press-release_MEMO-04-217_en.htm?locale=en

⁵² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, Article 9.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:en:PDF>

⁵³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, Article 24(1)(c).

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:en:PDF>

⁵⁴ Commission Memo 04/217

http://europa.eu/rapid/press-release_MEMO-04-217_en.htm?locale=en

which has a lower Quality Score will have to offer a higher price to rank at the same place.

iii.) Whether Google imposes exclusivity obligations on advertising partners, preventing them from placing certain types of competing ads⁵⁵ on their web sites, as well as on computer and software vendors, with the aim of shutting out competing search tools.

iv.) Finally, whether Google imposes restrictions⁵⁶ on the portability of online advertising data to competing online advertising platforms.⁵⁶

The Commission also added, this initiation did not imply that the Commission had proof of any infringements. It only signified that the Commission would conduct an in-depth investigation of the case as a matter of priority.⁵⁷

2.2. Additional complaints

This opening was followed by numerous complaints. A number of them were transferred to the Commission by the German competition authorities where three further companies filed for proceeding mainly focused on the preferential treatment of Google's own services.

This followed Microsoft's important formal complaint concerning⁵⁸:

i.) Google's technical measures that are preventing Bing, Microsoft's search engine from indexing content on YouTube – which is owned by Google.

ii.) Google's other measures that enable its own Android phones to access YouTube so that users can search for video categories, find favorites, see ratings, and so forth in the rich user interface offered by these phones. The same thing was done for the iPhones offered by Apple, which doesn't offer a competing search service.

Google refused to allow Microsoft's new Windows Phones to access this YouTube metadata in the same way that Android phones and iPhones do. As a result, Microsoft's YouTube application on Windows Phone is basically just a browser displaying YouTube's mobile website, without the rich functionality offered on competing phones. Microsoft claimed that it needed a permission to access YouTube in the way that other phones already do, as Microsoft was ready to release a high quality YouTube app for Windows Phones. Google, however, refused to provide this permission.

iii.) Google's effort to control the access to the large volume of so-called "orphan books" through its Google Books search engine. Orphan books are books for which no copyright holder can readily be found. Microsoft referred to a federal court decision in New York rejecting Google's plan under which only Google's search engine would be able to return search results from these books. According to the federal court's decision "Google's ability to deny competitors the ability to search orphan books would rather entrench Google's market power in the online search market,"

Microsoft stressed the importance of this initial step under U.S. law and added that it needed to be reinforced by similar positions in Europe and the rest of the world.

iv.) Google's restrictions on advertisers, its consumers, which limit them to move their own advertising data to competing advertising platform.

⁵⁵ "Ads" are online advertisements.

⁵⁶ An online advertising platform is a virtual marketplace that brings together advertisers and publishers offering advertising space on the internet.

⁵⁷ European Commission Press Release, "Antitrust: Commission probes allegations of antitrust violations by Google" IP/10/1624, 30. 11. 2010

http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en

⁵⁸ Microsoft's allegations in relation to Commission's investigation can be found at:

http://blogs.technet.com/b/microsoft_on_the_issues/archive/2011/03/30/adding-our-voice-to-concerns-about-search-in-europe.aspx

In its complaint, Microsoft explained well the significance of such behavior: Advertisers input a large amount of data into Google's ad servers in the course of managing their advertising campaigns. It belongs to the advertisers it reflects their decision on their own business, but Google contractually prohibits them from using their data "in an interoperable" way with other search advertising platform.

Basically, as Microsoft explains, the problem with these restrictions is that this makes too expensive for advertisers to port their data to competing platforms, and advertisers thus simply won't do it. "Competing search engines are left with less relevant ads, and less revenue. And while this restraint isn't visible to consumers, its effects are nonetheless felt across the Web." Advertising revenue is indispensable for search investments and "by reducing competitors' ability to attract advertising revenue, this restriction strikes at the heart of a competitive market."

v.) Google's exclusivity terms which block leading websites in Europe from distributing competing search boxes. "It is obviously difficult for competing search engines to gain users when nearly every search box is powered by Google." An example concerning Microsoft is the way Google, through its exclusivity terms imposed on European telecommunication companies, blocked Microsoft from distributing its Windows Live services, such as email and online document storage, because these services are monetized through Bing search boxes.

In addition, Microsoft shared concerns expressed by many others that Google apply dissimilar conditions to potential competitors by making it more costly for them to attain prominent placement for their advertisement.

Finally, the well-known Expedia and TripAdvisor joined the complainants claiming that Google's preferential treatment of its own services places competing travel websites in a competitive disadvantage and forecloses competition in the online travel market.

2.3. Commission' preliminary statement⁵⁹

The Commission conducted a comprehensive investigation into allegations described above and, on the 21 May 2012, and announced that the Commission reached its preliminary conclusions.

According to Commission's preliminary view, Google is dominant in the European Economic Area (EEA) in both in web search and search advertising. All specialized search services of Google were covered by the investigation, as long as they are subject to a specific treatment in Google's web search results, including not only existing specialized search services but also potentially new specialized search services which Google would roll out in the future.⁶⁰

The Commission identified four main areas in relation to the alleged anti-competitive practices where Google would abuse of its dominance.

i.) Preferential treatment of its own services

The first concern was in relation to the *manipulation of search results* and whether Google favors its own vertical services differently than it does for its rivals' link. In its general search results Google displays links to its own vertical search services differently than it does for links to competitors.

⁵⁹ Speech/12/372 Joaquin Almunia Vice President of the European Commission, responsible of competition policy. Statement of VP Almunia on the Google Antitrust Investigation, Brussels, 21 May, 2012.

http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm

⁶⁰ European Commission Press Release IP 13/371 Antitrust: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns 25/04/2013 http://europa.eu/rapid/press-release_IP-13-371_en.htm

The Commission was concerned that it might result in preferential treatment compare to those of competing services, *without informing users of its favorable treatment*.

Due to this preferential treatment consumers are more likely to not make of use of potentially more relevant competing services, and are thus foreclosed from choosing.

“Since Google is an important source of traffic for vertical search services. This conduct may result in reduction competitive incentive to innovate in specialized search.”⁶¹

ii.) Content usage without authorization

The second concern was in relation to the way Google *copies content from third party websites without authorization*, mainly competing vertical services, using this content in its own offerings. The Commission’s position is that by copying competitors’ content, Google weakens rivals’ profit and thus reduces their incentives to invest in creating original content to the detriment of consumers.

iii.) Exclusivity agreements with publishers

The third concern was in relation to the exclusivity deals between *Google’s partners are constrained to obtain all or most of their advertisement from Google*, thereby foreclosing competing providers of search advertising intermediation services and the choice of online search advertisement that competitors can offer to users in their websites are reduced.⁶²

iv.) Constrains on data portability

The fourth concern was *in relation to data portability* and the restrictions that Google placed in relation to the advertising campaigns from its platform AdWords.

In the preliminary statement it was an important point that Joaquim Almunia expressed the willingness of the Commission to settle the case without sending the formal statement of objections.

2.4. Google’s proposed commitments⁶³

Google, unsurprisingly, was not agree with the Commission’s concerns and “expressly denied any wrongdoing or any liability relating to the Commission’s investigation under Article 102 of the Treaty”.

Google, however, for the first time made a proposal on the following commitments in accordance with Article 9 of the Antitrust Regulation accepting legally binding changes to its search results and went much further in comparison to its minor concessions made to the Federal Trade Commission in its inquiry.

i.) As far as the preferential treatment of its own vertical search services are concerned, Google offered as follows:

Commission’s concern in relation to this practice was the lack of transparency towards internet users. In order to provide users with the necessary information, *Google offered a label with its vertical search results* in case, in response to a query, its general search box links to its specialized results. Labels would be accessible to users via clearly

⁶¹ European Commission Press Release IP 13/371 Antitrust: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns 25/04/2013 http://europa.eu/rapid/press-release_IP-13-371_en.htm

⁶² In recent years, Google has enjoyed a very strong position on the European market for the provision of search advertising to publisher web sites ("search advertising intermediation"). In view of this strong position, the concern is that customers would have less choice and that Google's competitors would face reduced incentives to innovate since Google's conduct limits their access to customers.

European Commission Press Release IP 13/371 Antitrust: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns 25/04/2013 http://europa.eu/rapid/press-release_IP-13-371_en.htm

⁶³ Commitments in Case COMP/C-3/39.740 – Foundem and others

http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_8608_5.pdf

visible icon and would inform them that the links to Google's own vertical search services have been added by Google to provide access to them, so that users do not confuse links to Google's own vertical services with links to other horizontal web search results. Also, where applicable, the label would inform users of where, in its horizontal web search results, they can find links to other vertical web search services.

Google also offered to *distinguish its own vertical search services from other horizontal web search results* to make users be aware of the difference of their nature.

Finally, for specialized search results that Google monetizes, Google would display on the general search results *three relevant competing search services selected on the basis of mechanisms aimed of ensuring their relevance to the search query*. These remedy links would lead, where possible, to the results page of third party vertical search site for the same query that the user entered on Google.

Google's position was that these measures would provide users with additional means to exercise an informed choice. Users, therefore, are made aware of the nature of the links in question and are enable to access third party vertical search results for their queries that enter on Google.

ii.) Equally, as the commitment offered by Google to the American authorities in relation to its conduct of content appropriation, *Google would offer third party websites a web-based opt-out from the use of all content* crawled from their site in Google's vertical search services, without unduly affecting the ranking of those websites in Google general web search results. Also, newspaper publisher established within the EEA will be enabled to control the display of their content, on a web page by web page basis, on Google News.

iii.) Concerning Google's partner websites on which Google delivers search advertisements, Google commits to *no longer* include in its contracts agreed with publishers any provisions or impose any unwritten obligation that would, de jure or de facto, oblige publishers to source their requirements for search Ads from Google in a way that gives rise to *exclusivity* with respect to Ads.

iv.) As regards the fourth business practice, Google also committed to *no longer* impose obligations that would prevent advertisers from porting and managing search advertising campaigns across competing advertising services.

The duration of the commitments will be five years and three months from the date on which Google receives formal notification of the Commission's decision pursuant Article 9 of the Antitrust Regulation.

Google will also appoint one or more natural or legal person(s), the "Monitoring Trustee" an independent organ to monitor Google's compliance with the duties and obligations set out in the commitments.

These commitments would cover the European Economic Area.

2.5. Commitments subject to market testing

It was subject to assessment whether Google's proposed commitments offered constructive and effective solution for Commission concerns and the Commission invited interested parties to submit comments on the proposal.⁶⁴

⁶⁴ According to Article 27(4) of the Antitrust Regulation where the Commission intends to adopt a decision pursuant Article 9 of the Regulation, it shall publish a concise summary of the case and the main content of the commitments so that interested parties may submit their observations within a time limit. The Commission asked feedback on Google's proposal on its Communication published on 26/04/2013. [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013XC0426\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013XC0426(02):EN:NOT)

However, the commitments failed in the market testing phase of the inquiry where Google's competitors expressed their concerns which then led to the *rejection of the proposal* by the Commission and Google was asked to improve its offer.⁶⁵

The main objection focused on Google's most important proposition to label its own services and show links to competitors which, according to rivals, would continue to attract users to Google's own product by using prime placement and rich graphics.

3. The latest round of negotiation

Google's second try was again unsatisfactory and rejected but the European Commission still preferred to reach a legally binding commitment decision to conclude the competition case on Google's internet search and advertising business.⁶⁶

Regarding the Commission's concern on the favorable treatment of Google's own services on its page, three issues were of critical importance to the Commission in the latest discussion with Google: First, given this importance of the choice of visual formats in attracting user clicks, it is essential that the presentation of rival links is comparable to that of the Google services. Secondly, given the speed with which Google develops its services, that comparability of presentation of rival links has to be ensured dynamically over time. This means that if Google improves the presentation of its services, so much the presentation of rival links. Finally, in a fast moving market, any commitments must retain their relevance throughout their lifetime. This means that any new vertical search services developed by Google must also be subject to the commitments.⁶⁷

In its proposal Google accepted to guarantee to display the services of three rivals, selected through an objective method, in a manner that it is clearly visible to users and comparable to the way in which Google displays its own services. Links to the three rivals would be shown next to the three Google specialized results with pictures of the same size and quality as Google's own. Rivals would have the full control of how their links look and where they take the server.

On mobile, one rival link would be displayed directly with a picture. There would be a number of additional Google and rival results if the user chooses to scroll across the screen. It was a significant improvement compared to Google's previous proposal where rivals were only accessible after going through an intermediary screen and where even at that point they would not have the possibility to display a picture. Regarding local search the three rival links, which have a logo and descriptive text, would be prominently displayed on top of the Google's specialized results. On tablets as well, high degree of prominence would be ensured for rival links.⁶⁸

The objective mechanism to the selection of rivals would consist of choosing them based on their ranking in natural search, and they would not be charged to participate in the rival links where Google does not charge for inclusion in its specialized search

⁶⁵ http://www.nytimes.com/2013/07/18/technology/europe-wants-more-concessions-from-google.html?pagewanted=all&_r=2&

⁶⁶ http://www.nytimes.com/2013/09/10/technology/google-makes-new-offer-in-european-antitrust-case.html?_r=0

⁶⁷ Speech 14/93 Joaquin Almunia Vice President of the European Commission responsible for Competition Policy, Statement on the Google investigation, European Commission Press Release, Brussel, 5 February 2014

http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm

⁶⁸ Speech 14/93 Joaquin Almunia Vice President of the European Commission responsible for Competition Policy, Statement on the Google investigation, European Commission Press Release, Brussel, 5 February 2014

http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm

service, such as in local search. Where Google charges merchants for inclusion in its specialized service, such as shopping, the three rivals would be chosen on the basis of a dedicated and transparent auction mechanism.⁶⁹

Regarding the Commission other concerns, Google's concessions had already been considered significant.⁷⁰

4. Statement of Objection relating to Google on comparison shopping service

After the unsuccessful efforts to reach a conclusion by a negotiated settlement, in 2015 Margrethe Vestager, Joaquín Almunia's successor as European Commissioner for competition adopted a rather different approach to Google's antitrust case: Today, the Commission, *narrowing the scope of the case to Google shopping service*, aims to set broad principles which would be applied to other products and practices.⁷¹

In April 2015 the Commission sent a Statement of Objection (SO), outlining the Commission's preliminary view that Google is abusing a dominant position, in breach of EU antitrust rules, *by systematically favoring its own comparison shopping product* in its general search page in the European Economic Area (EEA). The Commission is concerned that users do not necessarily see the most relevant results in response to queries – to the detriment of consumers and rival comparison shopping services, as well as stifling innovation.⁷²

The preliminary conclusion in the SO states that general online search service market and comparison shopping service markets are two different markets, and while concerning general search in European countries Google is dominant, in comparison shopping service it faces competition from a number of providers. Comparison shopping services allow consumer to search for products on online shopping websites and compare prices between different sellers. Google's comparison shopping service has been provided since 2002 by "Froogle", which was replaced by "Google Product Search", which in turn was replaced by "Google Shopping".

According to the preliminary conclusion:

i.) Google *systematically positions and prominently displays its own comparison shopping service* in its general search result pages, irrespective of its merits.

ii.) Google *does not apply the system of penalties to its own service*, which is applied to other comparison shopping services, which can lead to lower competitors' rank in Google's general search result pages.

⁶⁹ Speech 14/93 Joaquín Almunia Vice President of the European Commission responsible for Competition Policy, Statement on the Google investigation, European Commission Press Release, Brussel, 5 February 2014

http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm

⁷⁰ Press Release IP/14/116: Antitrust: Commission obtains from Google comparable display of specialized search rivals. Brussel, 5 February 2014

http://europa.eu/rapid/press-release_IP-14-116_en.htm

⁷¹ CDR, Commercial Dispute Resolution News, Shana Ting Lipton: A Year in the life: The new European competition regime finds its feet, 21, October 2015

<http://www.cdr-news.com/categories/competition-and-business-crime/featured/5913-a-year-in-the-life-the-new-european-competition-regime-finds-its-feet>

⁷² Press Release Memo/15/4781: Antitrust: Commission sends Statement of Objections to Google on comparison shopping services, Brussel, 15 April 2015

http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm

iii.)Froogle, Google’s first comparison shopping service was not treated more favorably and performed poorly.

iv.)As a result of favoring systematically its comparison shopping service - Google Shopping and its predecessor Google Product Search - the company experienced *higher rates of growth to the detriment of competitors’ services*.

v.)Finally, Google’s conduct has *negative impact on consumers and innovation*, as users do not necessarily see the most relevant comparison shopping result. The incentives to innovate from rivals are lowered, as they know that however good their product, they will not benefit from the same prominence as Google’s products.⁷³

The Statement of Objection took therefore the preliminary view that in order to remedy the conduct, Google should treat its own comparison shopping services and those of rivals in the same way so that the most relevant services would be selected in response to users’ query.⁷⁴

Google filed its response on the 27th of August 2015. Documents are confidential, but the company’s general counsel Kent Walker outlined his defense in a blog spot describing the European Commission’s preliminary conclusions as “wrong as matter of fact, law and economics.”⁷⁵ The general counsel’s statement says that Google in its response points out why the company finds the Commission’s allegations incorrect and why it believes that “Google increases choice for European consumers and offers valuable opportunities for businesses of all size”.⁷⁶ Kent Walker claims that instead of harming competitors’ price comparison services, “the universe of shopping services has seen an enormous increase in traffic from Google, diverse new players, new investments, and expanding consumer choice.”⁷⁷ According to Google’s view, the Commission is wrong not to consider the impact of major shopping services like Amazon and eBay when defines Google’s competitors. Google also rejects the Commission’s proposed remedy requiring that Google shows products sourced and ranked by other companies within its advertising space, as it would harm the quality of search results and legally would be justified only where a company has a duty to supply its own competitors, typically concerning companies providing essential services such as gas or electricity.⁷⁸

⁷³ Press Release Memo/15/4781: Antitrust: Commission sends Statement of Objections to Google on comparison shopping services, Brussel, 15 April 2015

http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm

⁷⁴ The Commission’s files and records are considered confidential. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, Article 28.

⁷⁵ Google, Europe blog: Improving quality isn’t anti-competitive, posted by Kent Walker, SVP and general counsel, Google. 27, August 2015

<http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html>

⁷⁶ Google, Europe blog: Improving quality isn’t anti-competitive, posted by Kent Walker, SVP and general counsel, Google. 27, August 2015

<http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html>

⁷⁷ Google, Europe blog: Improving quality isn’t anti-competitive, posted by Kent Walker, SVP and general counsel, Google. 27, August 2015

<http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html>

⁷⁸ Google, Europe blog: Improving quality isn’t anti-competitive, posted by Kent Walker, SVP and general counsel, Google. 27, August 2015

<http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html>

If its defense fails, Google faces a fine amounting up to 10% of its annual turnover and it can lead to significant alteration to its business practices. The Statement of Objection relates to the concern regarding Google's comparison service. In the context of that concern, the Commission continues to actively investigate Google's conduct as regard the alleged more favorable treatment of other specialized search services such as travel price comparison or local directories. The Commission also continues to actively investigate Google's conduct with regard to the other three concerns.⁷⁹

Even when the Statement of Objection is already issued, Google still has the possibility to negotiate a settlement by offering commitments to remedy Commission's concerns. Therefore, at the time of this writing, whether the Commission resolves the Google-case through settlement or provides precedent through a formal finding of infringement, remains to be seen.

V. Conclusion

1. Article 102 TFEU- an overview

Article 102 of the Treaty prohibits the abuse of a dominant position within the internal market. Together with the cartel prohibition (Article 101) and the rule on State Aid (Article 107) embodies the core of EU competition rules.

As we saw, the European Commission, as the European Competition Authority enforces Article 102. Decision by the Commission may be appealed to the General Court and the Court of Justice.

The prohibition on abuse only applies to undertakings with a dominant position. Hence, the assessment of dominance is essential. The first element, a necessary precondition in a finding of dominance is the determination of the relevant market, which in certain circumstances might not be as evident as it appears.

2. Market problems – Competition assessment

As it has already been referred to, web-based markets are characterized by very high market shares held by a very limited number of competitors. When companies have strong position on these markets, they attempt to use this position to foreclose other markets. However, dominance in the internet is difficult to establish. The real question is the effective degree of the contestability of these markets.⁸⁰

Google realizes its business in a two-sided market, with the particularity of having two distinct user groups, where one group on one side of the platform tends to realize more value when there are more users on the other side. Google provides a service that attracts users, who in turn attract the advertisers. As a classical "advertising-supported" media, the number of users determines the value of the market. Google offers charge-free services for users, while earns all its revenues from advertisers, which may help it to refine and develop its search functionalities of its search engine.⁸¹

⁷⁹ Press Release Memo/15/4781: Antitrust: Commission sends Statement of Objections to Google on comparison shopping services, Brussel, 15 April 2015
http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm

⁸⁰ UCL News: Competition will strengthen Europe's digital economy
<http://www.ucl.ac.uk/news/news-articles/1007/10070802>

⁸¹ Szilágyi Pál: A kétoldalú piacok versenyjogi megítélése a médiapiacokra tekintettel [Two-sided media markets], In *Medias Res*, 2012/1

<http://media-tudomany.hu/laparchivum.php?ref=15#footnote-19229-24-backlink>

These markets require particular concern when it comes to market assessment. Prices and profits are linked on the two sides and each side of the platform exerts some constraint on the other. This interdependence between the two sides is the essential point to be assessed. Within this context, even the basic concepts such as the definition of the market or the assessment of market power can be difficult but at least different from the one-sided market analysis.

2.1. Market definition difficulties

The relevant market includes all the products with which the product in question may compete, with which there is a sufficient degree of substitutability.

The test used by competition authorities to define the relevant market is the *Small but Significant and Non-Transitory Increase in Price* or *SSNIP-test*: If price increase leads to a loss due to lower demand, it means that the product has available substitutes which need to be included in the relevant market. If price increase induces revenue, there is a lack of available substitutes. The larger the relevant market is, the less likely dominance will be found on this market.⁸²

In two-sided markets the SSNIP-test can't be applied without modifications: Hypothetical increase in price is not interpretable on the side where users use the platform for free, and the test can be less profitable on side where the value of the product is determined by the number of users.

2.2. Product and geographical market definition

Focusing on Google's case, the Commission has identified relevant product and geographical markets in relation to the case Google/DoubleClick merger⁸³ and perceived online and offline advertising as separate markets stating that online advertising is much more capable of reaching the targeted audience.⁸⁴ (According to the Commission, the market for online advertising could be separated into search and non-search relating advertising, but there was no conclusion on this point.)

Furthermore, the Commission identified a separate market for intermediation in advertising services and other separate market for the provision of ad serving technology – with even more subdivisions between services to advertisers and to publishers.⁸⁵

These relevant markets defined above are related to online advertising. However, it is important to recall that not all of the companies complaining in relation to Google's anticompetitive conduct are operating in this field⁸⁶ and it can be stated that Google is much more than only a platform for online advertising, offering search engine services,

⁸²Szilágyi Pál: A kétoldalú piacok versenyjogi megítélése a médiapiacokra tekintettel [Two-sided media markets], In *Medias Res*, 2012/1

<http://media-tudomany.hu/laparchivum.php?ref=15#footnote-19229-24-backlink>

⁸³No COMP. M.4731. Google/DoubleClick

http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

⁸⁴No COMP. M.4731. Google/DoubleClick

http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

⁸⁵No COMP. M.4731. Google/DoubleClick

http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

⁸⁶E.g.: EJustice, Foundem, Ciao! Are vertical online service providers and thus may be considered as Google's competitors in the market for providing online advertising space, while other complainants are content providers.

software application (Gmail, Google Talk), content exploitation (YouTube) and other services as AdSense.

Therefore, the relevant product markets may rather be defined as the market for online advertising services, the market for internet search results and the market for vertical search results.

As far as the geographical market definition is concerned – as the relevant market is also a geographical dimension -, the Commission’s market investigation confirmed that the market for online and serving technology is at least EEA-wide.⁸⁷

However, at this point perhaps one observation can be made when analyzing separately the relevant markets defined above. The accessibility of the internet is world-wide but users’ preferences are connected to national or linguistic factors. While conditions for competition are similar on the market for internet search, as far as the market for vertical search and online advertising are concerned, these markets seem to be more oriented nationally, as conditions for competition are likely to vary much more.

2.3. Google’s dominance and abuse of this position

When assessing Google’s position, even though it holds a very large market share, competitive restraints may be taken account.

It was already subject to assessment that market contestability, the degree of substitutability and the barriers to entry led the European Commission to consider Google as being dominant in the relevant market.

Having a dominant position, however, is not prohibited under Article 102, but an undertaking in this situation carries a special responsibility “not to allow its conduct to impair genuine undistorted competition in the internet market”⁸⁸.

According to the European Court of Justice (The Court of Justice of the European Union) the abuse is an “objective concept” which relates to the behavior of an undertaking in a dominant position that influences the structure of either a market where the dominance were established or an adjacent market, where the degree of competition is weakened, with the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.⁸⁹

Abuses mentioned in its non-exhaustive list of Article 102, may be distinguished into two main categories: exploitative abuses (such as imposing unfair prices or trading conditions) and exclusionary abuses (such as contractual tying or refusing to deal).

Google’s questioned practices most likely fall in the category of exclusionary abuse. Below, I will consider the alleged anti-competitive practices one-by-one:

i.) Due to Google’s practice to intervene in its search results in order to give its own websites a higher ranking, some online markets are foreclosed to rivals and new entrants.

Although it can be argued whether this is a normal competitive behavior, the ECJ ruled that a dominant undertaking that refuses to supply a competitor in a derivative market

⁸⁷ No COMP. M.4731. Google/DoubleClick

http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

⁸⁸ Case 322/81 “Michelin v. Commission” (1983)

http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61981J0322

⁸⁹ Case 85/76 “Hoffmann-La Roche v. Commission” (1979)

http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61976J0085&lg=en

because it wishes to enter this market itself, abuses its dominance under Article 102 of the Treaty.⁹⁰

As Google is held dominant and it is demonstrated that the alleged practices actually occur, both the downgrading of rival' web pages in unpaid search results and the manipulation of paid search results is deemed abusive.

ii.) The complaint on harming competitors by copying third party content in order to generate advertising revenue without paying any remuneration was made by a German publisher association. German newspapers and magazines claimed for payments for content used in Google's news services and search results.⁹¹ (Google shows hyperlinks to news messages for third parties' websites.)

Content publishers' concerns were related to the fact that Google is earning money by using their content for free, without offering them any share of the advertising revenue.

It is more related to infringement of IPR's that possible abuse of dominance. If Google has the right to show the third party content under relevant intellectual property laws, the lack of payment should not be perceived as an abuse of dominance. If, However, the content is in public domain, users are able to view it for free, and thus, as several studies refer to this problem, there wouldn't be any reason to share its revenue with third parties for content that Google has access to for free.

iii.) Anticompetitive contractual restrictions on advertising partners are exclusivity obligations which may generally be considered abusive if Google is an unavoidable trading partner.

Exclusivity has to be assessed in the light of their potential foreclosure effect on competition, and thus the detailed assessment of the terms and condition of exclusivity agreements and the effects on consumer welfare is essential.

iv.) As far as constraints on data portability are concerned, the question is whether denying rivals' access to its content and data, and effecting rival search engines ability to provide the same quality as Google can provide, may be perceived as an abuse of dominance and if so, an intervention as appropriate remedy to grant access in favor of rivals may considerable as granting access to its strategic assets and can even lead to details on its protected algorithm.

VI. Final remarks

In the context of these fast-moving markets where technology and product innovation play the key role, market players' conduct is subject of further and careful assessment. Online platforms are innovators in the digital economy, helping smaller businesses to move online and reach new markets. These platforms generate and control huge amount of data about their customers and use algorithms to turn this into usable information. Depending on the size and the use of their market power, they are able to control access to online markets which may raise important competition concerns.

In the new economy competition would be dynamic: The most successful market player innovator shall dominate the whole market. This dominant position is nevertheless fragile, because if another competitor innovates successfully, it may in turn take over the whole market. "There would be monopoly for a while, which would be succeeded by another monopoly, so that competition would be dynamic." This dynamism is the

⁹⁰ Cases 6/73 and 7/73 "ICI and Commercial Solvents v. Commission" (1974) ECR 223
http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61973J0006&lg=en

⁹¹ Pfanner. E.: "An Antitrust Complaint for Google in Germany" The New York Times, 2010/01/18
<http://www.nytimes.com/2010/01/19/technology/19antitrust.html> date accessed: 2013/10/02

key role of economic growth.⁹² There is, however, a real possibility that a firm establishing a temporary dominance had a variety of mechanism by which it could perpetuate that temporary position. “As a result, the overall level of innovation would be suppressed.”⁹³

New economy entails huge network externalities, which may easily led to enormous market dominance, as trough Google’s case it was earlier demonstrated in this paper. However, this dominance is caused by the fact that it is used by many people, not because the dominant technology is the more efficient. “There is a certain irony in the fact that New Economy has in some respect increased competition and the potential for competition, while at the same time these network externalities and the way they have been abused have actually reduced competition.”⁹⁴

This is the central feature of the European Commission’s argument when it proceeds with caution while evaluating the market players’ conduct to apply appropriate measures to ensure the natural competitive process between competitor market players while it is doing its best to serve consumers.

⁹² The importance of competition was pioneered by the Austrian economist Joseph Schumpeter almost a century ago. Joseph E. Stiglitz: Competition and Competitiveness in a New Economy, Discussion Forum 2002

⁹³ This was an argument put forward in different works by the American economist Joseph E. Stiglitz, against the Schumpeterian view on short term monopolies. Joseph E. Stiglitz: Competition and Competitiveness in a New Economy, Discussion Forum 2002

⁹⁴ Joseph E. Stiglitz: Competition and Competitiveness in a New Economy, Discussion Forum 2002