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 Google's Anti-Competitive and Unfair Practices in Digital Leisure Markets
 

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*Anca D Chirita\**

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The purpose of this article is to reflect on the critical use of commitments in the Google case and to analyse and review the matrix of facts that have been highlighted in the academic and practitioner literature. Therefore, the core areas of reflection in this contribution are: relevant markets; barriers to entry; network and lock-in effects; dominance; and, potential anti-competitive, as well as unfair practices as regards commercial advertisements. The analysis of the online search-engine market is complemented by the comparative insights offered by the US class action against Google's Android mobile applications. In the EU, a similar trend is noticeable in the complaining tone of Google's competitors. When this is coupled with the transitional period of the mandate of the newly appointed Commissioner for Competition and the political sensitivity over the potential to misuse search-engine users' personal data to serve commercial purposes, such as boosting its advertising revenues, the giant Google swims in uncertain waters.

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### I. THE MAIN CONTROVERSIAL ISSUES OF THE GOOGLE CASE

One of the most controversially debated investigations,<sup>1</sup> by practitioners, academics, and even politicians,<sup>2</sup> is that of Google: a saga of long negotiated and re-negotiated commitments.<sup>3</sup> This saga has been paved with public criticism for the lack of any

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\* Lecturer in competition law, Durham Law School, England, UK. This paper was presented on 26 September 2014 at the CLaSF Workshop at the IE Law School in Madrid, Spain. I would like to thank the organisers and participants of the wonderful Competition Law Scholars Forum XXIII Workshop 'Competition Law in Leisure Markets' for many insightful suggestions, comments and questions, in particular, Angus McCulloch, Alan Riley, Barry Rodger, Francisco Marcos, Ben van Rompuy, Fernando Diez, Cristina Volpin and Christian Hoceped.

<sup>1</sup> The EC started its investigation against Google almost four years ago, see EC, 'Antitrust: Commission probes allegations of antitrust violations by Google', IP/10/1624, 30 November 2010; Cases COMP/C-3/39740, *Foundem v Google*; COMP/C-3/39775, *Ciao v Google*, and COMP/C-3/39768, *1PlusC v Google Inc. (Google)*.

<sup>2</sup> Apart from the EU Commissioner for Competition, J Almunia, see e.g., the German Minister of Justice, H Maas, 'Das letzte Mittel ist die Entflechtung von Google', *Frankfurter Allgemeine Zeitung*, 27 June 2014, who considered a possible divestiture of Google as a remedy of last resort; cf. that a lack of internet regulation does not allow competition authorities to divest Google, see, very recently the President of the German competition authority, A Mundt, 'Kartellamt lehnt Zerschlagung von Google ab', *WallStreet: online*, 8 October 2014; for an economist's similar view, see e.g. J Haucap, 'Eine Zerschlagung von Google würde wenig bringen', *Frankfurter Allgemeine Zeitung*, 26 April 2014; for the political opinion that divesting Google is impossible because Google is established elsewhere in the US, see e.g. the German Minister for Internal Affairs, Thomas de Maizière, who is in sharp contrast to the socialist Ministry of Economics, Sigmar Gabriel, *The Wall Street Journal Deutschland*, 'Gabriels großer Google-Bluff', 16 May 2014; Reuters, 'German vice chancellor urges stricter rules for Google and peers', Berlin 14 October 2014, Fortunately, UK ministers do not seem to care about Google's fate. Otherwise, DG COMP would soon start pooling political opinions.

<sup>3</sup> Generally on commitments procedure, see e.g. EC, 'To Commit or not to Commit?' 3 *Comp Policy brief* (2014); on the EC's wide margin of discretion after *Abrosa*, see e.g. M Messina and JC Alexandre Ho, 'Re-

antitrust fine being imposed on Google, for its allegedly anti-competitive business conduct, with academic criticism for a continued lack of new 'precedents' under Article 102 TFEU, and with an uncertain political climate inspired by the announcement of the transition to another mandate of the new Commissioner for Competition.<sup>4</sup> What, then, will happen to Google? Recent political statements, such as that by Commissioner Almunia, have suggested that Google could even end up involved in a case bigger than that of *Microsoft*.<sup>5</sup>

Arguments for and against intervention have already divided the academic arena with robust and pertinent argumentation on both sides.<sup>6</sup> The previous approach by the US Federal Trade Commission (FTC)<sup>7</sup> demonstrates that choosing not to pursue a case against Google<sup>8</sup> is equally litigious, as consumer associations reacted with a class action introduced before the US District Court of California.<sup>9</sup> This is a very welcome development, and one that is inspiring a comparative precedent for the European Commission (EC). In contrast, the EC's decision to agree on negotiated commitments,<sup>10</sup> instead of fining Google, is by no means a better deal. On the one

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establishing the Orthodoxy of Commitment Decisions under Article 9 of Regulation 1/2003: Comment on *Commission v Alrosa*' 36 *Eur L Rev* (2011), 747; F Wagner-von Papp, 'Best and Even Better Practices in Commitment Procedures after *Alrosa*: The Dangers of Abandoning the 'Struggle for Competition Law'', 49 *Common Market L Rev* (2012), 941; on the 'policitization' of commitments, see e.g., N Dunne, 'Commitment Decisions in EU Competition Law' 10 *J of Comp L & Ec* 2 (2014), 440.

- <sup>4</sup> See the incoming Commissioner, Margrethe Vestager, on the use of settlements that 'enable cases to be closed rather than to be dragged over years and years', in Reuters, FY Chee and A Macdonald, 'New EU antitrust head not swayed by anti-Americanism bullies', 23 September 2014. See also Euractiv, 'Vestager dodges questions on Google probe, Irish tax loophole', 3 October 2014.
- <sup>5</sup> Reuters, 'EU's Almunia says may probe Google's non-search services', 23 September 2014.
- <sup>6</sup> See as dismissive of Google's alleged biased search results, in particular, RH Bork and JG Sidak, 'What Does the Chicago School Teach about Internet Search and the Antitrust Treatment of Google?' 8 *J of Comp L & Ec* 663 (2012); GA Manne and JD Wright, 'Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google' *Harvard J of L & Public Policy* 34 (2011) 1; in favour of intervention, see e.g. I Lianos and E Motchenkova, 'Market Dominance and Search Quality in the Search Engine Market' *J of Comp L & Ec* (2013); MA Carrier, 'Google and Antitrust: Five Approaches to an Evolving Issue' *Harvard J of L & Technology Occasional Paper Series*, July 2013; MR Patterson, 'Google and Search-Engine Market Power' *Harvard J of L & Technology Occasional Paper Series*, July 2013; R Burguet, R Caminal and M Ellman, 'In Google We Trust?' *Barcelona GSE Working Paper Series* no 717 (2013); N Zingales, 'Product Market Definition in Online Search and Advertising' 9 *Comp L Rev* 1 (2013).
- <sup>7</sup> The FTC acknowledged that alterations by Google of its algorithm deprived competing advertisement sites of traffic; see e.g., AA Foer and S Vaheesan, 'Google: the unique case of monopolistic search engine', 24 June 2013, available at <http://www.blog.oup.com/2013/06/google-monopoly-search/>.
- <sup>8</sup> Two commentators attributed non-intervention to the influential views of Bork and Sidak, 'What Does the Chicago School Teach about Internet Search and the Antitrust Treatment of Google?' 8 *J of Comp L & Ec* (2012) 663, see e.g. F Pasquale and S Vaidhyanathan, 'Borking Antitrust: Google Secures Its Monopoly Dissent', *Dissent*, 4 January 2013, available on <http://www.dissentmagazine.org/blog/borking-antitrust-google-secures-its-monopoly>.
- <sup>9</sup> US Class Action Complaint 010437-11 683086 VI, para 74. Previously, the District Court of California ruled that there is no separate online market for search queries; see District Court of the Northern District of California, *Kinderstart.com, LLC v Googl Inc.*, C 06-2057 JF, 2007 WL 831806, 16 March 2007.
- <sup>10</sup> EC, 'Antitrust: Commission obtains from Google comparable display of specialised search rivals', MEMO/14/87, 5 February 2014; EC, Commitments in Case COMP/C-3/39740, 3 April 2013; A Lamadrid de Pablo, 'EU Google Commitments', *J of Eur Comp L & Practice* (2013); A Leyden and M Dolmans, 'The Google Commitments: Now with a Cherry on Top' *J of Eur Comp L & Practice* (2014).

hand, this sends across the Atlantic a positive signal of convergence with the FTC's philosophy of not protecting competitors<sup>11</sup> under the Sherman Act, which twists the EC's approach to one of protecting competition irrespective of what competitors or intermediary consumers say about their rivals. However, this is a critical use of commitment decisions that were intended to be used only as an exceptional remedy.<sup>12</sup>

The previous EU Commissioner for Competition acknowledged at his hearing before the European Parliament that 'antitrust enforcement is about consumer welfare, innovation and choice, not about protecting competitors'.<sup>13</sup> On the other hand, despite not yet having the privilege of a similar consumers' class action, the lack of any clear reaction on the part of the EC against Google can only upset the legitimate expectations of Google's competitors; including Microsoft, Expedia, Yelp, TripAdvisor,<sup>14</sup> the European Consumer Organisation,<sup>15</sup> European publishers, an association of picture industries and photo libraries, a telecom operator, and an advertising platform.<sup>16</sup> The huge number of competitors with complaints against Google shows that this case is very different from the situation faced by Microsoft.

Recent EU news demonstrates that the Google saga is far from over,<sup>17</sup> with suggestions of possible investigations, *inter alia*, into mobile applications and social networks.<sup>18</sup> There is an emerging trend of expressed dissatisfaction with the outcome reached by competition enforcers. This comes from both intermediary and final users of Google's search engine and additional tied services.

Finally, in recent years, the EC has all too often<sup>19</sup> used commitments in previous cases, such as *Rambus*,<sup>20</sup> *Microsoft*,<sup>21</sup> *IBM*,<sup>22</sup> *Apple E-books*,<sup>23</sup> *Samsung*,<sup>24</sup> and, most notably, in

<sup>11</sup> See e.g. JD Ratliff and DL Rubinfeld, 'Is There a Market for Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability?' *J of Comp L & Ec* (2014), 4, 13.

<sup>12</sup> On the use of commitments as 'unusual and rare', see e.g. J Temple Lang, 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law' in BE Hawwk (ed), *International Antitrust Law and Policy* (Fordham Corporate Law Institute, 2005) 265.

<sup>13</sup> See EC, J Almunia, 'The Google antitrust case: what is at stake?', European Parliament hearing, Brussels, 1 October 2013, Speech/13/768.

<sup>14</sup> Financial Times, 'EU: Yelp, TripAdvisor launch new anti-Google campaign', 30 September 2014.

<sup>15</sup> See a recent complaint by Hot Maps on the EC's monitoring of commitments undertaken by Google, e.g. K Fiveash, 'Google will 'pre-select' an 'independent' competition inspector in EU search case', The Register, 18 June 2014; that the EC receive 'very, very negative' feedback from Microsoft and Expedia, see e.g. A White and F Rotondi, 'Google Concessions Sought by EU to Rescue Antitrust Pact', Bloomberg Businessweek, 8 September 2014; D Meyer, 'Yelp piles into Google EU antitrust case with formal complaint about local search', 9 July 2014, [gigaom.com](http://gigaom.com).

<sup>16</sup> See Reuters, n 5.

<sup>17</sup> See e.g. 'EU: Google rethinks concessions as Commission's case continues', 22 September 2014, *Competition Policy International*.

<sup>18</sup> J Kanter, 'Google's European antitrust woes are far from over' *Economic Times*, 23 June 2014. For a similar approach see e.g. the U.S. Federal Trade Commission, press release, 'Google Agrees to Change its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search', 3 January 2013.

<sup>19</sup> There have been at least eighteen commitment decisions during the last ten years and, more significantly, almost 40% of these commitments fall under the scope of Article 102 TFEU.

<sup>20</sup> EC, decision, *Rambus*, OJ C30/2010; Case COMP/38636, *Rambus*, 9 December 2009, OJ C30/2009.

the energy sector,<sup>25</sup> which has caused alarm bells to ring. One has to question why the decision to commit is better in highly litigious cases of unfair competition against rivals, but not in other cases, such as Google's, where the decline in the quality of the search engine affects all of its users, not only competitors' inability to match the efficacy of this innovative search-engine. In certain instances, negotiated commitments can only restore competition for the future, as is the case, for example, with the commitment to refrain from entering into *de facto* exclusivity agreements.<sup>26</sup> Thus, the above commitment cannot undo the anti-competitive harm already being caused and subsequently, no civil claims can be made on the same grounds. The better alternative remains the imposition of a fine. In particular, there is a persistent perception of preferential ranking of Google's own services vis-à-vis those of its rivals.<sup>27</sup> While a separate display of 'generic' and 'specialised', i.e., advertised, search results will no doubt improve the user experience, the additional requirement of listing three vertical links to rivals' specialised searches partially addresses the competitors' rather than the generic users' concerns. The EC continues its investigation concerning Google's alleged abuse of dominance in relation to Android.

## II. GETTING THE FACTS RIGHT ON GOOGLE'S BUSINESS MODEL

This is probably the most daunting task to be faced; no one knows all the facts, yet everyone seems to have an opinion on Google's fate. Therefore, before getting into the matrix of facts, one has first to understand Google's business model.

### A. A Few Contentious Issues: Relevant Markets, Network Effects, Barriers To Entry And The Lock-In Effect

Initially, Google's founders were not sympathetic to an advertisement-funded, i.e., biased, business model for Google's search engine.<sup>28</sup> As licensing the search engine was not a viable option, the founders had to compromise; it was then that they started placing sponsored 'links'. In the primary relevant market, Google offers its users, that is, both intermediary and final consumers, a free horizontal search engine<sup>29</sup> that provides general information available on its online platform.<sup>30</sup> In the secondary

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<sup>21</sup> See EC, press release, IP/09/1941.

<sup>22</sup> EC, decision, *IBM*, OJ C18/2012; EC, press release, IP/11/1539.

<sup>23</sup> EC, decision, *E-Books*, OJ C 73/2013; Case COMP/39847 – *E-Books (Penguin)*, C 4750 final, 25 July 2013; EC, press release, IP/12/1367.

<sup>24</sup> Case COMP/39939 – *Samsung/Enforcement of UMTS standards essential patents*.

<sup>25</sup> Around nine commitment decisions applicable in the electricity and gas sectors.

<sup>26</sup> See Commitments in Case COMP/C-3/39740 – *Foundem and others*, 3 April 2013.

<sup>27</sup> iComp, Press Publishers' View in Google's Second Set of Commitment Proposals, 2013, available at [www.icomp.org](http://www.icomp.org).

<sup>28</sup> On the history of Google's search engine, see e.g., AD Vanberg, 'From Archie to Google – Search engine providers and emergent challenges in relation to EU competition law' 3 *Eur J of L & Technology* 1 (2013), 3.

<sup>29</sup> For the distinction between horizontal and vertical search engine markets, see e.g., A Langford, 'gMonopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention?' 88 *Indiana LJ*, 1564.

<sup>30</sup> See e.g. DF Spulber, 'The Map of Commerce: Internet Search, Competition, and the Circular Flow of Information' 5 *J of Comp L & Ec* 4 (2009), 635; generally on search engines, see e.g., A Milstein, 'Search

relevant market, Google charges online traders for displaying ‘AdWords’ in its vertical search engine, which ranks differently price comparisons for shopping or travelling.<sup>31</sup> Google’s business model is simple: a commercial tie-in agreement serving the marketing purposes of online traders subsidises the internet experience of its users surfing through its engine for online content. Thus, not all content is organically generated by Google’s engine. Similar to unwanted and very annoying TV or newspaper advertising, a multitude of keywords, which are relevant to both horizontal searches and vertical advertisements, are inserted into Google’s engine and then displayed to the user for free, while an intermediate beneficiary of the keywords ‘Ad’ pays Google revenues each time a user clicks on it. In this way, Google can offer horizontal searches sponsored by its advertising revenues. This ‘magic’ circle is Google-centric: the more content is indexed in the search engine, the more users it attracts, so the likelihood of clicking on commercial ads increases and, consequently, Google’s revenues increase, too. One has to overcome the bone of contention on the dual purpose of high-technology markets such as Google’s.<sup>32</sup> They are economically two-sided markets<sup>33</sup> that generate mutual benefits. For example, the search engine ‘network’ produces direct benefits to its users as more users discover online content via horizontal searches and indirect benefits through the advertising rents charged by Google to intermediate users of its vertically integrated online market place,<sup>34</sup> where bidders meet auctioneers of commercial Ads. A word of caution is needed on the potentially knock-out effect that vertical commercial ads can have when interfering with generated horizontal search results: final users, such as TV viewers, generally dislike advertising. Therefore, the more Ads that are shown, the more likely it is that users will eventually switch to alternative search engines that offer less or no advertising. Nonetheless, maintaining a non-irritating degree of

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Engine Bias as Rechtsproblem’ 11 *Computer und Recht* (2013); J Kühling and N Gauß, ‘Suchmaschinen-eine Gefahr für den Informationszugang und die Informationsvielfalt’ 51 *Zeitschrift für Urheber und Medienrecht* 12 (2007); T Höppner, ‘Das Verhältnis von Suchmaschinen zu Inhalteanbietern an der Schnittstelle von Urheber- und Kartellrecht’ 6 *Wettbewerb in Recht und Praxis* (2012); J Haucap and C Kehder, ‘Suchmaschinen zwischen Wettbewerb und Monopol: Der Fall Google’, 44 *DICE Ordnungspolitische Perspektiven* (2013).

<sup>31</sup> For the contrary opinion that general and specialised searches are two separate markets, see e.g., Bork and Sidak, n 6.

<sup>32</sup> Although implausible, the contrary opinion goes on to contradict that Google is a two-sided market as operating the two transactions is a ‘business strategy, not a structural feature of the market’; see e.g. G Luchetta, ‘Is Google Platform a Two-Sided Market?’ *J of Comp L & Ec* (2013), 9. In contrast, Patterson argued that as price, quality, and output are inter-related, one cannot consider Google’s search and advertisement markets in isolation; see e.g. Patterson, n 6, 16. On the economics of the two-sided search engine market model, see e.g. Lianos and Motchenkova, n 6, 27.

<sup>33</sup> See e.g. E Engelhardt, A Freytag and V Köllman, ‘Competition policy and vertical integration in internet-based two-sided markets: the Google case’ *MPRA Paper no 43326 Munich* (2012); N Zingales, cited above; F Thépot, ‘Market Power in Online Search and Social Networking: A Matter of Two-Sided Markets’ 36 *World Comp L & Ec Rev* 2 (2013), 195; M Gal, ‘Antitrust in High-Technology Industries: A Symposium Introduction’ 8 *J of Comp L & Economics* 3 (2012); M Armstrong, ‘Competition in Two-Sided Markets’, 37 *RAND J of Ec* 3 (2006), 668; L Filistrucchi, D Geradin and E van Damme, ‘Identifying Two-Sided Markets’ 36 *World Comp L & Ec Rev* (2013), 33; M Armstrong and J Wright, ‘Two-Sided markets, Competitive Bottlenecks and Exclusive Contracts’ 32 *Economic Theory* 2 (2007) 353; on the lack of empirical analysis, see e.g. A Goldfarb and C Tucker, ‘Substitution Between Offline and Online Advertising Markets’ 7 *J of Comp L & Ec* (2011), 37.

<sup>34</sup> For insightful suggestions on ‘search’ and ‘display’ advertising, see Burguet et al, n 6.

commercial advertising cannot work against Google. This raises one particular concern since even if switching costs are zero or very low,<sup>35</sup> switching or ‘multi-homing’<sup>36</sup> is less likely to occur<sup>37</sup> and, therefore, Google’s strategic business model locks-in all existing users, without the latter’s discovery of another rival search engine. Competition is ‘a process of discovery’ but, similar to being in a locked-in job, users often do not venture to discover new avenues. Therefore, the evaluation that Google competes on the basis of the merits of its search engine alone is wrong given the extent to which its users do not use any alternative engines. Furthermore, the efficacy of its horizontal engine could be attributed to its internal algorithmic metrics, which insert as many commercial ads as is subjectively and psychologically acceptable for TV viewers not to switch to another channel.<sup>38</sup> In fact, Google’s algorithmic metric adjusts the ads and costs to the advertisers based on the relevance of the link to the search query and the quality of the web pages.<sup>39</sup> In other words, advertisers pay Google if users click on the ads, which could turn into another profitable business if Google were to employ people to click on such ads. Leaving aside the maverick that follows from an internal manipulation by Google of its listings of ads based on auctioneered ranking, behavioural economics<sup>40</sup> could offer some further explanation of the decline of quality<sup>41</sup> due to the insertion of more ads. Another assumption is that a better search quality actually decreases the likelihood that users will click on sponsored ads.<sup>42</sup> Therefore, from this perspective, Google would be better off not improving the quality of its organic searches.

These telling facts should never encourage an optimistic expectation that the quasi-monopolist should first do something wrong to lose clientele, in other words, sink its own boat,<sup>43</sup> before competition authorities do something to prevent the anti-competitive lock-in effects on Google’s users and its rivals being kept out of the market. Unfortunately, this is not all. Google offers Google Places for hotels,

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<sup>35</sup> See e.g. Bork and Sidak, n 6; and, R Pollock, ‘Is Google the Next Microsoft? Competition, Welfare and Regulation in Internet Search’ *Cambridge Working Paper* (2009), 26.

<sup>36</sup> For the contrary opinion, see e.g. DA Crane, ‘Search Neutrality and Referral Dominance’ *J of Comp L & Ec* (2012), 5.

<sup>37</sup> According to Performics, 89% of users would switch to a different search engine if they could not find the information they were looking for; see e.g. Performics, press release, ‘Search Engine Usage Study: 92 Percent of Searchers Click on Sponsored Results’, 28 September 2010, available at <http://www.performics.com/news-room/press-release/Search-Engine-Usage-Study-92-Percent/1422>.

<sup>38</sup> Similarly, in mergers, the EC, COMP/M5727 – *Microsoft/Yahoo! Search*, 18 February 2010, para 144-69, where the EC assumed that consumers could detect the degradation in quality, see e.g. A Ezrachi and ME Stucke, ‘The Curious Case of Competition and Quality’ *SSRN Working Paper* (2014), 8.

<sup>39</sup> See e.g. GA Manne and JD Wright, ‘Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google’ 34 *Harvard J of L & Public Policy* (2011) 1, 23.

<sup>40</sup> Critically, an intervention to ‘regulate’ Google’s search algorithm could be ‘unconstitutional’; see e.g. A Candeub, ‘Behavioural Economics, Internet Search, and Antitrust’ 9 *J of L & Policy* 3 (2014).

<sup>41</sup> It is difficult for users to assess the quality of the search results they receive; see e.g., MR Patterson, ‘Google and Search-Engine Market Power’, *Harvard J of L & Technology* (2013) 8.

<sup>42</sup> See e.g. Pollock, n 35, 36.

<sup>43</sup> See e.g. Bork & Sidak’s, n 6, scenario where Google’s overinvestment in advertisement will trigger a subsequent decline in users’ experience.

restaurants and travel destinations, Google Travel for flights,<sup>44</sup> Google Product Search for product information and price comparisons, Google Maps for location and direction information, Google Chrome for browsing, Google Translate for translations, Google Scholar for citations of scholarly articles and books and, specifically for entertainment, YouTube for video content.<sup>45</sup> Similarly, Yahoo offers various categories, such as services, finance, real estate, jobs, movies, music, sports, personal, and yellow pages,<sup>46</sup> while Amazon offers books, movies, music, games, Kindles and so on.

One can also consider that having indexed a larger amount of information offers Google the competitive advantage of a larger search engine<sup>47</sup> that can produce better results. Any new entry into the market will incur significant investments in building its own search-engine platform, i.e., crawling pages, indexing them, and processing queries, and additional sunk costs to make the online platform known to users. A similar view suggested in the economic literature<sup>48</sup> is that the effect of Google's monopoly in the search engine market is to demand exponentially higher investments, i.e., sunk costs, on the part of its incumbents to rival the performance of its search engine. These costs represent actual barriers to market entry.

At this point, one cannot say that there are insurmountable barriers to market entry,<sup>49</sup> since there are quite a few competitors, albeit with insignificant shares of the market. The problem is that the competitive pressure on Google is either ineffective or non-existent. It could therefore be questioned whether effective competition is the result of massive investments in innovation, thereby improving Google's search engine. If these investments were gained from the other side of its business, namely, sponsored ads, then this is something that Google's competitors will have to adapt to as a business model. Applying the SSNIP (Small but Significant and Non-Transitory Increase in Price) test is not really helpful here; in the horizontal market, users are not charged at all, while in the vertical market, no uniform pricing is detectable.

In conclusion, a zero-priced search-engine is a mathematical delusion when approaching a near monopoly position with 'inefficiently low search quality'.<sup>50</sup> The real price to pay will be the decline in quality as a result of more or aggressive advertising.

<sup>44</sup> For concerns about Google favouring its own travel products, see e.g., M Williams, 'Expedia is Worried About Google/ITA Deal', Inside Google, 12 July 2010, available at <http://www.insidegoogle.com/2010/07/expedia-is-worried-about-googleita-deal/>.

<sup>45</sup> See e.g. Ratliff and Rubinfeld, n 11.

<sup>46</sup> Spulber, n 30, 641.

<sup>47</sup> See generally B Pal, 'Immaterialgüter, Internetmonopole und Kartellrecht' *GRUR-Beilage* (2014), 69; M Rato and N Petit, 'Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered' 9 *Eur Comp J* 1 (2013); J Verhaert, 'The Challenges involved with the application of article 102 TFEU to the new economy: a case study of Google' 35 *Eur Comp L Rev* 6 (2014).

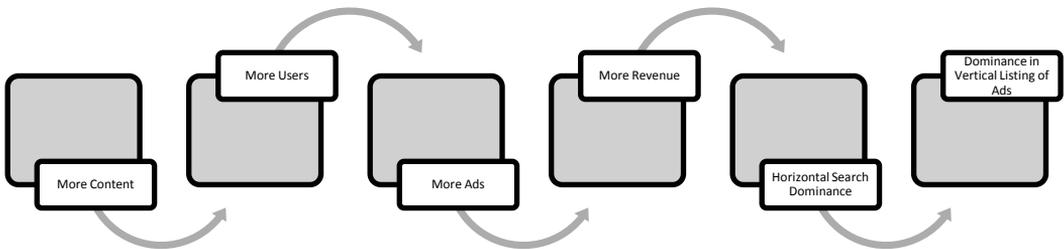
<sup>48</sup> See e.g. Pollock, n 35, 28; Langford, n 29, 1575.

<sup>49</sup> In contrast, see e.g. I Lianos and E Motchenkova, 'Market Dominance and Search Quality in the Search Engine Market' *J of Comp L & Ec* (2013), 10, where it is assumed that network effects and the fixed costs related to R&D or the development and maintenance of service infrastructure are barriers to entry into the search-engine market.

<sup>50</sup> See e.g. Pollock, n 35, 41.

For rivals to catch up with Google, there are certain barriers associated with market entry or with Google's competitive pressure, in particular, building an immense data infrastructure, which could amount to significant fixed costs,<sup>51</sup> and developing both a search and ranking algorithm. The latter is essentially 'learning-by-doing' and, therefore, could take years to develop. However, given that the information is a trade secret, a possible disclosure of Google's ranking algorithm could give rise to similar criticism as in the *Microsoft* case. Therefore, so far, the monitoring of Google's behaviour has been the better option adopted by the EC.

Figure 1



## B. Dominance

Dominating both primary and secondary markets is crucial to maintaining the clientele from both sides of the market, namely, online users who navigate Google's search engine and traders who pay to have commercial ads inserted vertically into it.

In 2010, the OECD suggested that the global search engine market is highly concentrated in the hands of only five major companies,<sup>52</sup> who account for over 90% of the market.<sup>53</sup> It is no secret that Google dominates the European online search-engine market with nearly 90% of the market share.<sup>54</sup> In the US, recent data acclaims Google as an incontestable leader of general searches with 81.87% as of March 2014.<sup>55</sup> This ever-growing monopoly has been assessed against the *Microsoft/Yahoo!* merger<sup>56</sup> where the EC considered it unlikely that the parties could degrade the quality of the

<sup>51</sup> See e.g. Pollock, n 35, 39.

<sup>52</sup> According to comScore data in 2009, the five leaders were Google with a 64% market share, Yahoo with 14%, the Chinese Baidu with 13%, Microsoft with 4%, and the South Korean Naver with a 2% market share.

<sup>53</sup> OECD, Report on 'The Economic and Social Role of Internet Intermediaries', DSTI/ICCP (2009) 9/FINAL, April 2010, 28, available at <http://www.oecd.org/dataoecd/49/4/44949023.pdf>. Recently, the same figure of 90% is being maintained in the EU; see e.g. M Scott, 'E.U. Official Urges Google to Offer Greater Concessions in Antitrust Inquiry', *New York Times*, 20 January 2015.

<sup>54</sup> See e.g. C Argeton and J Prüfer, 'Search Engine Competition with Network Externalities' 8 *J of Comp L & Ec* 1 (2012).

<sup>55</sup> Statcounter, available at [http://www.gs.statcounter.com#desktop+mobile+tablet-search\\_engine-US-monthly-201401-201403](http://www.gs.statcounter.com#desktop+mobile+tablet-search_engine-US-monthly-201401-201403).

<sup>56</sup> *Microsoft/Yahoo!*, n 38.

search engine results due to Google's presence. When it entered the market in 1998, Google was competing only with Microsoft's MSN (later Live Search), and thereafter, with many others such as AltaVista, Yahoo, Infoseek, Lykos,<sup>57</sup> or GoTo (later re-named Overture). The latter introduced the first auctions of keywords for the listing of ads, followed by Google's AdWords and its settlement with Overture in the patent lawsuit.<sup>58</sup>

Google Online search-engine market	Google Ads revenue	Google usage	Google per country	Google vertical integration
90% EU (2012)	\$36.5 bn (2011)	81.57% (2009)	95% Germany >66% US (2012)	GoogleMaps +50% MapQuest -20%
	\$15-18 bn US Ads			
	70% US (2010)			
81.87% US (2014)	Facebook \$3.2 billion	Yahoo 10.07% MSN 2.97% AOL MLS Ask AltaVista all <1%		YouTube >80% Photobucket <3% Google Images 50% Yahoo Images >7%

Based on the revenues gained from advertisements, anecdotal evidence from 2011 suggests Google leads the market with \$36.5 billion compared to its competitor, Facebook, with only \$3.2 billion. Recent US estimates indicate that Google's US AdWords revenues are 'somewhere in the range of \$15 to 18 billion annually'.<sup>59</sup> Facebook remains a potential contender in the advertisement market for entertainment. The same can be said about the strategic alliance in the Bing/Yelp deal, following

<sup>57</sup> See e.g. S Lawrence and CL Giles, 'Accessibility of Information on the Web', 400 *Nature* 107 (1999).

<sup>58</sup> Spulber, n 30, 645.

<sup>59</sup> See e.g., <http://arstechnica.com/tech-policy/2014/01/court-orders-google-to-pay-1-36-of-adwords-revenue-for-infringing-patents/>.

which reviews of Yelp restaurants could be featured prominently in Bing's search engine.<sup>60</sup>

Based on online usage, in 2009, Google was the market leader with 81.57% of the market share, followed by Yahoo with 10.07%, MSN with 2.97% and other competitors, including AOL, MLS, Ask, and AltaVista, all with less than 1% of the market share.<sup>61</sup> However, in 2012, Google held over 95% of the market share in Germany and over 66% in the US.<sup>62</sup> Another telling fact is that since its free vertical integration in Google's search-engine, Google Maps has gained 50% of the market share, while its rival, MapQuest, has lost 20% of its market share.<sup>63</sup> The same applies to Google-owned YouTube, which has doubled its market share of the video market to over 80%, and is now followed by Photobucket with less than 3% and MySpace with less than 1% in the US.<sup>64</sup> Google Images enjoys 50% of the market share compared to Yahoo Images with over 7% and other competitors with less than 10% of the market share.<sup>65</sup> In the search advertising market, Google was clearly dominant with over 70% of the US market in 2010.<sup>66</sup>

The period from 1998 to 2014, throughout which Google sought to consolidate its prominent and thereafter dominant position in the online search-engine market, cannot be considered as merely temporary, and the resultant monopoly should not be underestimated as 'a little monopoly'.<sup>67</sup> Things may be different in the market for digital devices, but solely on the basis of the period in question. However, the intention to maintain Google's prominent position in the online search-engine market prevails over purely innovative pursuits of a seemingly unfortunate number of thirteen Google applications, namely, Google Chrome, Google Maps, Google Drive, YouTube, Gmail, Google+, Google Play Music, Google Play Movies, Google Play Books, Google Play Newsstand, Google Play Games, Google+ Photos, and Google+ Hangouts.

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<sup>60</sup> See e.g. M Lao, 'Search, Essential Facilities, and the Antitrust Duty to Deal' 11 *Northwestern J of Technology & Intellectual Property* 5 (2013), 300.

<sup>61</sup> Spulber, n 30, 646.

<sup>62</sup> See Comscore, press release, 'comScore Releases March 2012 U.S. Search Engine Rankings', available at [http://www.comscore.com/Press\\_Events/Press\\_Releases/2012/4/comScore\\_Releases\\_March\\_2012\\_U.S.\\_Search\\_Engine\\_Rankings](http://www.comscore.com/Press_Events/Press_Releases/2012/4/comScore_Releases_March_2012_U.S._Search_Engine_Rankings).

<sup>63</sup> See e.g. T Körber, 'Google im Fokus des Kartellrechts' 7 *Wettbewerb in Recht und Praxis* (2012), 768; Vanberg, cited above, 6.

<sup>64</sup> Consumer Watchdog's Inside Google, 'Traffic Report: How Google is Squeezing Out Competitors and Muscling Into New Markets', 2 June 2010, available on <http://www.consumerwatchdog.org/resources/TrafficStudy-Google.pdf>.

<sup>65</sup> *Ibid*, 5.

<sup>66</sup> *Ibid*, 7.

<sup>67</sup> See e.g. in the words of J Haucap 'Monopöhlen', n 2. In contrast to temporary market power, practices that facilitate the acquisition of a monopoly should not be immune from intervention. On the effects of social networking, see e.g. SW Waller, 'Antitrust and social networking' 90 *North Carolina L Rev* (2012), 1802.

Google mobile	Google
Android	Vertical integration
78.4% smart-phones 61.9% tablets (2012)	Google Maps 65.9% (2nd after Facebook)
	Google Play 54.4%
	Google Search 53.5%
	Gmail 47.6%
	YouTube 46.4%

Google also transplanted its successful business model from the world of PCs to mobile devices and tablets. In particular, Google's open source application, Android, which is offered freely to owners of mobiles and tablets, is leading the market with 80% of the market share in the EU.<sup>68</sup> Statistics indicate that 78.4% of the smartphones and 61.9% of the tablets sold are running Android.<sup>69</sup> In 2012, in the US, Google Maps on mobiles came second after Facebook with 65.9%, followed by Google Play with 54.4%, Google Search with 53.5%, Gmail with 47.6%, and YouTube with 46.4%.<sup>70</sup>

Android promotes not only Google's famous search-engine, but also its other free services, such as Google Maps and Google Play. The business strategy disguised by Google's gratuitous Android offer seeks to maintain its incontestable online dominance on both static and mobile search-engine markets, and, with this in mind, maintains its sponsored links plus traffic-based revenues from advertising. Otherwise, the offering enhances consumers' satisfaction and, through the tying of mobile devices to pre-installed software applications, it avoids further fragmentation, too. However, the shortcoming is, again, a missed opportunity for Google's competitors to impose their own search-engine on digital devices.

### C. The Concept of Abuse and Potential Anti-Competitive and/or Unfair Practices

The contentious issue is that Article 102 TFEU has traditionally left outside its scope the monitoring of marketing strategies of this kind, e.g., through advertising, under the misleading and comparative advertisement directive and unfair commercial practices directive.<sup>71</sup> In contrast to the *Microsoft-tying* case, the borderline between technological

<sup>68</sup> See FY Chee and A Oreskovic, 'European regulators training sights on Google's mobile software', *Reuters*, 30 July 2014.

<sup>69</sup> See T Körber, 'Let's Talk About Android – Observations on Competition in the Field of Mobile Operating Systems', <http://ssrn.com/abstract=2462393>, 14.

<sup>70</sup> See <http://www.comscore.com/Insights/Press-Releases/2013/2/comScore-Releases-the-2013-U.S.-Digital-Future-in-Focus-Report>.

<sup>71</sup> The Unfair Commercial Practices Directive 2005/29, 11 May 2005, OJ L 149-22/2005.

and contractual tying is clearly defined since Google engages in non-technological tying, irrespective of whether there is a 'written' commercial agreement to tie advertising to a selected AdWord. What matters is that traders bid online with other auctioneers for their Ad to be placed on a 'priority' listing. This can only affect the quality of the generated search results offered 'freely' by Google to its users.<sup>72</sup> In other words, commercial advertising in this secondary market interferes with free competition in the primary market as it has the potential to distort and limit the natural listing of search results through the insertion of these paid ads. This contradicts the finding that the priority listing of organic searches is not interfered with by Google itself through its own algorithmic sequence. The quality of the organic searches will depend on the volume of available advertisements and the suitability of a key word to generate 'unfair competition'.

The issue of dealing with the protection of competitors and the allegation that Google's business model is set up to favour its own commercial interests to the detriment of those of its competitors may go beyond the scope of Article 102 TFEU. For example, one recent complaint from Google's competitors was that it displays specialised search queries, such as hotels, restaurants, or flights, more favourably than it displays competing services.<sup>73</sup> Therefore, while downgrading vertical search services offered by Google's competitors<sup>74</sup> could pose the risk of secondary-line discrimination and preferential treatment, this commercial practice appears more suitable to being dealt with under, or in conjunction with, the unfair competition rules on advertising rather than being captured by Article 102(c) alone. The first option, namely, a suit on unfair competition, should be considered where there are only an insignificant number of competitors at stake and no negative effects on final users. Otherwise, a general claim that Google engages in deceptive conduct against its users<sup>75</sup> could be substantiated on the basis of comparative and misleading advertising, but not on the basis of a promotion of its own brand. Such claims could be brought before the EC, irrespective of Google's dominance on the secondary market since the practice is behavioural, and it affects competitors directly. This approach was recently applied by a lower court, *Landesgericht*, in Hamburg, which ruled that Google displayed its own content prominently to 'increase the overall attractiveness of its search engine',<sup>76</sup> for which Google enjoys discretion. As such, Google is not required 'to limit itself to a neutral

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<sup>72</sup> For the opinion that 'what appears nowadays in Google search results pages is increasingly paid-for content', see e.g. Euractiv, 'Online consumer choice stifled by lack of competition', 11 April 2014; for the view that 'when the producer primarily earns its profits from one side of the market (such as advertising), its incentive to degrade quality (below levels that consumers prefer) on the other side of the market can increase', see e.g. Ezrachi and Stucke, n 38, 21.

<sup>73</sup> See MEMO/14/87, n 10.

<sup>74</sup> EC, press release, 'Antitrust: Commission probes allegations of antitrust violations by Google', 30 November 2010; 'Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns', 25 April 2013.

<sup>75</sup> This is similar to the US FTC's Act that empowers the FTC to prevent unfair methods of competition as well as unfair or deceptive acts or practices that are likely to mislead a reasonable consumer.

<sup>76</sup> LG Hamburg, *Verband Deutscher Wetterdienstleister e.V. v. Google*, no 408 HKO 36/13, 11 April 2013.

presentation of the results of its search algorithm'.<sup>77</sup> In a previous ruling, the High Regional Court in Frankfurt held that the use of online ads does not misuse a competitor's trademark as long as inserting the ad into the search engine does not result in 'clear and unambiguous' advertising.<sup>78</sup> In this case, users searching for the registered trademark received automatically an advertising link to this competitor's web site.

However, the demand that third party web publishers purchase 'all or most' of their online advertisement requirements from Google, made conditional upon purchase to guarantee content indexing in Google's horizontal search engine,<sup>79</sup> should be subject to scrutiny under the prohibition of contractual tying under Article 102(d) and (b) on exclusive arrangements. This commercial practice affects not only competitors through its foreclosure effect,<sup>80</sup> but it directly affects the search-engine's users. By offering consensual commitments, the EC prevented intervention in the advertising market by requiring Google to display comparatively specialised searches offered by its rivals,<sup>81</sup> instead of clarifying the law, namely, whether or not Google had breached Article 102 TFEU and/or the harmonising directives on unfair competition. As has already been argued elsewhere, the EC made critical use of commitments in investigations such as Google's, which 'raise novel legal questions or rest upon less-established theories of harm'.<sup>82</sup>

It is clear that the EU approach to dominance remains unfortunately too conservative on the concept of abuse as an 'objective' one.<sup>83</sup> The role of subjective indicators, such as the intention to free-ride on original publishers' content<sup>84</sup> or to downgrade competing bids in the search-engine results, are not taken as prerequisites for a monopolist's anti-competitive conduct, i.e., deception, though such subjective indicators could build a strong case against the monopolist's deception in advertisements. However, Google is immune from any accusation of free-riding since it

<sup>77</sup> Ibid.

<sup>78</sup> HRC Frankfurt, 6W17/08, 26 February 2008. See also the reference for a preliminary ruling in Joined Cases CC-236/08 to C-238/08, *Google France SARL, Google Inc v Louis Vuitton Malletier SA; Google France SARL v Viaticum SA, Luteciel SARL; Google SARL v CNRRH*, 23 March 2010, in AD Chiriță, *The German and Romanian Abuse of Market Dominance in the Light of Article 102 TFEU* (Baden-Baden, Nomos, 2011), 366.

<sup>79</sup> See the EC's MEMO/14/87, n 10.

<sup>80</sup> See e.g. Lianos and Motchenkova, n 6, 12.

<sup>81</sup> EC, press release, 'Antitrust: Commission obtains from Google comparable display of specialised search rivals', 5 February 2014.

<sup>82</sup> Y Botteman and A Patsa, 'Towards a more sustainable use of commitment decision in Article 102 TFEU cases', 1 *J of Antitrust Enforcement* 2 (2013), 348. In the same vein, see very recently Professor R Whish's Editorial, 'Motorola and Samsung: An Effective Use of Article 7 and Article 9 of Regulation 1/2003' *J of Eur Comp L & Practice* (3 September 2014).

<sup>83</sup> See H Schröter, T Jakob, R Klotz and W Mederer, *Europäisches Wettbewerbsrecht* (Baden-Baden, Nomos, 2nd ed, 2014), 840.

<sup>84</sup> See e.g. EC, press release, 'Antitrust: Commission obtains from Google comparable display of specialised search rivals', 5 February 2014; EC Memo, 'Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers', 25 April 2013.

imposed contractual restrictions on the use of its commercial Ads by rival search-engines.<sup>85</sup>

As has already been mentioned, Google's atypical non-pricing model to its end-users must extract revenues from elsewhere, such as auction bids for Ad placements, or even free-riding from web publishers of original content. For example, for indexing purposes, Google effectively uses other web publishers' content, such as text snippets and thumbnails or preview pictures. While this is, indeed, beneficial to the average user, who is made aware of the original content, there is also a shortcoming to this business model. Once the search-engine becomes a famous brand, publishers will certainly claim some revenues for their own inclusion. Then, Google could extract its lost profit from more advertising, which, in turn, will inevitably worsen the quality of the search-engine experience.

Google's successful business model of acquiring incontestable dominance in the search-engine market has been made possible by a simultaneous gain in prominence in vertical advertisements. It is a *sine qua non* condition to improve online presence so that traders' ads will be linked to Google's horizontal platform, which in economics is tantamount to leveraging dominance from one side of the market to the other. By displaying its own commercial Ads more prominently, Google cannot remain silent on its own altering of the natural occurrence of the search-engine results. This manipulative technique can not only discriminate against rivals;<sup>86</sup> but it can also affect the quality of organic searches offered to all users.

Nonetheless, regarding Google's search engine as an essential facility, i.e., a universal search engine that is 'an indispensable distribution tool,'<sup>87</sup> is quite hazardous.<sup>88</sup> First, there are functionally viable alternative search-engines, and while competitors could incur significant costs to reach the monopolist's storage of information<sup>89</sup> so as to make the engine more attractive, this has already been replicated, though unsuccessfully to date. The ranking methodology, such as search listing, can only be considered as proprietary trade secret information rather than an essential input. However, one powerful argument in favour of applying the essential facilities doctrine is the current EU loophole on the protection of trade secrets. This is due to change following an EU proposal that regulates trade secrets<sup>90</sup> as information which is 'generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question, has commercial value because it is secret, and has been subject

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<sup>85</sup> However, free-ride on Google is not acceptable see e.g. Speech by J Almunia, 'Public policies in digital markets: reflections from competition enforcement', 30 June 2014.

<sup>86</sup> See e.g. Pal, n 47, 73.

<sup>87</sup> Lianos and Motchenkova, n 6, 16.

<sup>88</sup> For the suggestion that the listing of results be considered as an essential facility, see e.g. Lao, n 60, 302; on the inapplicability of the essential facilities doctrine in the case against Google, see Bork and Sidak, n 6, 13.

<sup>89</sup> For the view that duplication of search engines is clearly impossible, see e.g. C Argenton and J Prüfer, 'Search Engine Competition with Network Externalities' 8 *J of Comp L. & Ec* (2012), 73, 97.

<sup>90</sup> Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, Brussels, 28 November 2013, COM (2013) 813 final.

to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret'.<sup>91</sup>

The 'economically viable' test developed under the EU essential facilities doctrine is also critical to the extent to which it could afford competitors' protection, rather than to address real competition law issues. The link to a commercial refusal to deal or supply is entirely missing in the *Google* case.<sup>92</sup> It is, therefore, clear that a case against Google can be instrumental in creating a new 'precedent' applicable to instantaneous bids for online advertisements targeted at dynamic searchers rather than following old-fashioned doctrines where the input is statically physical and not virtually dynamic.

Finally, the most powerful argument against Google's anti-competitive conduct that harms final consumers directly is their online monitoring and gathering of personal information,<sup>93</sup> such as server logs from users' browsers, which is passed on to advertisers and used for commercial purposes.<sup>94</sup> Similar to Microsoft's problem of the lack of interoperability of its Windows Operating System with non-competing systems, the Achilles' heel that demands vigorous scrutiny and intervention is not the existing competition on its rather insignificant (Windows Media Player or search-engine) market, but is the general public interest in ensuring that a privately-owned corporation does not successfully expand over so many tiny, inoffensive, and innovative markets in order to enjoy the monopolistic power over its users' personal data, which could be passed on to third parties for commercial advertising. This is similar to the loyalty cards offered by supermarkets, which monitor buyers' preferences and eventually offer them discounts on their next shopping.

However, Google's quasi-dominance on the search-engine market could raise legitimate national and EU security concerns, which explains the political sensitivity of this case. This is why the *Bundeskartellamt* proposed recently that Google should be regulated as 'utilities'.<sup>95</sup> In sharp contrast, a policy proposal has been put forward by economists according to which 'all search engines should be required to share their anonymized data on clicking behaviour of users following previous research queries'.<sup>96</sup> While allowing competing search engines access to the users' behavioural data makes perfect

<sup>91</sup> See e.g. the timely contribution of N Sousa e Silva, 'What exactly is a trade secret under the proposed directive', *J of Intellectual Property Law and Practice* (2014).

<sup>92</sup> This time, the scope of the doctrine is different from Cases 6-7/73, *Commercial Solvents*, [1974] ECR 223; Case 238/87, *Volvo v Veng*, [1988] ECR 6211; Case C-7/97, *Oscar Bronner*, [1998], ECR I-7791; Case C-418/01, *IMS Health*, [2004], ECR I-5039; Case C-52/09, *TeliaSonera*, [2011] ECR I-527; Case C-209/10, *Post Danmark*, ECLI:EU:C:2012:172.

<sup>93</sup> On the 'right to be forgotten', see C-131/12, *Google v AEPD and Costeja*, ECLI:EU:C:2014:317; H Crowther, 'Google v Spain: is there now a 'right to be forgotten'?' *J of Intellectual Property L & Practice* (2014). However, free-ride on Google is not acceptable; see e.g. Speech by J Almunia, 'Public policies in digital markets: reflections from competition enforcement', 30 June 2014.

<sup>94</sup> See the concern expressed by the German Monopolies Commission on the use of private data by Google and Facebook, Monopolkommission, press release, 'Google, Facebook and Co. – eine Herausforderung für Wettbewerbspolitik', Bonn/Berlin, 9 July 2014; see e.g. A Gebicka and A Heinemann, 'Social Media and Competition Law' 37 *World Comp L & Ec Rev* 2 (2014).

<sup>95</sup> PC Tech, N Kamanzi, 'Germany Cartel Offices Says Google Could be Regulated as Utilities', 14 July 2014.

<sup>96</sup> Argenton and Prüfer, n 89, 77.

economic sense, the EU rules governing privacy<sup>97</sup> and security would not allow this to happen, even if the data were anonymised.

### III. GOOGLE'S ANTI-COMPETITIVE PRACTICES ON ADJACENT LEISURE MARKETS

In the US, the consumer class action<sup>98</sup> submitted that Google made its most popular applications, such as mobile and tablet Android applications, including the Google Phone-top Search app,<sup>99</sup> YouTube, Google Maps, Gmail, and Google Play, all of which enable mobile customers to buy music, movies, and books from the Google Play store, subject to an unlawful tie-in secret agreement called 'Mobile Application Distribution Agreement'.<sup>100</sup> The latter required manufacturers of mobile phones and tablets to make Google the default search engine on all of their devices sold to consumers worldwide. For example, it is submitted that 'Google uses its popular apps to coerce manufacturers into making it the default search engine provider on handheld devices'.<sup>101</sup> All of the above agreements are 'contracts in restraint of trade'<sup>102</sup> and fall under the scope of the US Sherman Act. Thus, the plaintiffs mention various other acts dealing with unfair methods of competition, such as the Clayton Act or California's Unfair Competition Act.

'Google has conditioned the rights to pre-load any application from a suite of Google applications, including the YouTube app or the Google Play client, on the manufacturer's mandatory acceptance and installation of Google search, or so-called Google Phone-top Search, as the default search engine on that device'.<sup>103</sup>

This means that if a smartphone or tablet manufacturer wishes to pre-load the popular YouTube app on a given Android device, then it has to make Google the default search engine, too.<sup>104</sup> In other words, 'a manufacturer would struggle to offer a phone without a pre-installed YouTube app',<sup>105</sup> which makes mandatory the adoption of the default engine. The same technique applies to other rivals, for example, were AOL to pre-load its MapQuest onto Android mobile devices.<sup>106</sup> Furthermore, the plaintiffs submitted that Google had paid Apple hundreds of millions of dollars to act as the default engine

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<sup>97</sup> See e.g. EU Data Protection Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ [2005] L281, and the proposal for a new EU Data Protection Regulation, available at <http://ec.europa.eu/justice/data-protection/>.

<sup>98</sup> Initiated in the US by B Edelman, see e.g. 'Secret Ties in Google's 'Open' Android', available on <http://www.benedelman.org/news/021314-1.html>. Many thanks to Benjamin Edelman for the pointer.

<sup>99</sup> A widget for conducting web searches via Google's search engine.

<sup>100</sup> US Class Action, para 74.

<sup>101</sup> US Class Action, para 32.

<sup>102</sup> US Class Action, para 7.

<sup>103</sup> US Class Action Complaint 010437-11 683086 VI, para 74.

<sup>104</sup> *Ibid*, para 33.

<sup>105</sup> *Ibid*, para 40.

<sup>106</sup> *Ibid*, para 53.

on Apple iPhones, iPads, and iPods.<sup>107</sup> This pre-installing trend is noticeable on Samsung, too.

A mitigating factor is that, unlike in the *Microsoft* tying case,<sup>108</sup> where users could not remove the Windows Media Player, mobile devices entail Google's default search-engine is set up by manufacturers; thus, users are able to download other applications, interoperate, and/or change the settings.<sup>109</sup> Of course, as in the *Microsoft-Internet Explorer tying* case,<sup>110</sup> users may lack basic IT skills while downloading and installing an internet browser other than the default one, as well as inertia. Google's business model is the same: offering Android for mobile devices free of charge. This means that should a user decide to install competing applications, there is no guarantee that they will also be offered for free. A flexible option to switching may still require extra costs and operate as a potential barrier to market entry. This makes any pre-loading and pre-installation not particularly user friendly both to intermediary consumers, i.e., competitors, and to final consumers, i.e. ordinary users.<sup>111</sup> Therefore, combining both tying cases, the answer is that intervention against Google could proceed. This is unlike the seemingly inconsistent, shifting approach to network effects pronounced in recent merger proceedings.<sup>112</sup> In *Cisco Systems and Messagenet*,<sup>113</sup> the General Court (GC) departed from the previous *Microsoft* cases as there were no technical or economic constraints that could have prevented intermediary consumers, active on a narrower market for business communications, from downloading competing services on their device. The merged entity between Windows Live Messenger and Skype raised no entry barriers as the communications software had been offered for free, being made easy to be downloaded by corporate clients and occupying a limited space on their PC's hard drive. In this scenario, switching was found to be relatively easy and multi-homing possible. However, the business model operated by the merged entity is slightly different from Google's in that the free offering of communications to final consumers is made possible by the revenues extracted from the placement of commercial advertisements, while corporate clients are in no way subsidised by the final users. Rather, such intermediary users themselves have to pay for their enterprise communications services. However, what makes the previous approach to network effects inconsistently applied is precisely the much narrower scope for the definition of the relevant market for businesses' communications services, as opposed to those of final users.

Unfortunately, the EU merger policy and the prohibition of abuse of dominance may bring about contradicting outcomes. The recent approval by the EC of the acquisition

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<sup>107</sup> Ibid, para 62.

<sup>108</sup> Case COMP/C-3/37792 – *Microsoft (WMP)*, OJ L 32-23/2007; Case T-201/2004, *Microsoft*, [2007] ECR II-3601.

<sup>109</sup> See e.g. Körber, n 69, 2.

<sup>110</sup> See Case COMP/C-3/39530 – *Microsoft (Internet Explorer)*.

<sup>111</sup> For the view that the storage memory of the Google suit of apps is negligible, see e.g. Körber n 69, 42.

<sup>112</sup> For an insightful analysis, see e.g. I Graef, 'Sneak preview of the future application of European competition law on the Internet?: Cisco and Messagenet' 51 CML Rev (2014), 1263-1280.

<sup>113</sup> Case T-79/12, *Cisco Systems Inc and Messagenet SpA v Commission*, ECLI:EU:T:2013:635, paras 79-81.

by Facebook of WhatsApp was justified due to the flexible switching by customers from one mobile application to another, the popularity of the network amongst users, and the fast growing market for consumer communications apps, in particular, its 'short innovation cycles'.<sup>114</sup> The initial premise for allowing a merger appears to be that an emergence of dominance *ex post* is to be ignored *a priori* because of the unknown pace of an innovation cycle. This merger-friendly approach can only sit awkwardly when, under Article 102, it is thereafter suspected that Facebook may be dominant on the social networking platforms. It highlights how following preceding evaluations of network effects applied in the context of allowing mergers is simply a false friend should it be followed in another area.

While the quantification and recovery of the research and innovation pursuits by Google could be extremely difficult to measure, the revenues extracted from its commercial advertising represents a valid indicator that Google does not compete only on the basis of its zero-priced and innovative search-engine.

A final argument in support of intervention has to consider the user's experience, which has to be balanced somewhere in the middle to avoid a panoply of pre-installed applications, such as Desk Clock, Browser, Calendar, Contacts, Gallery, Global Search, Launcher, Music, Google Talk, and Settings, against the danger of fragmentation. Would the average user be better off without pre-installing these additional features? Based on the current consumers' class action, the balance seems to be tipped in favour of a 'yes' answer.

The plaintiffs questioned primarily the existence of a mandatory secret tie-in agreement, whether Google unlawfully monopolized or attempted to monopolize the search engine market in respect of the Android apps, and whether consumer harm can be established from consumers having paid more for mobile devices<sup>115</sup> with such pre-installed features than they could otherwise have paid had more choice been available.<sup>116</sup> In other words, this raises another pertinent question of whether when buying the mobile hard-core device, any increment will also be paid towards the running of software applications. Since Google has paid manufacturers of mobile devices for inclusion, this could be a competitive advantage to enhance consumers' experience. However, as no such apps' costs are passed on to consumers, the pre-installing of Google features could be used as an artificial means to maintain its present dominance, rather than as a natural enhancement of the hard-core device. In the long run, the effects on consumers will be a loss of choice and possibly a lack of innovation.

The above practice is similar in scope to Article 102(d) TFEU, which prohibits 'making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations (...) which have no connection with the subject of such contracts'. In particular, the above contractual tie-in agreement could eventually oblige manufacturers

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<sup>114</sup> See recently, EC, press release, 'Mergers: Commission approves acquisition of WhatsApp by Facebook', IP/14/1088, Brussels, 3 October 2014.

<sup>115</sup> For the contrary opinion that Google's offering of Android as open source software has actually lowered the price of mobile devices, see Körber, n 69, 4.

<sup>116</sup> See *Cisco Systems*, n 113, paras 79 a, c, and e.

of digital services to pre-install, predominantly or exclusively, Google's Android applications content and to accept its online search engine by default.<sup>117</sup> This commercial practice, obviously, pre-empts the choice of individual users,<sup>118</sup> namely, using or downloading other competing applications and/or search engines. The practice is anti-competitive as it encourages final users of smartphones and tablets to experience only Google's pre-installed applications. The purpose of this business strategy has to be understood in the wider context of maintaining Google's reputation and dominance in the horizontal and vertical search-engine markets. Due to such sunk costs, for example, the offering of Android applications as open source software, Google's rivals are practically denied an effective entry into the market for digital devices, which are mostly used for personal entertainment. In addition, YouTube and Google Play installation is also made conditional upon the manufacturer's pre-installment of Google Phone-top search.

FairSearch's complaint against Google<sup>119</sup> is similar to the criticism of the US's plaintiff, i.e., that 'Android phone makers who want to include must-have Google apps such as Maps, YouTube or Play are required to pre-load an entire suite of Google mobile services and to give them prominent default placement on the phone'. This obviously places Google at a competitive advantage vis-à-vis its competitors.

One can sum up from the above that Google's ubiquitous presence<sup>120</sup> has imposed itself not only on PCs but also on all other digital devices. In the light of these recent developments, similar to the booking of cheap or last minute flights or hotels,<sup>121</sup> the previous allegations of 'biased' or 'manipulated' search results<sup>122</sup> in the advertisement market have gained more weight. It is plausible to think of Google's search engine giving priority to a good number of commercial ads over others, which will remove the

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<sup>117</sup> On Android as a 'Trojan Horse' see e.g. Chilling' Competition, 'Some thoughts on the new anti-Google (Android) complaint' available at <http://chillingcompetition.com/2013/09/09/some-thoughts-on-the-new-anti-google-android-com>.

<sup>118</sup> US Class Action, para 64, where the plaintiffs emphasised the lack of choice and the stifling of innovations as a result of Google's monopoly.

<sup>119</sup> See <http://www.fairsearcheurope.eu/wp-content/uploads/2013/04/FairSearch-Announces-EU-Complaint-on-Google-Mobile-Strategy-9-April-2013.pdf>.

<sup>120</sup> Recently it has been suggested that Android forced access to a 'collection' of thirteen Google applications, namely Google Chrome, Google Maps, Google Drive, YouTube, Gmail, Google+, Google Play Music, Google Play Movies, Google Play Books, Google Play Newsstand, Google Play Games, Google+ Photos and Google+ Hangouts, in Quartz, 'Google is 'tightening the screws' on Android to keep control over the web', 26 September 2014.

<sup>121</sup> See J Hazan, 'Stop Being Evil: A Proposal for Unbiased Google Search' 111 *Michigan L Rev* (2013) 789, 805.

<sup>122</sup> See e.g. B Edelman, 'Hard-Coding Bias in Google 'Algorithmic' Search Results', 15 November 2010, available at <http://www.benedelman.org/hardcoding/>; Hazan, *ibid*, 789; for the view that the appearance of Google's products in search results is three times higher than for non-Google products, see e.g., B Edelman and B Lockwood, 'Measuring Bias in 'Organic' Web Search', available at <http://www.benedelman.org/searchbias/>; BG Edelman, 'Google's Dominance and What to Do About It' 2 *J of Law*, ACS Blog 'Debate on Antitrust Scrutiny of Google: Benjamin G. Edelman vs. Joshua D. Wright', 453: 'It's handy to have a single Google password providing access to personalized search, finance, videos, and more. But this misses the serious harms of Google's ever-broadening panoply of services'; for the view that it is possible to manipulate or trick algorithm results, see e.g. L Inrona and H Nissenbaum, 'Shaping the Web: Why the Politics of Search Engine Matters' 16 *The Information Society* 3 (2000), 141.

expected 'neutrality'<sup>123</sup> when generating results in the primary search-engine market. For example, airline companies were found to have weighted in their booking system carrier-specific factors, to have inflated the flight times of competitors, to have blocked flights with lower fares, and so on.<sup>124</sup>

A dangerous option is allowing cross-subsidisation from the free primary market to expand over the secondary digital market. Then, Google's brand and popularity in the primary market will leverage the secondary to the detriment of other competing applications. Recently, a Portuguese competitor, Aptoide, submitted to the EC that Google is 'leveraging' its dominant position in the Android market to control the market for such applications.<sup>125</sup>

The litigious aspect of intervention could follow suit under the umbrella of unfair competition; thus, the crucial element is that the likelihood of exclusionary conduct exists. Furthermore, it is difficult to see how users or final consumers, who know little about how the search itself operates, could be alerted to the decline in the quality of the search engine. The secrecy of Google's algorithmic metric has already been referred to as creating a 'black box' effect<sup>126</sup> with the consequence that consumers lack the knowledge to realise they are being misled. As long as the results do not become merely advertising, it is the task of the competition authorities to monitor how the search engine operates and to require manufacturers to include competing applications on digital devices. Pre-installing certain features can work only in Google's favour to gain an anti-competitive advantage and not to compete exclusively on the merit of its products. Limiting *ab initio* consumer choice can only have a 'lock-in' effect on consumers who cannot experience the quality of alternative products or services, thereby foreclosing potential competition. Nonetheless, this approach is very much consumer-welfare focused. Advocates of non-intervention appear somewhat malicious to a consumer-welfare approach since in the long run, Google's aggressive business model conquers every single digital market. It cannot be that in the name of avoiding fragmentation, all pre-installed features are made by Google.

From the conundrum of arguments for and against intervention in the case of Google, one clear conclusion is that, unlike the US Sherman Act, having an open-textured provision in Article 102 TFEU makes it easier to attack Google's abuse in the leisure digital market since exclusive and conditional agreements harm both intermediary and final consumers, thereby maintaining Google's dominant position. Anti-competitive practices of this kind are to be fined rather than negotiated and finalised with light-touch commitments. The monitoring of Google for the next five years and three months will partially solve the existing problems. For example, Google will cease to

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<sup>123</sup> For an interesting contribution on neutrality, see M Thompson, 'In Search of Alterity: on Google, neutrality, and otherness'<sup>14</sup> *Tulane J of Technology & Intellectual Property* (2011).

<sup>124</sup> See e.g. Langford, n 29, 1587.

<sup>125</sup> 'Google hit with new antitrust complaint in Europe, officials confirm', 23 June 2014, available at <http://www.pcworld.com/article/2364580/google-hit-with-new-antitrust-complaint-in-europe-officials-confirm.html>.

<sup>126</sup> See O Bracha and F Pasquale, 'Federal Search Commission? Fairness, Access and Accountability in the Law of Search' 93 *Cornell L Rev* (2008), 1149.

include ‘any unwritten obligations’ in future contracts, which could amount to a *de facto* exclusivity agreement to source any commercial requirements for ads solely from Google.<sup>127</sup> This behavioural remedy cannot address the past anti-competitive harm caused to competitors. What appears as a daunting task for Google is to create a pool of eligible Rival Vertical Search Sites according to objective criteria established by the EC. The site domain should enjoy some popularity based on its usage data and may not engage in harmful commercial practices, such as the deception of search engines, including index gaming, sneaky redirects, keyword stuffing, link spamming, or any other practices designed to deceive or manipulate legitimate site indexing and ranking.<sup>128</sup> The EC also mentioned the deception of consumers through deceptive or frustrating navigation, bait and switch advertising, deceptive billing practices, or other practices that mislead consumers. The end effect of what is being implemented is a ‘regulation’ of online commerce aimed at prohibiting deceptive practices to users and competitors. It is a welcome development that the specialised vertical market has been opened to external competition from Google’s rivals. However, while this may be pleasing to Google’s competitors, overall, these commitments do not touch upon the potential manipulation of results by Google’s own algorithmic metrics. The orientation of commitments is towards responding to competitors’ complaints, while the commitments remain minimalistic in terms of dealing with wider concerns in the horizontal search-engine market. Given that more vertical searches will be included, this could have a negative impact on the users’ experience in the primary market.

At the EU level, the existing Electronic Commerce Directive<sup>129</sup> also provides for a mechanism to apply for an injunction aimed at ‘the protection of the collective interests of consumers’.<sup>130</sup> This mechanism is devised to facilitate the free movement of services, thereby ensuring ‘a high level of consumer protection’. Member States may only restrict the free movement of services in exceptional cases of ‘public security, including the safeguarding of national security and defence, and the protection of consumers’.<sup>131</sup> Therefore, in the absence of a specialist regulation of online commerce, Article 6 of the Electronic Commerce Directive could be helpful as it refers, in particular, to commercial communications, i.e., advertising, including promotional offers, such as discounts, premiums, gifts, and unsolicited advertisements. In the eyes of its end-users, Google’s search-engine operates an online system of unsolicited advertisements. Furthermore, the area of competition is not excluded from the scope of application of this directive, as are, notably, tax, VAT, fiscal, or data protection issues.

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<sup>127</sup> See EC, Commitments, Case COMP/C-3/39740 – *Foundem and others*, 3 April 2013.

<sup>128</sup> *Ibid.*

<sup>129</sup> See e.g. the EC Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ [2000] 178/1.

<sup>130</sup> See recital 53.

<sup>131</sup> See Article 3 (4) (a) (i).

The cornerstone of the ongoing investigation against Google remains public policy, or wider non-economic considerations, such as the online privacy of Google's users as a fundamental human right.<sup>132</sup>

#### IV. CONCLUSIONS

The negotiated and re-negotiated commitments in the Google investigation are an attempt to regulate online commercial advertising that is taking place when, on one side, users search for keywords while on the other, advertisers bid for such keywords to distract users' attention. What once was essentially a process of searching through the internet has evolved into an advertising engine. A giant processor of a vast amount of information, Google has been under fire from competitors who felt downgraded in commercial search results when bidding for a place in specialised ads. The EC chose not to respond with a fine on the alleged anti-competitive conduct, as has traditionally been the case, but to remedy a truly complicated situation. Unfortunately, the proposed commitments fail to clearly address a wider competition concern over the possible decline in the quality of the organic search results as a result of more commercial ads, which will have an impact on Google's final users/consumers.

The commitments accepted by Google are not only quite long, but are also ambiguous pronouncements of the law applicable to Google's future conduct in the market. Therefore, the lack of an *erga omnes* effect of these commitments means they are limited to Google only, instead of clarifying the law for the benefit of many other online service providers, including advertisers. However, the most sensitive aspect of the above commitments remains the fact that they are not being exposed to judicial review. Therefore, unless they are successfully implemented and accepted by Google's vocal competitors and final users, such commitments may, indeed, weaken EU competition enforcement, in particular, in the area of abuse of dominance where the number of preceding prohibition decisions by the DG COMP has declined since the famous *Microsoft* ruling. Probably, the widespread criticisms of the theories of harm and network effects employed by the EC in the latter ruling discouraged the DG COMP from taking a bolder action.

In contrast, the EU Parliament's recent non-binding resolution, which passed with an overwhelming majority of 384 votes, is to be welcomed since it suggested a possible divestiture of internet giants by 'unbundling search engines from other commercial services'.<sup>133</sup> Should this happen to Google in the near future, the resolution will also apply, without discrimination, to all search-engines' providers.

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<sup>132</sup> See recently the European Commission's Statement 14/1646, 'Statement by Commissioner Vestager on Google antitrust investigations at the European Parliament (ECON committee meeting)', Brussels, 11 November 2014.

<sup>133</sup> See EU Parliament's Plenary Session of 26 November 2014, 'MEPs to vote on plans to separate internet search engines from commercial activities', available on <http://www.europarl.europa.eu/news/en/newsroom/content/20141126STO80726/html/MEPs-to-vote-on-plans-to-separate-search-engines-from-commercial-activities>.

Nonetheless, one thing is clear: irrespective of whether there will be a case or not, there will always be an angle of criticism for academics to lean on. However, the final decision rests in the very capable hands of the DG COMP to review the matter giving careful consideration of all the facts of the case, without any fear of further consequences and outside pressures, coming notably from the colour of politicians who also include the Commissioner for Competition, national ministers, and many more.