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The Google Commitments – how undue diversion of Internet traffic can be abusive?

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Statutory Declaration

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ABSTRACT

This paper is intended to identify possible abusive practices of Google with regard to specialized search market in order to assess the commitments accepted by DG Comp in January 2014. The EU competition investigation against the web giant touches upon several hottest topics of the competition debate and provides insight into recent developments in competition law enforcement on technology-enabled markets. Analysis of these proceedings will allow critical reflection on those developments.

To begin with putting analysis in the right context, the search engines market will be described as an asymmetrical two-sided platform. Also, the market power of Google will be assessed, revealing characteristics of super-dominance due to high barriers to entry and extreme concentration.

The next step is to verify the hypothesis that the commitments accepted by DG Comp are based on novel theory of harm which significantly departs from types of abuses previously defined in decisions of the Court of Justice. To investigate this hypothesis the available information and the concerns of the Commission with regard to potentially exclusionary conduct on specialized search market will be confronted with Article 102 case law. Allegations of Google's abuse will be confronted with tying and refusal to supply theories which seem *prima facie* applicable. This will be followed by applying the general framework for identifying exclusionary abuse in considering the "undue diversion of traffic" to constitute a *sui generis* type of favouring abuse.

In the light of the substantive analysis of Google's conduct in this paper the solution proposed by DG Comp is unsatisfactory. The measures proposed are not consistent in addressing easily identifiable harm whilst containing measures which severely intervene in the product design and can be only based on some novel and undocumented behavioural theory of harm. Furthermore, by accepting such solutions the Commission does not contribute to proper development of competition law, hence leaving space for legal uncertainty and possibly exceeding its mandate. This leads author to the conclusion that from systemic perspective Article 7 procedure is more suitable for cases which include novel theories, even if they involve dynamic new technologies markets.

Keywords:

Technology-enabled market

Intellectual Property

Innovation

Meta-data

Network Effects

Refusal to Supply

Essential Facility

Technological Tying

Microsoft

Google

Diversion of traffic

Favouring

Behavioural

Misleading of users

Product design

Commitments

List of Abbreviations

EU	European Union
GC	General Court
CoJ	Court of Justice of the EU
IE	Internet Explorer
IPR	Intellectual Property Rights
TFEU	Treaty on the Functioning of the European Union
ECR	European Community Reports
ECJ	European Competition Journal
CMLR	Common Market Law Review
JoCL&E	Journal of Competition Law and Economics

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INTRODUCTION

"Aggressive, competitive conduct by a monopolist is highly beneficial to consumers…
Aggressive, exclusionary conduct by a monopolist is deleterious to consumers…
There is only one problem. Competitive and exclusionary conduct look alike."[1]

Frank H. Easterbrook

The dynamics of the search engine market are not easy to assess, representing a classic mixture of pro- and possibly anti-competitive elements. Google, having established its leading position in the search engine market, has been implementing the strategy of substituting competitors' links with its own services. The transition from being a gateway to other content-providers to becoming a one-stop shop started with acquiring YouTube in 2006 and will continue in the future.

The EU competition investigation against the web giant has all the potential of the *Microsoft* saga. It touches upon several on the hottest topics of the competition debate: the standard of intervention on new technology markets, the abuse on two-sided non-transactional markets, and the usage of commitments procedure. Furthermore, the unique business models involved and the Internet environment, so much different from traditional supply chain structure, make the application of the existing case law even more challenging.

The purpose of this paper is to critically assess the commitments proposal published on January 31st, 2014 in the light of the legal framework of Article 102 TFEU.[2] To that extent the primary focus will be on the possible substantive theory of abuse applicable to Google's conduct towards its vertical search competitors. The second objective is to look at the proposed commitments from the systemic perspective. Due to scarce documentation of the case the facts will be deducted from all available sources of information: Commission documents, parties' publications and press releases. The analysis of the case will rely on critical application of the case law of the European Courts, both with regard to specific types and the general theory of abuse.

In the first chapter, a brief overview of the EU proceedings against Google will be followed by assessment of market power. Due to limited scope of this paper, the market analysis will rely on Commission's findings which will be complemented by remarks necessary to understand Google's environment and conduct. In this regard we will look at the specific features of two-

[1] Easterbrook F., "On Identifying Exclusionary Conduct", (1986) 61 *Notre Dame Law Review*, p. 972
[2] Commission press release MEMO/10/47, "Statement of Press Reports on Complaints against Google", 24.02.2014

sided platforms and identify incentives and barriers for the competitors on search engine markets.

Subsequently, the concerns of the Commission with regard to potentially exclusionary conduct on specialized search market will be confronted with Article 102 case law in order to identify potential abuse. Firstly, the facts of the case will be considered in the light of *Hilti/Microsoft* case law on tying.[3] The full five-element test, which includes foreclosing effects and objective justification analysis, will provide necessary input for further considerations. Secondly, the position of Google towards specialized search engines will be considered under refusal to supply doctrine, taking into account theories of behavioural economy. Lastly, the general framework for identifying exclusionary abuse will be used in considering the 'undue diversion of traffic' to constitute a *sui generis* type of favouring abuse.

In the final chapter the measures accepted by DG Comp will be compared with the substantive analysis provided in Chapter II. Having assessed the suitability of the proposed obligations we will look at the Google case as a whole. In that respect the implications of these proceedings for the enforcement of competition law on new technology markets will be considered. Finally, the use of negotiated Article 9 procedure in this case will be appreciated.[4]

It seems that in Google case the Commission was wary not to penalize the giant for winning the game by avoiding adversarial proceedings. This research will investigate whether such policy is always optimal for technology-enabled markets.

[3] Case C-53/92 P, Hilti v. Commission, [1994] ECR I-667; Case T-201/04 Microsoft v. Commission [2007] ECR II-3601, (hereinafter as "Microsoft")

[4] Council Regulation 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] O.J. L1

Chapter I: Foundem and others vs. Google EU antitrust proceedings

In recent years (2010-2014) numerous antitrust authorities and civil courts around the globe were approached to intervene on search engine market. Also in the EU, on February 24, 2010 the Commission announced that it would examine complaints against the most popular search engine Google.[5] The first three complainants were specialized search providers: Foundem.co.uk, Ciao.de and Ejustice.fr, but subsequently they were joined by 15 other undertakings including publishers' and consumers' associations which resulted in broadening of the scope of investigation.[6] The allegations against Google can be categorized in 3 groups:

- discrimination of specialized search competitors in Google search engine (ether by downgrading competitors' links on results page and AdWords or by introduction of specialized search pool),
- unauthorized and non-transparent use of complainants' original content in own services,
- exclusionary practices with regard to online advertising (exclusive dealing and restriction of portability of advertising campaigns).

After over three years of examination, on February 5, 2014 the Commissioner for Competition announced his acceptance of the current – third – version of commitments (hereinafter as "Google Commitments") proposed by Google and that he had no intention of subjecting them to further market testing.[7] The proposal has been submitted to the College for adoption as Article 9 decision of the Commission[8]. Though formally it still can be modified, major changes are rather unlikely[9].

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[5] Commission press release MEMO/10/47, supra note 2; the investigation was formally initiated on November 30, 2010; Commission Press Release IP/10/1624, "Antitrust: Commission probes allegations of antitrust violations by Google", 30.11.2010

[6] Wall Street Journal, *EU Examines Antitrust Complaints About Google,* at http://online.wsj.com/news/articles/SB10001424052748704240004575084881889667848 (22.04.2014)

[7] Commissioner Joaquín Almunia: *"The relevant opinions of stakeholders – and the information we needed from them – are already well-known to the Commission. So I consider that at this point we do not need a new market test. There is no requirement to do so as the structure of the commitments remains unchanged.[…]*
The concessions we extracted from Google in this case are far-reaching and have the clear potential to restore a level playing-field in the important markets of online search and advertising. […] Moreover, these commitments are forward-looking and enforceable. They would ensure competitive conditions are guaranteed for the years to come. I am convinced this would help avoiding that in this fast-evolving sector the problems we've seen in the past are repeated in the future.", Commission press release SPEECH/24/93, 5.02.2014

[8] Council Regulation 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] O.J. L1

[9] See: Commission publication, "Minutes of the 2075 Meeting of the Commission held in Brussels on 12.02.14, PV(2014) 2075 final, p. 19-25

Antitrust investigation conducted under Article 9 of Regulation 1/2003, due to limited transparency, provides us with only basic information about the Commissions' findings and concerns. Some information can be extracted from press releases and call for market test from 2013.[10] Also the Commitments proposal can be of some help. Since after long internal negotiations the Commission found them to be appropriate to address its concerns, the design of remedies should give us some additional insight into Commission's findings in the substantial analysis.

Notwithstanding that the final decision has not been adopted yet, the available information about this investigation allows us to make some observations about the implementation process and the competition policy of the Commission.

I.1. The "four concerns" of the Commission

In its documents the Commission mentioned four concerns which may allegedly lead to abuse of dominant position. The laconic statements do not refer to any known substantive theory of abuse, they only provide description of potentially abusive practices. First two are related to specialized search services, the other two concern advertising:

1) **Specialized search.** The Commission found that Google's inclusion of specialized results unit into its organic search results can unduly divert traffic from specialized search (also called "vertical search") competitors. Specialized search platforms are dedicated to find specific category of products and services from various sources and to conclude transactions at the platform or provide deep links to the source, while **"**organic search" (also called "general", "generic" or "horizontal search") is which a general search that ranks pages relevance based on objective criteria, using universal algorithm. Google, holding majority share of organic search market, presented specialized search results (e.g. Google Shopping, Google Maps, see *Picture 1.*) on most prominent part of the results

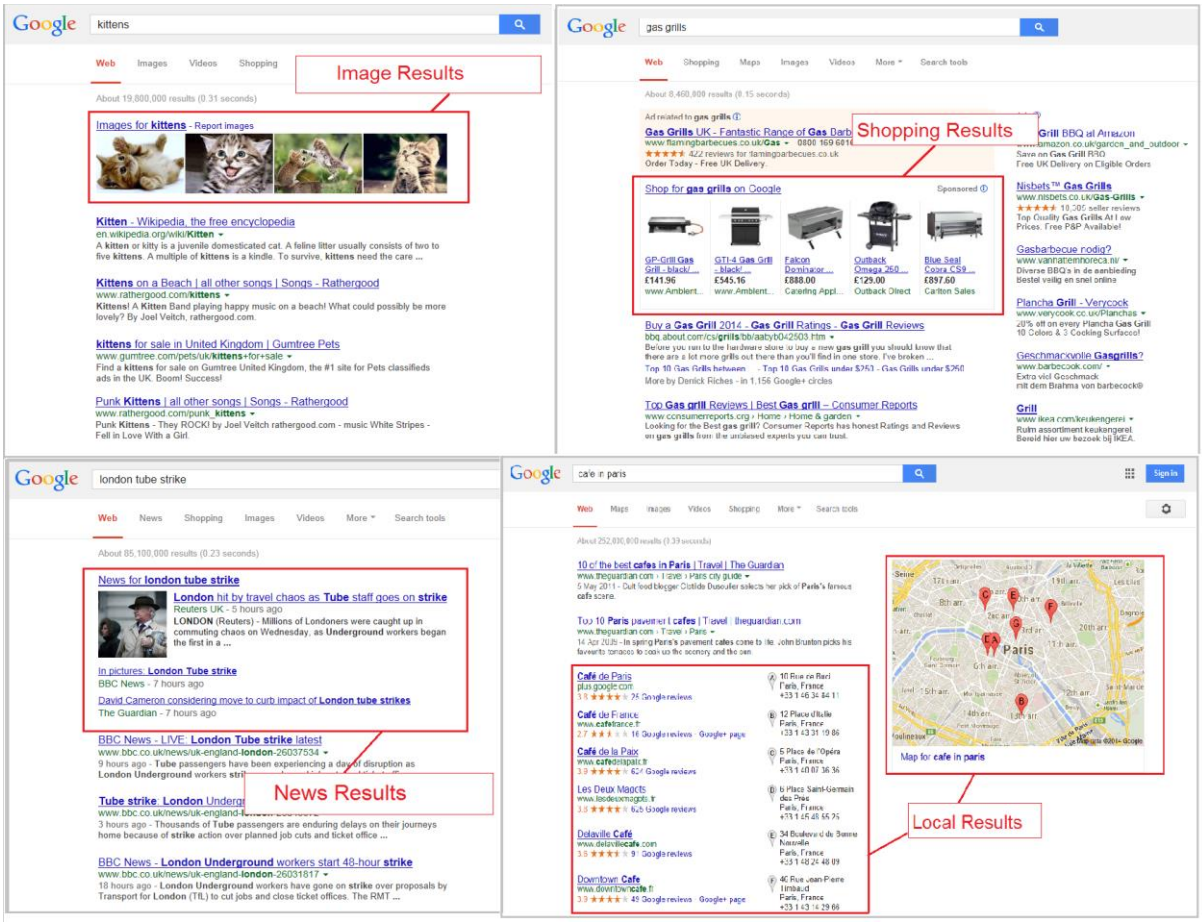
[10] Commission press release IP/10/1624: "Antitrust: Commission probes allegations of antitrust violations by Google", 30.11.2010; Commission press release MEMO/13/383, "Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers", 25.04.2013; Commitments in case COMP/C-3/39.740 Foundem and others for market test, 3.04.2013, at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_8608_5.pdf (22.04.2014); Commitments in case COMP/C-3/39.740 Foundem and others, 31.10.2013, at: http://blogs.ft.com/brusselsblog/files/2013/11/comparison-of-proposals.pdf (22.04.2014); Commitments in case COMP/C-3/39.740 Foundem and others, 31.01.2014 at: http://docs.dpaq.de/6448-google_commitments_full.pdf (22.04.2014) - (hereinafter referred as "the Commitments" or "Google Commitments");
Commission press release 5.02.2014, SPEECH/24/93; Commission press release MEMO/14/87, "Antitrust: Commission obtains from Google comparable display of specialized search rivals - Frequently asked questions", 5.02.14,

page which is usually reserved for the most relevant outcome of organic search. Google also did not inform its users that his own specialized search results were not picked on same algorithmic criteria. Exclusion of a potentially more relevant specialized search results provided by competitors may reduce their incoming traffic and incentive to innovate.[11]

2) **Content Use.** Google used competitor's original content in its own specialized search services, e.g. placing users' reviews of products directly on Google results page without authorization of content owners which disincentivizes consumers to go to source website and thus may unduly divert traffic from them and reduce their incentive to invest in original content supply.[12]
3) **Exclusivity agreements with publishers for the provision of online search advertising on their web sites**. Google obliged ad publishers to make all or majority of their online search advertising with Google. Considering Google's majority share of EU market such parallel network of vertical agreements may reduce choice and innovation.[13]
4) **Contractual restrictions on the portability and management of online search advertising campaigns** across Google AdWords and competing platforms which artificially created switching costs and prohibited creation of an innovative software for campaign management.[14]

Exclusionary practices with regard to search advertising through exclusive dealing and limiting ad campaign portability (concern no. 3 and 4) fall outside of the scope of this paper. Restrictive character of such conduct can be easily assessed in the light of existing jurisprudence and Commission documents and was duly addressed in the Commitments. Also, practices with regard to advertising are not directly interlinked with less clear specialized search issue and so the latter can be assessed separately.

[11] Commission press release MEMO/13/383, supra note 10, p.1
[12] Ibidem, p. 2
[13] Ibidem, p. 2
[14] Ibidem, p. 3



Picture 1. Google specialized search – different variants: Google Image, Google Shopping, Google News, Google Local Results/Maps

Following official documents it can be inferred that Commission's theory of harm with regard to specialized search is based on the following logic:

- Google is dominant on organic search market,
- Specialized search unit integrated into Google's organic results page provides a distinct vertical search service – a product offered by Google which competes with specialized search engines like Foundem.com,
- Google favours its vertical search services by displaying them prominently and uses competitors' content without permission, thus unduly 'diverts' clicks from rival sites and leverages its dominance from organic to vertical search market.

Those three elements of the alleged Commission's reasoning will be further analysed in this paper.

I.2. Two-sided Search Engines Market

Focus of this research is primarily on the type of abuse found in this case. Yet, the determination of Google's dominance is a prerequisite for any decision based on Article 102 TFEU. Due to lack of all relevant data, Google's dominant position will be assumed based on Commission's positive conclusions. Nevertheless, a few remarks on the relevant market should be made to better assess case-specificity and possible general implication of the case.

The Commission's preliminary findings are that Google is dominant in the EEA both in web search and search advertising. This is due to very high and stable market share (over 90% in web search), significant barriers to entry and network effects in both markets.[15] However, establishing Google's dominance or even defining relevant market is a very complex task. According to the Notice on market definition:

> "the relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use"[16]

When considering basic product characteristic, Google's search engine is traditionally considered to compete with similar search engines like Bing or Yahoo. But ever since it started do include specialized search services in its results (acquisition of YouTube in 2006) Google has been directly competing with specialized search engines, online map services, news publishers, content providers etc. Clear distinction of markets is difficult in the Internet while all successful players tend to merge and link their products to provide its users with as advanced and universal tools as possible. Often successful online-business models include multiple functionalities offered as part of specific "environment" or platform which compete with products offered "solo" by other players (e.g. Google vs. Foundem).

In fact, web search service is a business model which can be described two-sided non-transaction market – it brings together advertisers on one side and Internet users on the other though the parties do not conclude any transaction between each other.[17] The users are not charged for use of the service, so the whole revenue comes from the other side of the platform. This is economically justifiable because positive indirect effect is just on advertises' side while users, similarly like readers to advertising in newspapers, are neutral

[15] Commission press release MEMO/13/383, supra note 9, p. 1

[16] Commission Notice on the definition of relevant market for the purposes of Community competition law, 9.12.1997, O.J. C372/03, para. 7

[17] L. FILLISTRUCCHI, D. GERADIN, C. VAN DAMME, "Identifying Two-sided Markets", (2013) 36/1, *World Competition*, p. 41; see also I. LIANOS, E. MOTHENKOVA, "Market Dominance and Search Quality in the Search Engine Market", (2013) 9/2 JoCL&E, pp. 419-455

about the amount and quality of search advertising. This is not why they use or not use the platform so there is no circular interdependence of the two groups of clients.[18]

Also specialized search service brings together two sides: consumers and sellers (online shops, hotels, restaurants etc.). This market is also two-sided, but in more classic way – positive indirect effects are present on both sides and interdependent (amount of users effects on attractiveness of platform for sellers and vice versa). One of characteristics of such double-sided platforms is that the company can rationally invest in innovation of its product perpetually, even in absence of direct competition pressure. [19] Also, there is no incentive for excessive pricing because it would reduce number of actors on the overcharged side of the platform and in effect make it less attractive to the other one.

These features are only partially valid for organic search where value for users is detached from advertisers' presence and some types of abusive conducts towards advertisers can be profitable, e.g. excessive pricing, exclusive dealing, discrimination etc.

The two conclusions: that Google is operating in two-sided market and that organic search is an asymmetric type of such market, constitute a great challenge for application of standard market power tests and theories of harm.[20] Incentives for Google to provide more, cheaper and better are different then for simple one-sided seller. Market power of two-sided platform cannot be defined by market share of one side only, though in this case Google search engine acquired significant majority share on both sides. Implications of those findings for the assessment of the conduct will be considered in Chapter II.

I.2.1. Market Shares

While finding dominance under current enforcement standards in EU, there is still strong emphasis on market share.[21] Google's market share in general search has been stable for last decade and is above 90% in EEA and is similar in all Member States. Only in Czech Republic market share is below 89% - it crossed 71% in 2013 and it is rising (see Table 1). Similar market shares can be quoted for search advertising market. *Prima facie,* if we applied AKZO line of case-law, Google holds stable dominant position, maybe even super-dominant.[22]

[18] R. O'DONOGHUE, A.J. PADILLA, *The Law and Economics of art 102*, Hart, Portland, 2010, p. 105
[19] G. PARKER, M. VAN ALSTYNE, "Two-Sided Network Effects: A Theory of Information Product Design", (2005) 51/10, *Management Science*, pp. 1494–1504
[20] L. FILLISTRUCCHI, D. GERADIN, C. VAN DAMME, supra note 15, p. 37
[21] Case C-62/86, AKZO v. Commission, [1991] ECR I-3359, para. 60
[22] ibidem; Case C-333/94 P, Tetra Pak v. Commission, [1996] ECR I-5951, para. 31, (hereinafter as "Tetra Pak II")

However, following the representatives of Chicago school "equating high market shares with dominance in the case of these 'fragile monopolists' of the new economy is potentially very damaging. (…) A better test of market power is contestability. If the market is contestable a firm with high market share does not enjoy a position of dominance because potential entry imposes an effective constrain on its conduct"[23]. Indeed, it can be argued that Google is a contestable monopolist since there are no switching costs for search engines consumers – "the competition is just one click away!" as Larry Page, Google co-founder, says.[24] This reasoning was also followed by civil court in Sao Paulo where Google with 95% market share was not found to be a monopoly.[25]

Also, the Commission decision approving Skype acquisition by Microsoft (together holding 80-90% of consumer communications market on the Internet) was recently upheld by GC, which indicates more openness of the EU in this regard in the new technologies sector.[26] It should be therefore considered, that with regard to market dominance Google's market share is an indicative, but not conclusive factor.

I.2.2. Network Effects and other barriers of entry

Commission referred to Google dominance also in the context of strong network effects.[27] Network effect can be direct or indirect. Direct effect arises when user's utility of the product increases with the number of other users (the more popular the better for individual user)[28]. Indirect network effect is when people increasingly use the product or technology which

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[23] C. AHLBORN, D. EVANS, A.J. PADILLA, "Competition Policy in the New Economy: Is European Competition Law up to the Challenge?" (2001) 22 ECLR, p. 156; See also: R. Schmalensee "Antitrust Issues in Schumpeterian Industries", (2000), *AEA Papers and Proceedings*, p.193

[24] Forbes, "Google's Larry Page: Competition Is One Click Away and Other Quotes of the Day" at http://www.forbes.com/sites/davidwismer/2012/10/14/googles-larry-page-competition-is-one-click-away-and-other-quotes-of-the-week/ 22.04.2014

[25] "*Google's leadership in the internet search segment in Brazil cannot be mistaken with a monopoly of that activity*", Case BUSCAPÉ vs. Google, Summary Judgment ruling of 5.09.2012, 18th Civil Court of the State of Sao Paulo Lawsuit n° 583.00.2012.131958-7, at http://pl.scribd.com/doc/105502055/BUSCAPE%CC%81-vs-Google-Summary-Judgment-ruling, 22.04.2014

[26] "*The Commission took the view that that combination did not give rise to serious doubts as to the compatibility of the concentration with the internal market. First, in this respect, it took the view that market shares are not particularly indicative of competitive strength in a fast-growing market and that, in so far as video communications services are offered free of charge, any attempt to increase prices would encourage consumers to switch supplier. The same would be true if the merged entity stopped innovating, since consumers attach great importance to product innovation. Second, the new entity would face competition from both new entrants offering innovative products and from the numerous existing operators, including Google and Facebook."* Case T‑79/12, Cisco Systems Inc. vs Commission, 11.12.2013, (not yet published), para. 55

[27] Commission MEMO/13/383, supra note 9, p. 1

[28] M. LAO, "Networks, Access and Essential Facilities: form terminal Railroad to Microsoft", (2009) 62, *SMU Law Review*, pp. 560-562

makes this technology widespread and other technologies, products, even business models are adjusted to that one, when it becomes a *de facto* standard.[29]

Google search engine is benefiting from both: direct network effect (the more users and search queries the more exact search results) as well as indirect network effect (the more exact matching of ads to individual users by one provider the more attractive is its search advertising service for companies on the other side of platform). Indirect network effect is also reinforced by other actors adjusting the design of their web pages to score high in Google Page Rank and not in other algorithms.

Network effects in the Internet are very beneficial for the consumers, but by definition they also undermine competitive structure by picking the 'winner', the default tool we use for every functionality. For proper assessment it is crucial to look at a long term effect.

European Union is much less fond of network effects in its antitrust law then the Chicago School. While the EU is open to assess its pro- and anti-competitive implications when analysing the conduct, it is definitely an aggravating factor in the market dominance test:

> "The conduct may allow the dominant undertaking to 'tip' a market characterized by network effects in its favour or to further entrench its position on such a market. Likewise, if entry barriers in the upstream and/or downstream market are significant, this means that it may be costly for competitors to overcome possible foreclosure through vertical integration." [30]

High barriers of entry resulting from network effects are further backed by IP rights – the famous Google algorithm protected by trade secret (the original one was patented and it is public, but after thousands of amendments it is again considered a trade secret[31]) and the unprecedented amount of collected data.

Google is a single entity holding probably the largest collection of personal and meta-data in the history of mankind and its distance to competitors is increasing every day. So far there have been no examples in the EU jurisprudence of taking into account data collection aspect in competition investigation – even though the issue was raised in context of the

[29] *"the more people use the platform, the more there will be invested in developing products compatible with that platform, which in turn reinforces the popularity of that platform*"; Microsoft, supra note 3, para. 1061

[30] Commission Communication of 24.02.2009, Guidance on the Commission's enforcement priorities in applying Article 102 of the TFEU to abusive exclusionary conduct by dominant undertakings, [2009], O.J. C45/7, para. 20, (hereinafter as „Guidance of the Commission")

[31] D. GIFFORD, R. KURDLE, "Antitrust Approaches to Dynamically Competitive Industries in the United States and The European Union", (2011) 7/3 JoCL&E, p.708

Google/Doubleclick merger.[32] It is not mentioned in the Commission's documents if Google's database was considered relevant with regard to dominance assessment, though it seems absolutely appropriate in this case. The amount of data Google holds and collects reinforces its supremacy on organic search market and constitutes major barrier to entry.

To sum up, the Commission's determination of Google's market dominance with regard to organic search and search advertising seems to be in line with current state of law and specificity of innovative Internet markets.[33] Extremely high and stable market shares combined with finding of very strong network effects and other barriers to entry lead to conclusion that Google is dominant and holds close to monopoly position.[34] However, the reference to two markets: web search and search advertising is not the full picture, as those are inseparable elements of the same two-sided platform. For this reason, even with extremely high market share Google still has some incentives to innovate and improve quality of its search results, which should be beneficial for consumer welfare. It is, however, not easy to assess how strong those incentives are in comparison with possible benefits from capturing neighbouring markets (vertical search) of exploitative or exclusionary practices towards advertisers, due to asymmetrical character of this platform.

Contestability of Google's position on the market is severely undermined by strong network effects, IP rights and unmatched database. It is for these reasons, though "competition is just one click away", nine out of ten Europeans never make this click.

I.3. Procedural remarks

The Commission decided to investigate claims against Google in the Article 9 commitments procedure, which is in line with general trend in recent years. The limitations of this

[32] Commission Decision in Case COMP/M.4731 Google/DoubleClick of 11.03.2008, declaring a concentration compatible with the common market and the functioning of the EEA Agreement, at http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf (22.04.2014), PAPPAS S. A., "Intervention by Spyros A. Pappas, Attorney-at-Law, former Director General in the European Commission – Public Hearing on Data protection on the Internet (Google-DoubleClick and other case studies)", 15.02.2008, at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/pappas_intervention_/Pappas_Intervention_en.pdf (22.04.2014)

[33] J. Almunia: "Some claim that there is no need for antitrust intervention in high-tech markets. As you may remember, this is what Microsoft argued in its antitrust cases here as in the EU. The argument is that it is impossible for a company to become dominant – and to stay dominant – in sectors where new products, platforms and services appear all the time. I'm not convinced by this argument. In fact, owing to some specific features of these markets, it can actually be easier for a company to hold a dominant position over time.
One such feature is network effects, which tend to reinforce the position of market leaders. These effects can make markets become highly concentrated and can impose significant barriers to entry. Similarly, switching costs may prevent the displacement of market leaders because customers are locked in.", Commission press release SPEECH/13/758, "Abuse of dominance: a view from the EU, European Commission", 27.09.2013,

[34] Tetra Pak II, supra note 22, para. 31

procedure rise concerns weather it is appropriate for such complex and novel cases.

The prohibition decision under Article 7 is a powerful tool with significant deterring effect due to possible high fines, yet the Commission declared openly that it intends to use Article 9 procedure in the area of new technologies.[35] The policy of pursuing commitments investigations has twofold effects. On one hand it is beneficial for the market to address potential market distortions as soon as possible, especially when dynamic changes on the market would be irreversible after years-long full investigation.[36] On the other hand, negotiated enforcement of legal rules may raise many concerns about legal certainty, lack of transparency, limitation of party's rights in the proceedings and more discretionary application of law by the Commission without proper judicial supervision.[37] As observed by some authors: "*commitment decisions were originally expected to be unusual and rare, and mostly meant to resolve recurring competition problems. (..) However, in recent years (…) the EC appears to make use of commitment decisions more and more, including in investigation that rise novel legal questions or rest upon less-established theories of harm."*[38]

The systemic implications of using commitments proceedings in this case will be further discussed in Chapter III.

Chapter II: Google specialized search under Article 102 TFEU

Having established, or rather having assumed Google's dominance based on the information available, it is time to look at its conduct. Commissioner's acceptance of the Commitments proposal proves that Commission believes to have identified abusive conduct prohibited under Article 102 TFEU. [39] In this chapter the Commission's concerns will be confronted with the current state of EU competition law.

The allegations against Google with regard to specialized search did not include any exploitative abuses (e.g. pricing), but rather that its conduct at the organic search market excludes competitors from the other markets. Use of dominance in one market as a leverage

[35] Council Regulation 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] O.J. L1; Commission press release SPEECH/13/758, supra note 33, 27.09.2013

[36] Case C-52/09, Konkurrensverket vs TeliaSonera Sverge Ab, [2011] ECR I-527, para. 108 (hereinafter as "TeliaSonera")

[37] See: P. MARSDEN, "The Emperor's Clothes Laid Bare: Commitments Creating the Appearance of Law, While Denying Access to Law, (2013)8/1 *CPI Antitrust Chronicle;* Y. BOOTTERMAN, A. APSTA, "Towards a more sustainable use of commitment decisions in Article 102 TFEU cases", (2013), *Journal of Antiturst Enforcement*

[38] Y. BOOTTERMAN, A. APSTA, supra note 37, p. 23

[39] European Commission SPEECH/24/93, 5.02.2014

could be classified as tying, refusal to supply or possibly some other unknown non-pricing exclusionary practice with anti-competitive effect. All those scenarios will be examined, taking into account existing case-law, relevant tests and general objectives of Article 102 TFUE. The second concern (use of competitors' content) will be analysed only in the last point because it does not even remotely resemble known types of abuses. Before applying specific tests, some general remarks on abuse of dominance will be made.

II.1. Article 102 and the technology-enabled markets

The consumers' welfare is not mentioned in Article 102 TFUE, but according to both – the Commission and the Court of Justice – it is the primary objective of EU Competition law and it is best achieved by protection of effective competitive process.[40][41] In this context "protection of competitive process" should be distinguished from "protection of competitors" of which Europeans have been often accused by their American colleagues, usually with reference to the dreaded word "Ordoliberalism".[42] Though there are so far no proofs that the European Court of Justice would be willing to accept any balancing test of pro- and anti-competitive effects of a conduct (there is no application of "rule of reason" like in the US), there is however a visible shift from formalistic form-based approach towards effect-based one.[43] While some types of behaviour are still qualified as abusive with only the assumption that they restrict competition (form-based tests, i.e. predatory pricing), for some more sophisticated types of behaviours where pro- and anti-competitive effects often coexist – such restrictive effect has to be proven by the Commission (effect-based tests, i.e. technological integration, selective above-price cuts).[44]

Article 102 TFEU which prohibits the abuse of dominant position does not provide any definition thereof, only enumerates some examples. The basic definition of exclusionary abuse was provided by case law, and so in *Hoffman-La Roche* the Court of Justice explains:

> *"An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of very presence of the undertaking in question the degree of competition is weakened*

[40] Case 6/72, Continental Can vs Commission, [1973] ECR 215, para. 25; also: *"The Commission will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.",* Guidance of the Commission, supra note 30, para. 5

[41] E. ØSTERUD, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law*, Kluwer Law International, London, 2010, p. 42

[42] See e.g. D. GIFFORD, R. KURDLE, supra note 31, p. 717

[43] Case C-280/08 P, Deutsche Telekom v Commission, [2010] ECR I-09555, cf. TeliaSonera, supra note 36; See: R.WISH, D. BAILEY, *Competition Law,* 7th ed., Oxford University Press, New York, 2012, p. 201

[44] E. ØSTERUD, supra note 41, pp. 49-52

and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of the competition still existing in the market or the growth of that competition."[45]

The general definition mentions two factors: the form of conduct and the effect on market structure. The vague "abnormal methods" were further clarified as "other than those which come within the scope of competition on merits".[46] Notion of "competition on merits" is exemplified in vast case law and summarized by Commission as offering lower prices, better quality and a wider choice of new and improved goods and services.[47]

The catalogue of types of abuses prohibited by Art. 102 TFEU is not exhaustive and every now and then new types are identified.[48] Only recently, in *AstraZeneca* judgment CoJ found that making misleading representations before patent office and undue extension of patent protection period on pharmaceuticals amounted to an abuse of dominance.[49] Therefore, a proper analysis of Google case cannot concentrate only on already defined types of abuse and should consider also a possible new type.

Possible undue interventionism is partially reduced by so called "as efficient competitor" test, which precludes the use of EU Competition law against dominant firm by its less efficient competitors.[50] Yet, the question of unduly interventionist approach (false positives) is especially sensitive with regard to dynamic industries where competition is often won not by superior allocative or productive efficiency but through dynamic efficiency. The dynamic efficiency is achieved through so called 'drastic innovation', Schumpeterian creative destruction, introduction of new technology that changes the whole market.[51]

There is an ongoing discussion on to what extent antitrust system should intervene in those dynamic markets described as "new economy" or "technology-enabled markets".[52] It is argued that in those markets there is usually one winner, a leader holding *de facto* monopolistic position, but this position is often temporary and can be challenged by another

[45] Case 85/76, Hoffmann-La Roche vs Commission, [1979] ECR 461, para. 91 (emphasis added)
[46] Case C-280/08P Deutsche Telekom vs Commission, supra note 42, para. 177; Microsoft, supra note 3, para.1070
[47] Guidance of the Commission, supra note 30, para. 5
[48] Tetra Pak II, supra note 22, para. 37
[49] Case C-457/10P, AstraZeneca vs Commission, 6.12.2012, not yet published ; R. WISH, D. BAILEY, supra note 43, p. 193
[50] Case C-280/08 P, Deutsche Telekom, supra note 43, para. 177
[51] E. ØSTERUD, supra note 41, p.28, also: M. RATO, N. PETIT, "Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?", (2013) 4 ECJ, p. 3
[52] M. RATO, N. PETIT, supra note 51, pp. 1-2; GIFFORD, R. KURDLE, supra note 31

"drastic innovator". The perspective of overtaking this monopoly position is a big incentive to innovate for the leader and its rivals.[53]

The position of CoJ on this matter was clarified in *TeliaSonera* decision: it favours a non-differential application of competition rules towards new technologies market, but at the same time recognizes that in case of abuse the intervention should be as quick as possible. [54] It seems that the Commission's policy in this regard is in line with the CoJ, though not very consistent in general. On one hand it recognizes that *ex-ante* sector specific regulation is not a suitable tool for newly emerging markets.[55] On the other hand the Commission sometimes pursues this strategy on the field of competition policy with regard to technology-enabled markets, through negotiation of commitments which shape obligations of market players without redress to any known theory of harm.[56]

This approach is the opposite to the one proposed by Rato and Petit, who argue for same standards as to selection of procedure (no ex-ante regulation, no commitments overuse) but double caution with regard to finding of abuse in those markets.[57]

Rato and Petit provide three reasons why antitrust authorities should rather err on the side of false negatives than false positives: (1) these markets are often *"combinatorial, […] they draw on distinct technologies whose reach set of components can be combined and recombined to create new products"* and undue intervention can be detrimental not only for relevant market but for more related and interdependent components, (2) limiting rewards of market leaders will reduce incentives to innovate for both the infringer and the potential innovative pretenders, (3) "*negative consequences of over-enforcement will be more*

[53] D. GIFFORD, R. KURDLE, supra note 31, p. 705

[54] *"Moreover, taking into account the objective of the competition rules, as stated in paragraph 22 of this judgment, their application cannot depend on whether the market concerned has already reached a certain level of maturity. Particularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible, to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking which has a dominant position on that market or on a closely linked neighbouring market, in other words it requires action before the anti-competitive effects of that strategy are realised."* TeliaSonera, supra note 36, para. 108

[55] *„Newly emerging markets should not be subject to inappropriate obligation, even if there is a first mover advantage. […] The purpose of not subjecting newly emerging markets to inappropriate obligations is to promote innovation",* Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communication sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 2007, O.J. L3334/65, para. 7

[56] Commission press release MEMO/13/189, "Antitrust: commitment decisions – frequently asked questions– Commitments", 8.03.2013, p.2; Commission press release SPEECH/13/758, supra note 33

[57] See M. RATO, N. PETIT, supra note 51,

pronounced in technology enabled markets" because they are *"deemed to be the key drivers of modern, knowledge-based economy"*.[58]

II.2. The old and the new tying

An undertaking engages in tying when it makes a purchase of one service or good conditional on purchase of another. The rationale of prohibition of abusive tying is traditionally based on economic doctrine of 'leveraging'. In this case a company with monopoly power in the tying market engages in tying practices in order to further monopolize complementary markets.[59] However, tying is often an economically justifiable conduct with possible pro-competitive effects therefore it is only abusive under certain conditions listed below.

Tying can have different forms depending on which way customer is coerced to accept tying: contractually (when he cannot purchase one product without another), economically (also called mixed bundling, when products bought separately are significantly more expensive then bought together) or technologically (product is technically integrated into another product and sold as one).[60] The third category is represented by *Microsoft* judgment of the General Court with regard to Windows Media Player integrated into Windows OS. *Prima facie* the third type seems the most relevant to Google vertical search integrated into search engine.

The classification of tying is relevant, as some commentators distinguish different approach of Court of Justice between the first two categories and the third one. According to Østerud contractual and economical tying remain form-based abuses as applied in *Hilti* and *Tetra Pak II*, while in *Microsoft* the General Court endorsed Commission's effort to prove foreclosing effect of technological tying and implicitly sanctioned the new effect-based test.[61] Other authors, however, consider *Microsoft* to be consolidation of all tying case-law and that foreclosing effect is one of prerequisites of abusive tying.[62] Either way, five conditions of tying

[58] ibidem, pp. 9-10
[59] See: J. CHOI, C. STEFANADIS, "Tying, Investment and the Dynamic Leverage Theory", (2001) 32 *The RAND Journal of Economics*, p.54-55
[60] R. O'DONOGHUE, A.J. PADILLA, supra note 18, p. 206
[61] E. ØSTERUD, supra note 41, p. 90
[62] R. O'DONOGHUE, A.J. PADILLA, supra note 18; M. DOLMANS, T. GRAF, "Analysis of Tying under Article 82 EC: The European Commission's Microsoft Decision in Perspective" (2004) 27, *World Competition*, pp. 225-244

deducted from *Hilti/Microsoft* case law seem relevant to the Google case and will be analysed below. [63]

II.2.1. Five-step test for tying

1) Undertaking is dominant in tying market[64] - this is a general precondition of any abuse. As concluded in Chapter I, Google is dominant in organic search market which it presumably uses to tie specialized search service.

2) Separate product test - if the case against Google is based on tying the Commission would have to meet the burden of proof that there are two distinct products involved and not merely parts of the same one. [65]

   First, we should check if there is substantial customer demand for tying product without the tied one.[66] Maybe there is a portion of users that would like to go back to "twelve blue links" without specialized search unit, but would this group be "substantial" enough to sustain stand-alone search engine? Like in the *Microsoft* case there are no conclusive evidence for that since all major search engines include specialized search feature. But let's look at indirect evidence.

   Second, but not sufficient indicator is to establish existence of demand for the tied product outside of the bundle.[67] In this case there is indeed demand for specialized search services offered separately from organic search - examples are complainants' products. One problem is that the specialized search unit displayed at Google's results page does not have same characteristics as specialized search platforms. To quote recent decision of Brazilian civil court in a similar case: "Google Shopping is not a shopping comparison site like Buscapé and Bondfaro (…) Google Shopping is one more among the thematic search options of Google search (…) Google Shopping is not a "site" to compare prices, but just a thematic search option within the generic search made available by Google Search."[68]. What is incorporated into organic search is only a display of some excerpts of those specialized services without their key functions, more like an advertisement of other product then a product itself. It is

[63] P. CRAIG, G. DE BURCA, *EU Law. Text Cases and Materials*, 5th ed., Oxford University Press, New York, 2011, p. 691; M. DOLMANS, T. GRAF, supra note 62, p. 226,
[64] Case C-53/92 P, Hilti v. Commission, [1994] ECR I-667, para. 74
[65] R. O'DONOGHUE, A.J. PADILLA, supra note 18, p.617
[66] Guidance of the Commission, supra note 30, para. 51
[67] Ibidem; Microsoft, supra note 3, para. 917, 921 and 922
[68] Case BUSCAPÉ vs. Google, supra note 24

therefore questionable weather existence of demand for specialized search websites proves existence of demand for 'specialized search unit', which is also not offered anywhere outside of the 'bundle'.

Finally, considering nature and technical features of the product, it is difficult to draw the line between tying and tied service here.[69] Unlike computer OS and media players or Hilti's cartridge gun and nails, functions of specialized search unit cannot be clearly distinguished from organic search. In recent years search engines evolved from being only "address book" into end-provider of information which may take various forms (images, videos, maps, prices etc.). In big part specialized search units among organic results fulfil the same user need – they provide information relevant to search query.

3) Coercion – in *Microsoft* decision the General Court concluded that technical integration of two products constitutes coercion.[70] Interestingly, Windows users' ability to use other media players was not limited by any technical or contractual constraints, but the pre-installed and non-removable Windows Media Player was found to affect their choices in tied market. Analogically, Google does not preclude use of specialized search engines, but its organic search users inevitably see Google's specialized search unit if they type search query that triggers its display. It can be argued that on the Internet every second of user's attention, a glimpse of his eye is the currency companies compete for. Still, it would be a stretch to say that a mere display of product images or a small map among organic search results can be equated with purchasing two products by user.

   Moreover, coercion in this form can be only considered with regard to 'specialized search unit' which, as discussed in previous point, is not a separate product. The full Google's specialized search service can be accessed by clicking on specialized search icons. In fact, at the organic results page level Google gives users choice to ignore specialized search unit or to voluntarily access its service.

4) Foreclosure effect – is achieved through restriction of consumers' choice on the tied product market.[71] Unlike in *Hilti*, where clients were precluded from using competition's nails, this situation resembles *Microsoft*, where users equipped with

[69] Microsoft, supra note 3, para. 926
[70] Microsoft, supra note 3, para. 961
[71] M. DOLMANS, T. GRAF, supra note 60, p.230; M. RATO, N. PETIT, supra note 62, p. 46

Windows Media Player integrated into OS had less incentive to look for other media software.[72] According to behavioural economics the dominant undertaking can leverage its market power to other markets by simply exploiting customers' biases: default bias, endowment effects and consumer inertia.[73] Microsoft's technological tying of WMP did not restrict consumer choice directly, it was possible for customers to multi-home, to download other players free of charge.[74] Similarly, in *Microsoft* Internet browsers case the Commission relied on empirical evidence of foreclosure, showing that majority of Windows users had not downloaded browsers alternative to the bundled Internet Explorer.[75] In both cases the advantage of users' inertia would effectively lead to restriction of choice by affecting competitive structure of tied market.

This may also be the case with Google – there is no limitation in using other search engines, switching costs are minimal and many users actually use multiple vertical search engines to obtain best results. There is, however, certain group of clients that will not look further and will be happy with first results obtained. This effect of inertia is further strengthened by conduct addressed in the second concern: presentation of competitor's original content within the frame of own service. In this way users are more prone to spend their time and attention (which can be 'monetized') on Google's platform then on competitors'. User clicks can be turned into money on the other side of the platform, thus such practice eventually leads to reduction of specialized search websites' revenue and ability to expand and innovate.

The behavioural approach to tying of new technology products was likely applied in Google's case by the Commission. Like Microsoft, Google may be benefiting from "*unparalleled advantage with respect to the distribution of its product*" [76] due to its market power and special function of 'the gateway to the Internet', but – as demonstrated above – absent of key elements of tying theory.

5) Objective justification – the dominant undertaking can still prove that conduct is not abusive due to efficiency gains off-setting its anti-competitive effects. This element is

[72] Microsoft, supra note 3, para. 1041

[73] M. Bennet and others, "What Does Behavioral Economics Mean for Competition Policy?", (2010) 6 *Competition Policy International,* p. 121

[74] *"In technology enabled markets and in particular with regard to information goods such as software and internet-based services, however, the exploitative or exclusionary consequences of coercion will often not occur. That is because many of those products are not rivalrous in consumption (because they are supplied free of charge)"* M. RATO, N. PETIT, supra note 51, p. 47

[75] Commission Decision in case COMP/39.530 Microsoft (tying) of 16.12.2009, summary published in O.J. C36/7 (hereinafter "Microsoft II")

[76] Microsoft, supra note 3, para. 1054

common to all types of exclusionary abuses.[77] Such efficiency should (1) benefit the consumer, (2) the conduct should be indispensable to achieve the benefit, (3) the benefits overweight the negative effects on competition (4) and the conduct does not eliminate effective competition.[78]

The benefit of specialized search unit for the consumer (1) is the possibility to get maps, commercial offers, images etc. on the first results page of organic search, without need for further referrals to other websites. As we know, every click on the internet costs time and effort of decision-making, therefore integration of specialized search unit responding to user need for one-click search may be considered indispensable to achieve this benefit (2). Just a short thought about forcing Google to 'unbundle' organic and specialized search services is enough to tell that it is not an artificial bundle but rather effect of evolution of search engine services and such intervention would work against innovation and consumer welfare.

This would not, however, justify that it is always Google's service that appears at the prominent spot. The shape of the Commitments, which allow Google to keep specialized search bar at the results page with inclusion of competitors' offers might indicate that Commission accepted Google arguments on product innovation but exclusion of competitors' links from the specialized search unit did not meet the second condition.[79] The same differential assessment applies also to the last two conditions (3, 4).

II.2.2. New tying after all?

While there might be foreclosing effects similar to one in *Microsoft* case, the conduct of Google cannot be called 'tying' as we know it. Notwithstanding how difficult is to apply separate product test in the Internet environment, even the lenient conditions of *Microsoft* decision were not present here. If we looked at the specialized search unit alone – there is no separate product and if we looked at full specialized search service – there is no coercion.

What Google actually does is it coerces its users to look at its specialized search unit including own specialized results, which may negatively affect traffic flow to its

[77] Guidance of the Commission, supra note 30, para. 28-31
[78] Guidance of the Commission, supra note 30, para. 28
[79] TeliaSonera, supra note 36, para. 76

competitors. Since users can access other specialized search websites directly, the foreclosing effect can only be attributed to the special role search engines have on the Internet, being a gateway to find and access other services. Leaving those considerations for the next points, it is suffice to say that calling Google's conduct 'tying' would constitute even more radical departure from established case law then the *Microsoft* decision ever was. However, the identified foreclosure effects may indicate that Google's conduct constitutes some other type of abuse. The tying analysis shows that foreclosure effects do not stem from the integration of specialized search unit into general search, but rather from exclusion of competitors' results in that unit. Such exclusion also does not meet criteria of objective justification.

II.3. Refusal to supply

Search engine in the Internet has a special role because of the way it influences the flow of traffic and effective access to other services offered on the Internet. This special function has some characteristics of an essential facility network, illustrated by popular phrase: "if it is not Google it does not exist", as well as of an input product, because it transfers the traffic which is the 'blood' for other websites.[80] The first concern of the Commission refers to how Google, with over 90% market share, conducts this special function.[81] The freedom to choose trading partners is one of basic economic freedoms and can be only limited by EU Competition law if strict conditions of refusal to supply doctrine are met.[82] The general cumulative conditions are (1) refusal of objectively necessary product (2) likelihood of the elimination of effective completion on downstream market and (3) likelihood of consumer harm.[83]

First we should ask if there is an actual refusal. If we considered traffic directed from search engine as an input product to internet services, then demotion of rival's links, ether by prominent display of specialized search unit with own services or by downgrading competitors' links in the results page (or both combined) could regarded as denial of this

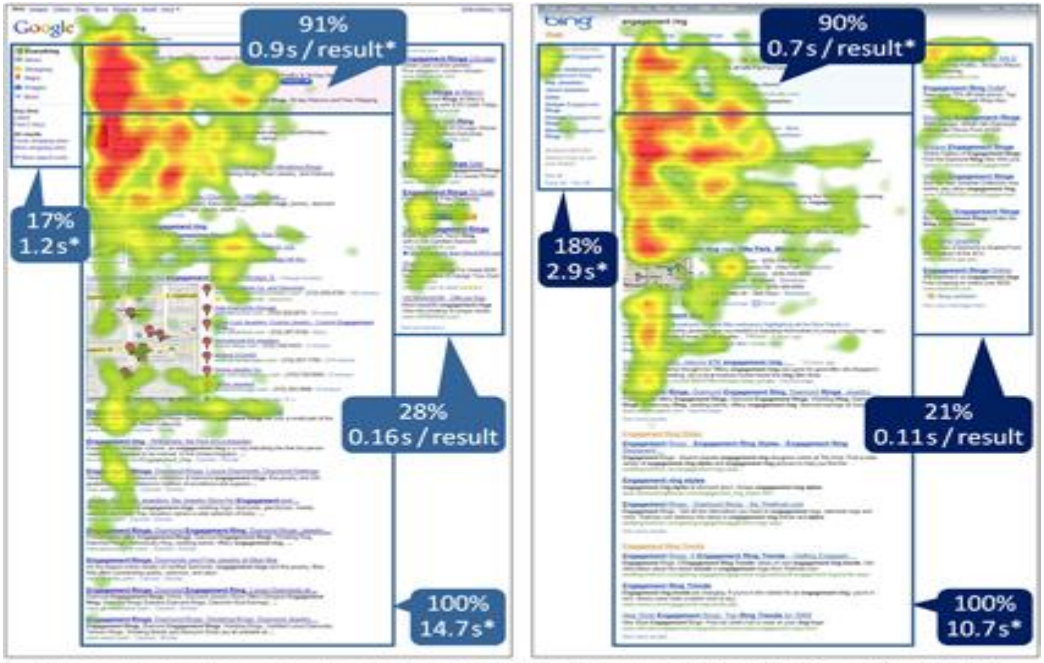
[80] In the words of the Director General of Axel Springer AG: "Google is for the Internet what Deutsche Post is for delivery of letters or what Deutsche Telekom was for calling on a phone. Then we had national state monopolists. Today we have a global Internet monopolist." M. DUMPFER "Why we fear Google?", 17.04.2014, p. 1, at http://www.faz.net/aktuell/feuilleton/debatten/mathias-doepfner-s-open-letter-to-eric-schmidt-12900860.html,

[81] Commission press release MEMO/13/383, supra note 10, p.2

[82] Guidance of the Commission, supra note 30, para. 75

[83] Guidance of the Commission, supra note 30, para. 81

input.[84] In fact, empirical studies show that the first three links get 80% of the traffic which is consistent with the eye-tracking tests (see *Picture 2*).[85]



Heatmaps showing the aggregate gaze time of all 24 participants on Google (left) and Bing (right) for one of the transactional tasks. The red color indicates areas that received the most total gaze time (4.5 seconds and above). Each callout includes the percentage of participants who looked at the area and the time (in seconds) they spent looking there. The numerical data are an average across all four tasks. Asterisks indicate values that were significantly different between Google and Bing at alpha = .1.

Picture 2. Eye-tracking test of two most popular search engines.[86]

Classical refusal to supply theory of abuse assumes, that provider of essential input sacrifices potential incomes from sale to competitors in order to foreclose them from downstream market. If we tried to translate it into web environment, Google would have taken the strategy of giving up on search quality in order to foreclose specialized search engines. Deterioration of search quality can be translated into reduction of income of the search engine in long term, since both sides of two-sided platform: users and – indirectly - advertisers who pay for the running of the engine are interested in keeping high quality of results. The essential facility doctrine could be, however, only applied with regard to the specialized search unit, in which Google refused to include rivals' services. Positioning in the organic search (outside of the unit) depends on Page Rank and is not an indispensable tradable good so there is no refusal to any potential transaction. Should we assume

[84] A popular joke says that second page of Google results is the best place to hide corps after a murder because no one ever looks there.
[85] M. RATO, N. PETIT, supra note 51, p.58
[86] Source: http://blog.gfk.com/2011/01/eye-tracking-bing-vs-google-a-second-look/ (20.04.2014)

otherwise, Google would face competition claims from all companies which are not highly ranked.[87]

Even if we assumed that there is some kind of refusal on Google's side, it should be referring to an indispensable product, according to the test defined in *Bronner/IMS Health/Microsoft* line of case law:[88]

(1) Are there products or services which constitute alternative solutions, even if less advantageous?[89]
Yes. Though high ranking in Google engine gives competitive advantage, specialized search engines can be accessed directly. In fact most of their traffic comes from other sources then Google search engine. There is open question whether it is possible to remain "viable competitor" in specialized search engine market in a long run without traffic direction from Google.[90] The scope of the 'refusal' is, however, limited to the potential traffic from the specialized search unit.[91]

(2) Are there technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services?[92]
Yes. Considering amount of necessary investments, high barriers to entry due to network effects etc. there are significant economic obstacles to duplicate Google's search engine.
However, as for the existence of economic obstacles it must be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service.[93] In this regard it is rather possible to create a second search platform with traffic comparable to Google.

Both *Bronner* conditions of indispensability are clearly not met, even considering broader criteria used by the General Court in *Microsoft* decision.[94] Furthermore, should we consider prominent display in Google specialized results to be indispensable for websites – then

[87] I. LIANOS, E. MOTHENKOVA, supra note 17, p. 436
[88] Case C-7/97, Bronner v. Mediaprint, [1998] ECR I-7791, para. 42-45 (hereinafter as "Bronner"); Case C-418/01, IMS Health v. NDC Health, [2004] ECR 5039, para. 28, Microsoft, supra note 3, para 369-422
[89] Bronner, supra note 88, para. 43
[90] Microsoft, supra note 3, para. 421
[91] Guidance of the Commission, supra note 30, para. 81
[92] Bronner, supra note 88, para. 44
[93] Ibidem, para 28
[94] On criteria in *Microsoft*: E. ØSTERUD, supra note 41, p. 239

absolutely every online service would be able to demand it from Google (and the spots are limited!).

Lastly, the obligation to supply in exceptional circumstances provided in *Magill/IMS Health* case law cannot be applied in this case, since there is no new product involved.[95] Competitors' services are broadly present in the market and there is no innovation which can be blocked by this refusal of prominent display. Also, looking at the *Microsoft* decision on interoperability, if companies were looking for access to Google's IPR (there were no such claims in this case) they would not be able to provide new product based on this input. Its disclosure could only be used to duplicate Google's engine or to manipulate the search results by those requesting access. Finally, Google's main source of market power – the algorithm – is a trade secret, its disclosure would definitely undermine the essence of this IPR, which is the borderline of competition law intervention in the EU.[96]

II.4. *Sui generis* favouring abuse

The *"diversion of traffic*", as the Commission called it, is a descriptive name of conduct which can be categorized as favouring own services.[97] Favouring is in general a legitimate way to compete and so far only few forms of abusive favouring have been identified (tying, exclusive dealing, margin squeezing, refusal to supply). The legitimacy of favouring was recently recalled by Landesgericht in Hamburg.[98] It its decision the court rejected request of weather forecaster to be displayed on Google's results page in place of Google's own forecast. In the statement of reasons the Court reminded that and in some instances limiting this legitimate favouring would reduce freedom of undertaking to innovate and improve its product or lead to *de facto* competitors' free-riding, which is not in line with the "competition on merits" goal.

Since the facts of the case do not fit into strict and clearly defined conditions of these forms we are stepping into a very dangerous zone where risk of legal uncertainty and undue interventionism hide behind every stone. Google, being one of its kind, might have been investigated under *sui generis* type of abuse which had not been seen in the existing case law.

First we should locate the abuse. Under Article 102 a behaviour can be found abusive if it takes place in the dominated market, in vertically related markets or through coercive tying in

[95] Joined cases C-241/91P and C-242/91P, RTE vs Commission, [1995] ECR I-743; Case C-418/01, IMS Health v. NDC Health, supra note 87
[96] Microsoft, supra note 3, para. 691
[97] Commission press release MEMO/13/383, supra note 10, p. 1
[98] Decision of Landesgericht Hamburg of 4.04.2013 in case Verband Deutscher Wetterdienstleister v. Google, reference AZ 408 HKO 36/13, available at : http://www.taylorwessing.com/fileadmin/files/docs/pdf-german/Google_Wetter-InBox_-_Beschluss_LG_Hamburg_2013-04-04.pdf (20.04.2014)

any other market. The first was not claimed and we excluded the latter. We also know that search engine is not exactly an essential facility or in a input/end-product relationship towards other online services. The last possibility is to consider the organic search and the vertical search markets to be closely associated, like in *Tetra Pak II*.[99] However, the link between the dominance and the abusive effects in ancillary market can only be found in special circumstances.[100]

What makes this case exceptional is that there are no transactions involved between Google and the websites presented in the results. Yet, the special role search engines play in relation to other online services is obvious. In the Internet all markets are somehow connected to search engines. It is the first source of information about online services and a major source of traffic inflow to those websites, so it definitely influences the functioning of those markets.

The associative links are even stronger with regard to specialized search platforms. Apparently, majority of potential specialized search users conduct so called meta-search in an organic search engine (e.g. googling itinerary or product name) before accessing specific websites.[101] It is for this reason the specialised search engines are not able to eliminate Google's influence on their business. Furthermore, it is clear that customers in one sector are also potential customers in the other.[102] The role of Google in the net is so strong, that some describe it as full dependency.[103] And though organic search engine is not indispensable for vertical search engines in *Bronner* terms, according to CoJ this condition is required only with respect to refusal to supply and not to other types of abuses.[104]

Secondly, we should look at the character of the allegedly abusive foreclosure. A consistent theory of harm assumes undertaking's (1) ability to foreclose (2) incentives to foreclose and (3) existence of anti-competitive effects (4) without objective justification for such conduct.

(1) Ability to foreclose

The special role which search engine plays towards specialized search market is in the EU in over 90% of cases played by Google. Google's dominance, strengthened by network effects and IPR was analysed in Chapter II. It is important to note that foreclosing ability is neither counterbalanced by customers – individual consumers, nor by the competitors – Google has over ten times bigger market share then closest competitor which allows it to act

[99] Tetra Pak II, supra note 22, para. 25-27
[100] Tetra Pak II, supra note 22, para. 25
[101] M. RATO, N. PETIT, supra note 51, p. 58
[102] Tetra Pak II, supra note 22, para. 29
[103] E.g. M. DUMPFER , supra note 80, p. 1
[104] TeliaSonera, supra note 36, para. 58

independently and focus its efforts in ancillary markets. [105] Again, situation is very similar to the one in *Tetra Pak II*, where CoJ considered super-dominance on distinct yet closely associated to put Tetra Pak in a position "*comparable to dominance on the markets in question as a whole*".[106]

What can Google do with all that power? Organic search engine plays two main roles: it's a 'gateway to the Internet' ('address book') and at the same time the basic source of information for consumers. Its results page is based on simple rule – the higher display, the more relevant outcome. In 2007 Google integrated in the result page its own specialized search results without any visually distinctive features and presented them usually on a prominent spot, suggesting that they are the most relevant. This was further backed by displaying original competitors' content (e.g. users' discussions, reviews) in own services [107] (concern no. 2) and alleged discriminatory demoting the competitors' links. In this way, instead of redirecting users to most relevant services (e.g. most successful price comparison website), Google could have been able to keep a portion of competitors' clients on its platform.

Traffic to search engines is like fuel to cars. Without sufficient inflow of traffic specialized search engines lose calibration. Less visitors means lower quality of results, less transactions (if applicable) and less viewers for advertisements, while the costs of operation stay the same. The competitors therefore would be forced off the market in two ways – by limited inflow of necessary traffic and by reduction of revenue.

Unlike in case of vertically related markets, Google is able to manipulate its results without immediate harm to its incomes. Since the revenue is generated by the advertisers on the other side of the platform who have only indirect interest in quality of results, the sole constraint is a risk of losing users in a long-term. This risk is, however, reduced by consumers' inertia and vulnerability to misleading practices.

However, assuming that the aim of every website offering services for free is to acquire as much traffic as possible – how is Google's conduct different? From the perspective of 'competition on merits', Google's ability to foreclose is based on (1) misleading of the consumers and (2) exploitation of consumer bias and inertia through technical integration of own product and use of competitors' content. It is clear that misleading practices cannot be classified as "*normal competition in products and services based on traders' performance",* because it is not the best product on specialized search market that wins but rather the one

[105] Tetra Pak II, supra note 22, para. 29; Guidance of the Commission, supra note 30, para. 20
[106] Tetra Pak II, supra note 22, para. 31
[107] M. RATO, N. PETIT, supra note 51, p. 57-58

affiliated with organic search engine.[108] The same could *prima facie* apply to behavioural theories, though the foreclosing effects should be substantiated by sound empirical evidence.

It seems that diversion of traffic can be considered as a strong tool in hands of Google, allowing it to foreclose its competitors on associated markets with 'abnormal' methods.

(2) Incentives to foreclose

Since Google introduced own online services it has been facing obvious conflict of interests – to promote own products at the cost of organic search quality or to show most relevant results, even when they come from competitors. Google's market power stems primarily from popularity of its search engine and was achieved through provision of the best quality of search, it has therefore strong interest in keeping its superior quality. However, according to economic model of Lianos and Mothenkova, progressing monopolization of the search engine market unambiguously results in reduction of incentives to invest in search quality, compared to social optimum.[109] This is due to the asymmetric character of this double-sided platform (see point II.2). The competitive structure may have been already weakened to such extent that Google could 'afford' to give up on quality of organic search in order to promote its own services in highly competitive markets.

The potential foreclosing conduct may be also partially motivated by 'defensive leveraging' theorem. Google has incentive to protect its dominance in organic search market through disabling potential entrants from neighbouring markets.[110]

(3) Anti-competitive effects

Practice of an undertaking in a dominant position cannot be characterized as abusive in the absence of any anti-competitive effect on the market. Article 102 is aimed both at practices which may cause damage to consumers directly and at those which are detrimental to them through their impact on an effective competition structure.[111]

With regard to direct harm to the consumers, misleading practices negatively affect their decisions by referring them sup-optimal services.[112] They receive lower quality of service and, though "competition is just one click away", they would not turn to competing organic

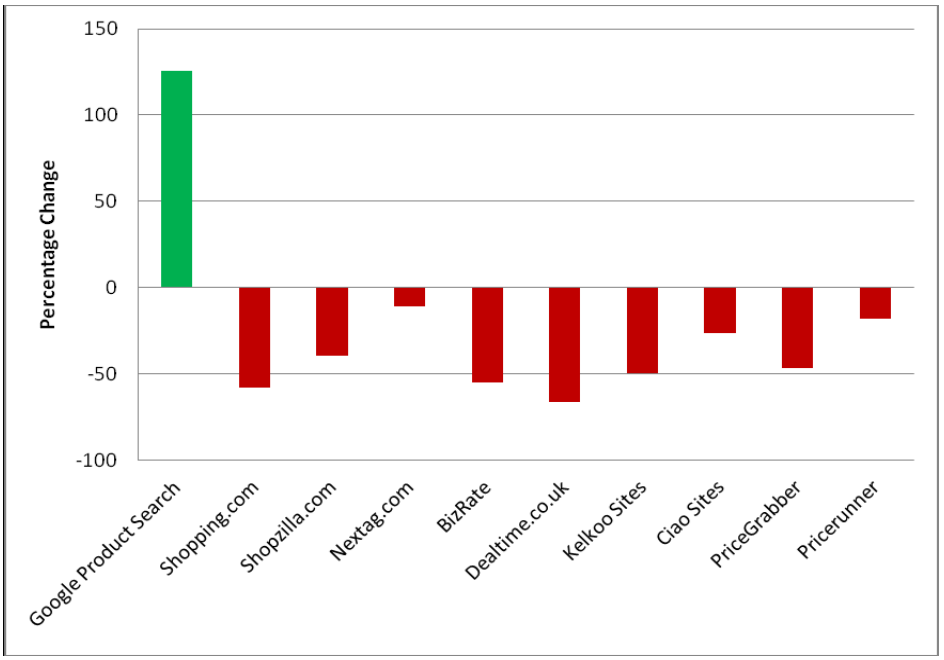
[108] Case C-322/81 Michelin vs Commission, [1983] ECR 3461, para. 70
[109] I. LIANOS, E. MOTHENKOVA, supra note 17, p.450
[110] B. NALEBUFF, "Bundling, Tying and Portfolio Effects, Part 1- Conceptual Issues", (2003)1 *DTI Economics Paper,* p. 13
[111] Case C-322/81 Michelin vs Commission, supra note 107, para. 70; Case C-457/10P, AstraZeneca vs Commission, supra note 48, para. 353
[112] *"Five out of six items in the panels shown on a Google search made in America are more expensive than the same items form other merchants hidden deeper in the index, with an average premium of 34%",* Financial times, "Google's showcased shopping found to come at a premium*",* 24.11.2013

search engines if they are not aware of the manipulation. On the other hand, display of specialized search unit among 'blue links' is to some extent beneficial for users, which will be discussed in the next point.

As to the harm to the effective competitive structure, according to CoJ it is sufficient to demonstrate a potential anti-competitive effect which may exclude as efficient competitors[113]. Nonetheless, possible evidence of such effect is considered relevant to identify abusive foreclosure.[114]

The official documents contain no information on evidence analysis, but the Commission was provided with vast documentation in this regard (Google did not publish any rebuttal), including objective sources (ComScore). If we relied on data presented by Foundem, we could observe that introduction of specialized search unit in October 2007 instantly boosted number of unique visitors on Google's specialized search services.[115] This was accompanied by significant drop of competitors' products popularity (see *Picture 3*). All Google services (Maps, YouTube, Product Search/Shopping etc.) which were integrated into organic search results page have been benefitting from massive traffic inflow. The fact that some of Google's services had been quite unsuccessful before their integration additionally illustrates the advantages of this 'favouring' strategy (e.g. Google Product Search had been used by only 2% of Google users in the US before it was integrated into search engine in 2007, only to become a leading price comparison engine in 2010).[116] On the other hand, sudden success of a failing product, which had been broadly criticized for its poor functionality, may suggest that this competition was not won 'on merits'.

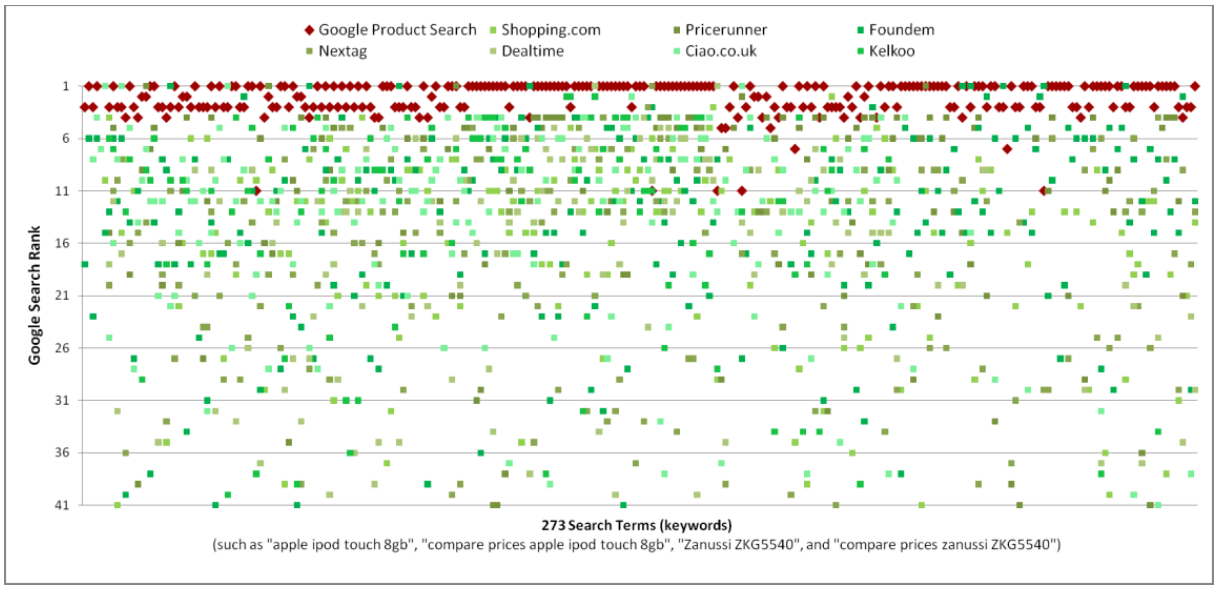
[113] TeliaSonera, supra note 36, para.64
[114] Guidance of the Commission, supra note 30, para 20.
[115] A. RAFF, S. RAFF, "How Google's Universal Search Mechanism Threatens Competition and Innovation on the Internet", p. 5-9 at http://www.foundem.co.uk/Foundem_Preferencing_Data_and_Arguments.pdf (20.04.2014) (hereinafter as "Foundem submission")
[116] ibidem, p. 8-9



Picture 3. Percentage change of unique monthly visitors to the UK's leading price comparison websites, including Google Product Search, from October 2007 to October 2009 (source: ComScore)[117]

The favouring strategy – again, relying on complainants' data - was accompanied by reduction of Competitors' visibility in the organic search, which could be attributed to (a) introduction of specialized search unit on a prominent spot, which automatically demotes other results and (b) alleged discriminatory manipulation of Page Rank (see *Picture 4*). In both cases the abusiveness of the conduct would rely on intentional misleading of consumers and had the same potentially foreclosing effect, however claims relying on the allegation of intentional changes of Page Rank algorithm were not at all addressed in the Commitments.

[117] Foundem submission, supra note 114, p. 7



Picture 4. Google Search Rank of leading UK price comparison websites across a broad sample of product-price-comparison-related search queries, as of January 29, 2010. Google Product Search results are presented in red, competitors' are presented in shades of green.[118]

Can't touch this algorithm

"When Google changed an algorithm, one of our subsidiaries lost 70 percent of its traffic within a few days. The fact that this subsidiary is a competitor of Google's is certainly a coincidence."[119]

Situation like the one described by the director of Axel Springer have been happening for some time in the EU. The usual explanation is that the websites were abusing Page Rank, yet it cannot be verified due to lack of any transparency of this penalizing procedure. The resolution is usually agreed in bilateral negotiations, which also shows how efficient leveraging tool has Google over other websites. Examples of punitive demotion in organic search prove that Google is able to single out specific websites and deprive them from part of traffic inflow. The demotion does not always have to be so spectacular, yet even placing competitors' results 2-3 spots below their relevance rank would amount to misleading. Bearing in mind findings of Lianos and Mothenkova model, Google has the ability and incentives to foreclose and such potentially abusive situations should be addressed.[120]

The practical problem is that Google's Page Rank is protected by trade secret. Proving such claim without disclosure of the algorithm would require some empirical evidence, some kind

[118] Foundem submission, supra note 114, p. 6
[119] M. DUMPFER, supra note 80, p.2
[120] I. LIANOS, E. MOTHENKOVA, supra note 17, p. 450

of surveillance mechanism which would monitor 'competitive neutrality' of Google's results. Construction of an effective monitoring tool would be difficult, yet conceivable.

4) Efficiency justification?

No conduct based on misleading of consumer can be justified because it directly harms them. With regard to the integration of specialized search unit, the benefit for the consumers is clear, yet the means cannot go beyond what is necessary to achieve this benefit.[121] As mentioned before (point II.2.1.5) the least foreclosing option would be inclusion of competitors in the specialized unit. Therefore, only if exclusion of competitors from specialized search unit were found to be abusive, it could not be absolved by efficiency justification.

Chapter III: Assessment of Google Commitments

In this final chapter the content of Google's Commitments will be assessed, as well as the proceedings as a whole. In the first two points the design of the measures will be shortly presented and confronted with the 'diversion of traffic' theory of harm. Next, we will consider the implications of the proceedings for the enforcement of competition law on technology-enabled markets in the EU. Finally, the appropriateness of use of Article 9 of Regulation 1/2003 in this case will be discussed.

III.1. Content of the Commitments proposal

The proposal of the Commitments published on January 31, 2013 and submitted to the College for adoption responds to all four concerns of the Commission. The most sophisticated measures, and at the same time the most criticised, are intended to eliminate "undue diversion of traffic" from specialized search competitors.

The measures are mainly focused on the specialized search unit, treating it as a legitimate element of search engine design:

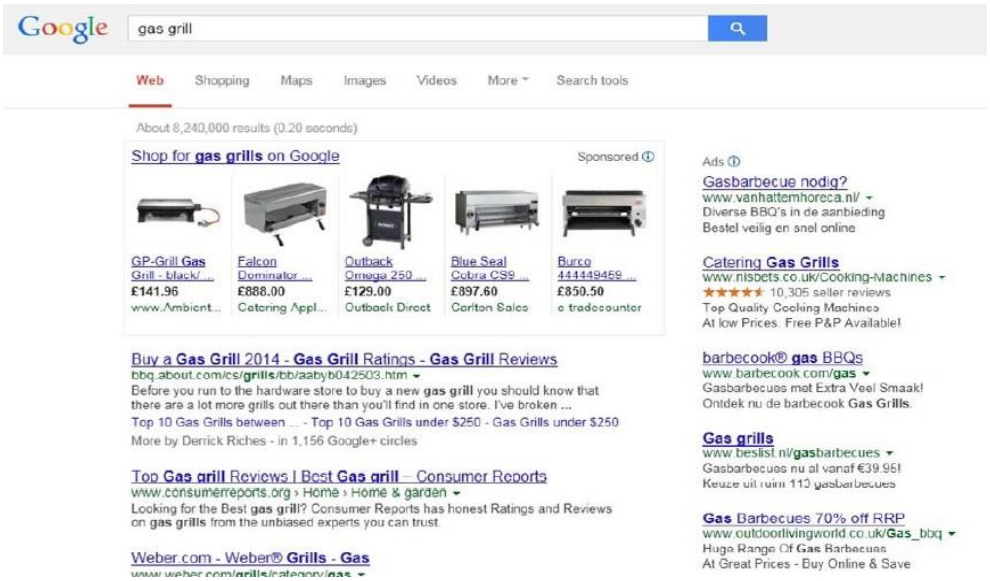
a) Google will label the specialized search unit in a way that would distinguish it from organic search results in order to avoid confusion of the two. The specialized search

[121] TeliaSonera, supra note 36, para. 76

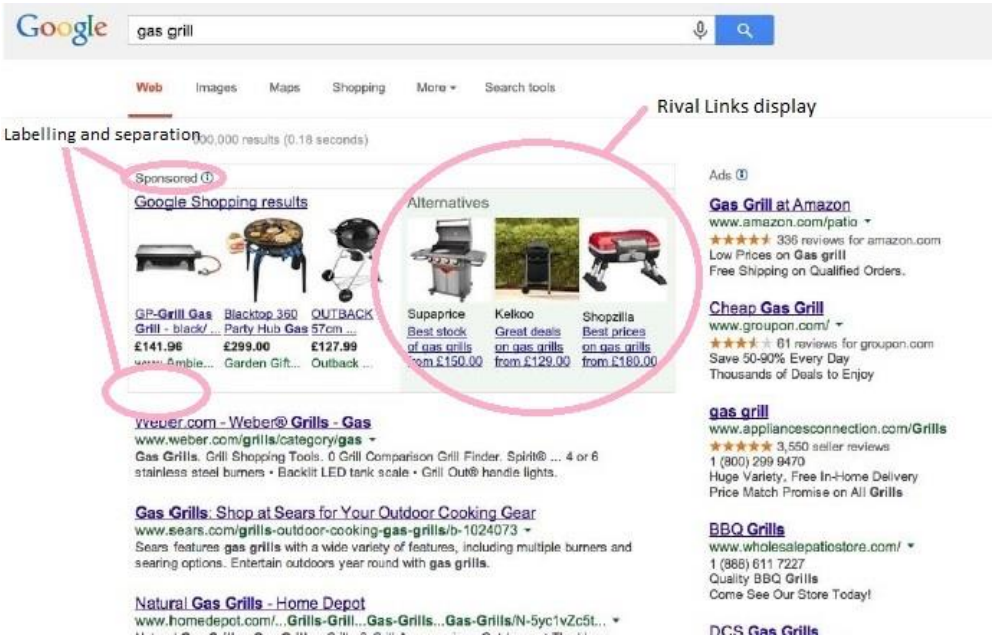
unit will be graphically separated, not mixed with organic results, though it can be placed above organic results in the same column (see *Picture 5*).[122]

b) In every category of specialized search service concerned, Google will also be obliged to include its competitors in the specialized search unit. Three competitor's results (i.e. Rival Links) will be presented in similar visual format in an immediate visible area next to Google's results (see *Picture 5*). The exception is when search query triggers map display. Then the three Rival Links to competing map providers will be displayed without 'similar format' condition (see *Picture 6*).[123]

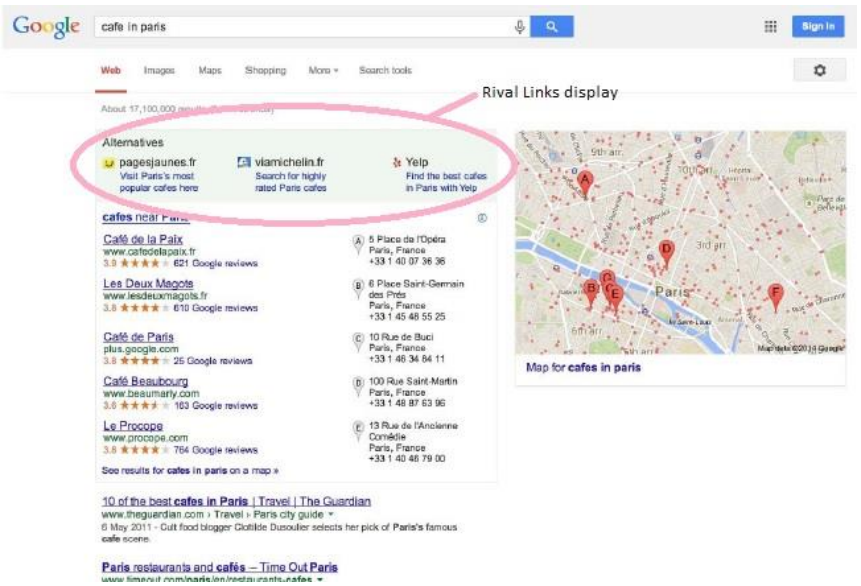
c) Selection of competitors included in specialized search unit will depend on weather and what type of monetization model Google applies for the particular category of search. And so, in case of specialized search results provided by Google free of charge the competitors will be selected to Free Rival Links based on algorithm ranking. More often, however, if Google charges for being displayed in specialized search unit, there will be special auction mechanism to select vertical search engines included in Paid Rival Links. In both cases Rival Links will be available only to those vertical search engines that meet strict admission criteria of quality and relevance described in Annex 1 to the Commitments.[124]



[122] Google Commitments, supra note 10, p. 2
[123] Google Commitments, supra note 10, pp. 2-5
[124] Ibidem, Annex 1, pp. 2-6



Picture 5. Comparison of the current display and the agreed solution – Google Shopping[125]



Picture 6. Agreed solution - Google Maps[126]

As to diversion of traffic through unauthorised use of content (concern no.2), Google will provide opt-out possibility for website owners. They will be able to determine domains or subdomains the content of which will not be displayed directly by Google. There is also special option for product, local and travel search sites to be able to block up to 10% of its content (e.g. reviews) without opting-out the whole domain. Additionally, Google will

[125] Commission press release MEMO/14/87, supra note 10, p. 4
[126] ibidem, p. 7

guarantee that by using the opt-out mechanism the website will not be demoted in the organic search or AdWords.[127] This clause is interesting to see, because it refers to Googles' ability to demote competitors in search results.

The concerns no. 3 and 4, which were not analysed here, have been addressed appropriately and raise no controversies. In this regard Google proposed it will no longer impose written or unwritten exclusivity obligations and will allow development of tools facilitating multi-homing of search advertising campaigns.

The execution of the provisions of the Commitments will be supervised by Monitoring Trustee, an independent contractor which will be remunerated and nominated by Google and approved by the Commission.[128]

III.2. Elimination of harm

The logic of the Commitments is that the function of specialized search unit is different than the one of organic search results and its design should reflect this distinctiveness. This stands in accordance with the findings in chapter III that the foreclosing effect does not stem directly from inclusion of the specialized search unit but rather from the way it is offered. In the end it is up to Google to decide how much of its results page it wants to leave for the list of 'blue links' and how much will be monetized through various types of commercial display. The proposed labelling and separation measures are delicate but correctly address problem of misleading users and seem to be a legitimate and proportional intervention in product design. They are fit to eliminate direct harm to the consumers and the foreclosing effects of the misleading conduct to the extent that conscious users will look for objectively best results in the organic search results area.

On top of that there is obligation to include Rival Links in the specialized search unit which cannot be attributed to the misleading rationale and suggests that the Commission found also other sources of foreclosure. Inclusion and presentation of competitors in graphically similar way refers to the logic of essential facility doctrine and can only be motivated by behavioural theories relating to consumer inertia and default bias.[129]

The prominence of display of Rival Links constitutes the main difference between the previous and the last version of the Commitments, which shows how crucial was this element

[127] ibidem, pp. 6-7
[128] Google Commitments, supra note 10, pp. 15-21
[129] M. BENNET and others, "What Does Behavioral Economics Mean for Competition Policy?", (2010) 6 *Competition Policy International*, p. 121

in the proceedings.[130] Though there are historical examples where the Commission made recourse to behavioural theories to identify abuse, e.g. in both *Microsoft* tying cases (WMP and Internet Explorer), yet they were accompanied by sound empirical evidence of foreclosing effects.[131] In this case there is no information weather the Commission investigated those effects. Another difference is that in those cases behavioural theories were used to prove an element of known substantive theory (e.g. coercion), while this case does not fit to any of them. At this stage, without empirical evidence which would substantiate to sufficient degree the probability of the foreclosing effect of the non-inclusion, it is impossible to assess the legitimacy of this obligation.

As to the content use opt-out mechanism, it seems that this is to address part of the described 'diversion of traffic' theory, and not a stand-alone type of abuse. The possible foreclosing effects of this conduct seem to be dealt with correctly.

Finally, while the Commission took strong stand on the specialized search unit design, many complainants criticize it for not addressing the other form of demoting competitors' results: downgrading rivals in the organic search.[132] Like it was presented before (see section III.4), the discriminatory practices with regard to Page Rank are perfectly possible and Google has incentives to use them to foreclose its competitors. Furthermore, if we considered allegations of the competitors to be true and assumed the theory of harm to be firm, Google's conduct in years 2007-2010 could qualify for imposition of massive fines since it drastically changed market structure and allowed Google to monetize billions of unduly diverted clicks.

Yet the Commission did not pursue those allegations, even though they are based on the same theory of harm as the proposed Commitments: misleading and exploitation of behavioural consumer bias. Even if we relied on the 'misleading' rationale alone, which raises no doubts as to the abusiveness of such conduct, lack of any solution or at least thorough investigation of the matter is clearly inconsistent and disappointing. What was the reason? It might be simply the burden of proof. To prove an intended bias of the Page Rank would require ether disclosure of Google's most precious trade secret or empirical evidence. The first goes beyond the reach of EU competition authorities; the second is costly, time consuming and raises many doubts as to reliability of such evidence.[133] The least intrusive

[130] Google Commitments, supra note 10
[131] Microsoft, supra note 3, para. 870; and Microsoft II, supra note 74
[132] I-Comp, "Analytical Framework for the Assessment of Innovation Efficiencies in case 39.740 – Google", 14.03.2014, p. 16 at http://www.i-comp.org/wp-content/uploads/2014/03/140313_icomp_innovation_final.pdf (22.04.2014); BEUC, "Fair Internet Search. Remedies in Google case", 8.03.2013, p. 5 at http://www.beuc.eu/publications/2013-00211-01-e.pdf (22.04.2014)
[133] M. RATO, N. PETIT, supra note 51, p. 49

solution could be to oblige Google to establish transparent procedure for punitive demotion. Lack of any commitments in this regard is the weakest point of the agreed solution and raises doubts as to its consistency.

III.3. Implications for technology-enabled markets

The Google case is another prominent example of use Article 9 procedure on technology-enabled markets without redress to any known theory of harm. In the context of the three arguments of Rato and Petit against over-enforcement of competition law on technology-enabled markets (see section II.2), this case has all the potential to illustrate their concerns.[134]

First, the products concerned are indeed combinatorial and it is impossible to foresee how the described intervention in product design will affect the innovation on the Internet services markets. Second, this intervention could have only been based on an undocumented behavioural theory of harm which resembles, yet in crucial elements clearly departs from known substantive theories of tying and refusal to supply. Such resolution, combined with limited transparency of the case can only increase legal uncertainty for this sector. The detrimental effects from the perspective of innovative pretenders are to some extent reduced by the unique circumstances of the case – in particular the unprecedented market power of Google and its special role in the Internet.

On the other hand, those concerns do not prevail with regard to obligations based on the 'misleading' rationale. Diversion of traffic through misleading of users may be a novel and search-engine-specific theory of harm. Yet, since it clearly collides with basic function of search engine it may be easily identified by reference to the general framework of abuse. Such open-minded approach of the Commission should be assessed positively. New technology markets and new business models provide also new opportunities for abuse and the competition law should provide same standard of protection.[135] The elastic construction of Article 102 is intended exactly for such cases.

III.4. Was use of Article 9 procedure appropriate?

The Commission used novel and undocumented substantive theory to settle potentially abusive practice, setting precedents that result in legal uncertainty in this area.[136] The critic

[134] M. RATO, N. PETIT, supra note 51, p. 9-10
[135] TeliaSonera, supra note 36, para. 108
[136] P. MARSDEN, supra note 37, pp. 5-7

that followed the SEP injunction settlement can be repeated in this case.[137]

First, looking at the merits of the case, to the extent the behavioural theory of harm may not meet the standards of Article 102 the Commission is *de facto* regulating new technology markets via *ex-ante* obligations. In this way it is stepping into legislator's shoes without democratic legitimacy. On the other hand, by giving up on investigating claims relating to misleading manipulation of the Page Rank, the Commission might have given Google a 'licence to kill' its competitors through demotion in the organic search.[138] In this way the risks of over- and under-enforcement resulting directly from limited evidentiary requirements of Article 9 procedure are both exemplified in this case.

Secondly, the use of Article 9 procedure does not seem optimal also from the perspective of rights of the parties. The judicial review of the commitments is effectively limited to being proportionate and not onerous, while the substance of the commitments and the theory of harm behind them will not be verified.[139]

Finally, if we considered systemic implications of using commitments procedure, the Google case confirms the tendency of total switch to negotiated resolution, including novel and complex abuses. It also continues the trend in the competition law to rely more on behavioural economics, yet provides no instruction on methodology or evidentiary requirements to use such theories. This is particularly harmful for development of competition law. Since the introduction of Regulation 1/2003 no case including new technologies was addressed by Article 7 prohibition decision and thus none was reviewed by the European Court of justice. At the same time the commitments become soft law that can influence interpretation of Article 102 in future cases. Thus the use of unverified theories of harm can be potentially seminal.[140]

In the light of the above concerns it seems that the shortcomings of the Article 9 procedure in Google case prevail over the advantages of quick and effective intervention and economy of process.

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[137] Ibidem, p. 4

[138] *"as a commitment decision, if properly implemented, shields the company from further antitrust scrutiny, it may serve as a quasi Article 101 (3) TFEU exemption",* P.LUGARD, M. MOLLMANN, "The European Commission's Practice Under Article 9 Regulation 1/2003: A Commitment A Day Keeps the Court Away", (2013)7/3 *CPI Antitrust Chronicle, p. 14*

[139] P. MARSDEN, supra note 37, p. 4; see e.g. Case C-441/07 Alrosa vs Commission, [2010] ECR-I-05949; Case T-148/10 Hynix v Commission (Rambus), 5.07.2013, not yet published

[140] P. MARSDEN, supra note 37, pp. 5-7

CONCLUSIONS

This paper was intended to identify possible abusive practices of Google with regard to specialized search market in order to assess the commitments accepted by DG Comp in January 2014.

Firstly, to put the analysis in the right context, the search engine business model was described as an asymmetrical two-sided platform. Also, the market power of Google was assessed, revealing characteristics of super-dominance due to high barriers to entry and extreme concentration.

Following that, the conduct of Google has been considered under Article 102 jurisprudence. The conditions of tying were not met in this case, because the possible coercion did not involve a separate product. The doctrine of refusal to supply has also been found inapplicable due to the fact, that Google's search engine was not indispensable for specialized search engines in *Bronner* terms. Lastly, using the general framework for identifying foreclosure, Google has been found to abuse its dominance by using abnormal methods which relied on misleading of users. In the current business model Google has *prima facie* ability and incentives to foreclose its competitors, which in part is attributable to possibility of anti-competitive manipulation of algorithm.

Eventually, the content of the Commitments was assessed. The measures proposed correctly address the theory of harm based on misleading of consumers, yet only in part. Lack of any obligations precluding discrimination in Page Rank makes this proposal inconsistent. At the same time the Commitments proposal contains measures which severely intervene in the product design and can be only based on some novel and undocumented behavioural theory of harm.

It seems that use of commitments procedure opens doors for solutions that reflect the negotiating power of the parties rather than the substance of law. While it might best address the interests of the two negotiating parties, it does not necessarily lead to the elimination of direct and indirect consumer harm. Furthermore, by accepting such solutions, the Commission does not contribute to the proper development of competition law, leaving space for legal uncertainty and possibly exceeding its mandate. The negative implications from systemic perspective show that Article 7 procedure is more suitable for cases including novel theories, even if they involve dynamic technology-enabled markets.

Bibliography

Articles:

[1] AHLBORN C., EVANS D., PADILLA A.J., "Competition Policy in the New Economy: Is European Competition Law up to the Challenge?" (2001) 22 ECLR, p. 156; See also: R. Schmalensee "Antitrust Issues in Schumpeterian Industries", (2000), *AEA Papers and Proceedings*

BENNET M. and others, "What Does Behavioral Economics Mean for Competition Policy?", (2010) 6 *Competition Policy International*

CHOI J., STEFANADIS C., "Tying, Investment and the Dynamic Leverage Theory", (2001) 32 *The RAND Journal of Economics*

BOOTTERMAN Y., APSTA A., "Towards a more sustainable use of commitment decisions in Article 102 TFEU cases", (2013), *Journal of Antiturst Enforcement*

DOLMANS M., GRAF T., "Analysis of Tying under Article 82 EC: The European Commission's Microsoft Decision in Perspective" (2004) 27, *World Competition*

EASTERBOOK F., "On Identifying Exclusionary Conduct", (1986) 61 *Notre Dame Law Review*

FILLISTRUCCHI L., GERADIN D., VAN DAMME C., "Identifying Two-sided Markets", (2013) 36/1, *World Competition*, p. 41; see also I. LIANOS, E. MOTHENKOVA, "Market Dominance and Search Quality in the Search Engine Market", (2013) 9/2, JoCL&E

GIFFORD D., KURDLE R., "Antitrust Approaches to Dynamically Competitive Industries in the United States and The European Union", (2011) 7/3, JoCL&E

LAO M., "Networks, Access and Essential Facilities: form terminal Railroad to Microsoft", (2009) 62, *SMU Law Review*

LUGARD P., MOLLMANN M., "The European Commission's Practice Under Article 9 Regulation 1/2003: A Commitment A Day Keeps the Court Away", (2013) 7/3 *CPI Antitrust Chronicle*

MARSDEN P., "The Emperor's Clothes Laid Bare: Commitments Creating the Appearance of Law, While Denying Access to Law, (2013) 8/1 *CPI Antitrust Chronicle*

NALEBUFF B., “Bundling, Tying and Portfolio Effects, Part 1- Conceptual Issues”, (2003) 1 DTI Economics Paper

PARKER G., VAN ALSTYNE M., “Two-Sided Network Effects: A Theory of Information Product Design”, (2005) 51/10, *Management Science*

RATO M., PETIT N., “Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?”, (2013) 4 ECJ

Books:

CRAIG P., DE BURCA G., *EU Law. Text Cases and Materials*, 5th ed., Oxford University Press, New York, 2011

O’DONOGHUE R., PADILLA A.J., *The Law and Economics of art 102*, Hart, Portland, 2010

ØSTERUD E., Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law, Kluwer Law International, London, 2010

WISH R., BAILEY D., *Competition Law,* 7th ed., Oxford University Press, New York, 2012

Commission Publications:

Commission press release IP/10/1624, “Antitrust: Commission probes allegations of antitrust violations by Google”, 30.11.2010

Commission press release SPEECH/13/758, “Abuse of dominance: a view from the EU, European Commission”, 27.09.2013,

Commission press release MEMO/13/189, “Antitrust: commitment decisions – frequently asked questions– Commitments”, 8.03.2013

Commitments in case COMP/C-3/39.740 Foundem and others for market test, 3.04.2013, at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_8608_5.pdf (27.04.2014)

Commission press release MEMO/13/383, “Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers”, 25.04.2013

Commitments in case COMP/C-3/39.740 Foundem and others, 31.10.2013, at: http://blogs.ft.com/brusselsblog/files/2013/11/comparison-of-proposals.pdf (27.04.2014)

Commitments in case COMP/C-3/39.740 Foundem and others, 31.01.2014 at: http://docs.dpaq.de/6448-google_commitments_full.pdf (27.04.2014)

Commission press release SPEECH/24/93, 5.02.2014

Commission press release MEMO/10/47, "Statement of Press Reports on Complaints against Google", 24.02.2014

Commission publication, "Minutes of the 2075 Meeting of the Commission held in Brussels on 12.02.14, PV(2014) 2075 final

Commission Decisions:

Commission Decision in case COMP/39.530 Microsoft (tying) of 16.12.2009, summary published in O.J. C/36/7

Commission Decision in Case COMP/M.4731 Google/DoubleClick of 11.03.2008, at http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf (22.04.2014)

Decisions of the Court of Justice:

Case C-62/86, AKZO vs Commission, [1991] ECR I-3359

Case C-441/07, Alrosa vs Commission, [2010] ECR-I-05949

Case C-457/10P, AstraZeneca vs Commission, 6.12.2012, not yet published

Case C-7/97, Bronner vs Mediaprint, [1998] ECR I-7791

Case C-280/08 P, Deutsche Telekom v Commission, [2010] ECR I-09555Case 6/72, Continental Can vs Commission, [1973] ECR 215

Case T‑79/12, Cisco Systems Inc. vs Commission, 11.12.2013, not yet published

Case T-148/10 Hynix vs Commission (Rambus), 5.07.2013, not yet published

Case C-53/92 P, Hilti vs Commission, [1994] ECR I-667

Case 85/76, Hoffmann-La Roche vs Commission, [1979] ECR 461

Case C-418/01, IMS Health v. NDC Health, [2004] ECR 5039

Case C-52/09, Konkurrensverket vs TeliaSonera Sverge Ab, [2011] ECR I-527

Case C-322/81 Michelin v. Commission, [1983] ECR 3461

Case T-201/04 Microsoft v. Commission [2007] ECR II-3601

Joined cases C-241/91P and C-242/91P, Radio Telefis Eireann (RTE) v. Commission, [1995] ECR I-743

Case C-333/94 P, Tetra Pak v. Commission, [1996] ECR I-5951

Other Court Decisions:

Decision of Landesgericht Hamburg of 4.04.2013 in case Verband Deutscher Wetterdienstleister v. Google, reference AZ 408 HKO 36/13, available at http://www.taylorwessing.com/fileadmin/files/docs/pdf-german/Google__Wetter-InBox_-_Beschluss_LG_Hamburg_2013-04-04.pdf (20.04.2014)

Case BUSCAPÉ vs. Google, Summary Judgment ruling of 5.09.2012, 18th Civil Court of the State of Sao Paulo Lawsuit n° 583.00.2012.131958-7, available at http://pl.scribd.com/doc/105502055/BUSCAPE%CC%81-vs-Google-Summary-Judgment-ruling, (22.04.2014)

EU Legislative Acts and Communications:

Communication from the Commission of February 24, 2009 – Guidance on the Commission's enforcement priorities in applying Article 102 of the TFEU to abusive exclusionary conduct by dominant undertakings, [2009], O.J. C45/7

Commission Notice on the definition of relevant market for the purposes of Community competition law, 9.12.1997, O.J. C372/03

Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communication sector susceptible to ex ante regulation in

accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 2007, O.J. L3334/65

Regulation 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU, [2003] O.J. L1/1.

Other sources:

Wall Street Journal, *EU Examines Antitrust Complaints About Google,* at http://online.wsj.com/news/articles/SB10001424052748704240004575084881889667848 (22.04.2014)

BEUC, "Fair Internet Search. Remedies in Google case", 8.03.2013, at http://www.beuc.eu/publications/2013-00211-01-e.pdf (22.04.2014)

DUMPFER M. "Why we fear Google?", 17.04.2014, p.1, at http://www.faz.net/aktuell/feuilleton/debatten/mathias-doepfner-s-open-letter-to-eric-schmidt-12900860.html, (22.04.2014)

Forbes, "Google's Larry Page: Competition Is One Click Away and Other Quotes of the Day" at http://www.forbes.com/sites/davidwismer/2012/10/14/googles-larry-page-competition-is-one-click-away-and-other-quotes-of-the-week/ (22.04.2014)

I-Comp, "Analytical Framework for the Assessment of Innovation Efficiencies in case 39.740 – Google", 14.03.2014, at http://www.i-comp.org/wp-content/uploads/2014/03/140313_icomp_innovation_final.pdf (22.04.2014)

PAPPAS S. A., "Intervention by Spyros A. Pappas, Attorney-at-Law, former Director General in the European Commission – Public Hearing on Data protection on the Internet (Google-DoubleClick and other case studies)", 15.02.2008, at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/pappas_intervention_/Pappas_Intervention_en.pdf (22.04.2014)

Picture: http://blog.gfk.com/2011/01/eye-tracking-bing-vs-google-a-second-look/ (22.04.2014)

RAFF A., RAFF S., "How Google's Universal Search Mechanism Threatens Competition and Innovation on the Internet" at

http://www.foundem.co.uk/Foundem_Preferencing_Data_and_Arguments.pdf (20.04.2014)