
ПРАВО КОНКУРЕНЦИЈЕ

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THE EUROPEAN COMMISSION, GOOGLE AND THE DIGITAL SINGLE MARKET

Summary

The European Commission is committed to the connected digital single market. Google is viewed as abusing a dominant position in internet search, as Europe does not have global search engines of its own. This paper assesses the Commission's attitude towards dominant market players in the IT sector and Google. Instead of combining politics with antitrust enforcement, the economics of search engines, multi-sided internet platforms and their network effects should be applied.

Key words: Art. 102 TFEU, digital single market, Google, search engines, multi-sided internet platforms.

I The Digital Single Market and Google

1. The Commission's Single Digital Market Strategy for Europe

The European Commission is committed to the “connected digital single market”¹ with a “level playing field for advanced digital networks and innovative services”, predicated on a “fit for purpose regulatory environment for

¹ See Opening Statement in the European Parliament by Jean-Claude Juncker, the then President-elect of the European Commission, of 15 July 2014 (available at https://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf) and Communication from the European Commission to the European Parliament, the Council, the European and Economic and Social Committee and the Committee of the Regions, A Single Digital Market Strategy for Europe, 6 May 2015 (COM (2015) 192 final (available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>)).

platforms and intermediaries”². Internet platforms which expose a “lack of transparency ..., strong bargaining power..., a promotion of their own services to the disadvantage of competitors, and non-transparent pricing policies”³ are viewed as a potential threat to the Commission’s vision: In April 2015, (Competition) Commissioner Vestager emphasised her determination to police what she described as an “abuse of Google’s dominant position in general internet search”⁴. Earlier this year, the Commission announced plans to review Google’s tax settlement with United Kingdom authorities⁵.

After a corporate restructuring Google is now a subsidiary of Alphabet, Inc.⁶ with powerful search engine services for information, images maps, videos, news, travel reservations and shopping⁷. Google combines unpaid search results with paid search results and sponsored links, i.e. advertisements⁸. According to the European Commission, Google’s market share for general online search ser-

2 Communication from the Commission of 6 May 2015, chapters 1 and 3.3.

3 *Ibid.*, sub-chapter 3.3.1.

4 European Commission, Statement by Commissioner Vestager on antitrust decisions concerning Google, Brussels 15 April 2015 (available at http://europa.eu/rapid/press-release_STATEMENT-15-4785_de.htm).

5 Financial Times on-line, 29 January 2016, Margrethe Vestager, EU competition commissioner (available at <http://www.ft.com/intl/cms/s/0/e7d325d6-c5b9-11e5-808f-8231cd71622e.html#axzz42u4EqnU3>); The Guardian on-line, 28 January 2016, Margrethe Vestager: the woman prepared to take Google to task over tax (available at <http://www.theguardian.com/business/2016/jan/28/margrethe-vestager-eu-competition-commissioner-google-tax-deal-uk-government>).

6 The Wall Street Journal on-line, 2 October 2015, Google Establishes Alphabet Holding Company – Google shares will be converted to same number of Alphabet share (available at <http://www.wsj.com/articles/google-to-establish-alphabet-holding-company-after-close-of-trading-friday-1443801447>); Süddeutsche Zeitung on-line, 2 February 2016, Alphabet: Ex-Google wird zur wertvollsten Firma der Welt (available at <http://www.sueddeutsche.de/wirtschaft/google-alphabet-ex-google-wird-zur-wertvollsten-firma-der-welt-1.2845254>).

7 For a survey of Google’s activities see A. Lopez-Tarruella in: Id. (ed.), *Google and the Law – Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models* (T.M.C. Asser Press/Springer, The Hague (2011), 1 (2 *et seq.*).

8 European Parliament, European Parliamentary Research Service, Briefing July 2015, Google Antitrust Proceedings: Digital business and competition (available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565870/EPRS_BRI%282015%29565870_EN.pdf); Communication from the European Commission in Case AT.397.40 – Google (2013/C 120/09), O.J. C 120/22 of 26 April 2013), European Commission, Statement by Vice President Joaquín Almunia on the Google investigation, Brussels 5 February 2014 (SPEECH/14/93) (available at http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm), and European Commission Press Release, Brussels 15 April 2015 (IP/15/4780), Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android (available at http://europa.eu/rapid/press-release_IP-15-4780_en.htm).

vices in most countries of the European Economic Area has attained some 90 percent⁹. In view of this market share, European antitrust enforcement officials have accused Google of favouring its own specialised services over those of its competitors and of practising restrictive advertising schemes ('comparison shopping case')¹⁰. In April 2015, the European Commission decided to initiate a separate formal investigation on Android, an open-source mobile operating system which Google combines with proprietary applications and services. Google is charged with hindering the development and market access of rival innovative mobile operating systems (the 'Android case')¹¹.

The Commission's investigations against Google are motivated by concerns about abusing an allegedly dominant position. In explaining its pre-2015 approach to accepting commitments instead of imposing fines, the Commission emphasises the nature of "fast-moving markets in the IT sector" and makes a reference to previous proceedings against then computer giants IBM, Microsoft and Apple¹². This seems to suggest that the Commission classifies its Google investigations just as an extension of previous IT monopoly cases. The Commission's approach in the Android case has now a U.S. counterpart before the United States Federal Trade Commission (FTC): The FTC examines complaints that Google used Android to discriminate against competitors¹³. It is common ground that Google operates a multi-sided internet platform. What is less clear, however, is whether traditional market-share and market-dominance analysis are also applicable to search engines and digital markets. This paper will assess the Commission's case against Google in the light of previous anti-monopoly cases and the economics of digital markets.

9 European Commission Fact Sheet, Brussels 15 April 2015, Antitrust: Commission sends Statement of Objections to Google on comparison shopping service (available at http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm).

10 See statement by the then Vice President of the Commission of 5 February 2014 (SPEECH/14/93), *supra*, FN 8.

11 See European Commission Press Release of 15 April 2015 (IP/15/4780), *supra*, FN 8.

12 European Commission Press Release, Antitrust: Commission obtains from Google comparable display of specialised search rivals – Frequently asked questions, Brussels, 5 February 2014 (MEMO/14/87, available at http://europa.eu/rapid/press-release_MEMO-14-87_en.htm) and *infra*, sub I.2.a.-c.

13 Wall Street Journal on-line, 25 September 2015, FTC Looking at Complaints Over Google's Android Control (available at <http://www.wsj.com/articles/ftc-looking-at-complaints-over-googles-android-control-1443201867>); Reuters on-line, 25 September 2015, Google faces renewed U.S. anti-trust scrutiny, this time over Android (available at <http://www.reuters.com/article/us-google-anti-trust-idUSKCN0RP0WR20150925>).

2. Google's Predecessors before the Commission: Apple, IBM and Microsoft

Prior to its digital single market strategy, the European Commission had embraced the political concept of 'competition and web 2.0'¹⁴. In preparing itself for a transformation of the internet which absorbs traditional telecommunications, media and software applications the Commission pledged "to carry forward traditional [competition law] values into the new environment"¹⁵. The regulatory approach for electronic communications has moved from liberalising telecommunications to tailoring a competition regime for specific sectors¹⁶. The Commission envisages efficient networks which deliver retail broadband services to consumers and are marked by neutrality¹⁷. In October 2015, the European Parliament adopted legislative measures designed to implement the concept of net neutrality¹⁸. Closer inspection suggests, however, that the legislative package allows for escape mechanisms whereby companies can establish paid fast lane facilities under the specialised services exception¹⁹. This would create different classes of internet users²⁰. In this, European law stays behind U.S. concepts on network neutrality²¹.

14 See title of the speech given by Herbert Ungerer, Deputy Director General in charge of State Aids, Sectoral Inquiries and Services of general interest, Directorate General Competition, European Commission, London 22 September 2008 (Annual SCl Policy Forum, available at http://ec.europa.eu/competition/speeches/text/sp2009_04_en.pdf).

15 *Ibid.*

16 D. Gabathuler/E.M. Rivero, in: Jonathan Faull/Ali Nikpay (eds.), *The EU Law of Competition* (Oxford University Press Oxford (3rd ed. 2014), 13.04 *et seq.*

17 *Id.*, at 13.209 *et seq.*, 13.219 *et seq.*

18 See Statement of Council's reasons: Position (EU) No 14/2015 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council laying down measures concerning open internet access and amending Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 of the European Parliament and of the Council on roaming on public mobile communications networks within the union (2015/C 365/02), *O.J. C* 365/21 of 4 November 2015.

19 Cf. Barbara van Schewick, 21 October 2015, Europe is About to Adopt Bad Net Neutrality Rules. Here's How to Fix Them (available at <https://medium.com/@schewick/europe-is-about-to-adopt-bad-net-neutrality-rules-here-s-how-to-fix-them-bbfa4d5df0c8#.dzh309n7g>).

20 Cf. The Washington Post on-line, 27 October 2015, Brian Fung, Europe has approved 'net neutrality', but not quite the kind advocates wanted (available at <https://www.washingtonpost.com/news/the-switch/wp/2015/10/27/europe-has-approved-net-neutrality-but-not-the-kind-advocates-wanted/>); van Schewick, *supra*, FN 19.

21 For a comparative survey see Daithi Mac Síthigh, "Regulating the Medium: Reactions to Network Neutrality in the European Union and Canada", 14 (8) *J. Internet L.* 3 (7 *et seq.*) (2011).

The policy debate for net neutrality is driven by concerns about equal access to information available via internet platforms²². In this context, Google has played a prominent role in advocating U.S. rules on net neutrality²³. Closer inspection suggests that the economics of net neutrality are more complicated than facilitating equal access to what might be considered as an essential facility²⁴. Current U.S. rules are seen as the result of successful lobbying by internet platform companies to shift the costs of developing new technologies on market entrants²⁵. Instead of charging those with an interest in speedy communications, consumers will have to pay the general costs which cannot be passed on²⁶. It would thus seem that European rules on network neutrality defy a general cost-shifting approach to the detriment of consumers.

a) Apple

Until 2008, Apple used to operate an iTunes on-line store selling music downloads in various European countries. Consumers could only download music from the views directed at their country of residence²⁷. In the United Kingdom, Apple maintained a price level at 10 percent beyond the Eurozone counterparts²⁸. Apple did not organise its iTunes store with the help music producers, but would identify the consumer's country of residence on the basis of credit card data²⁹. The Commission invoked art. 102 TFEU and forced

22 See Mark R. Patterson, "Non-Network Barriers to Network Neutrality", 78 *Fordham L. Rev.* 2843 (2860 *et seq.*) (2010).

23 Frank Pasquale, "Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines", 2008 *U.Chi. Legal Fr.* 263 (277) (2008).

24 See *infra*, sub II.2., and the criticisms by Brooke Ericson, Comment – "Möbius-Strip Reasoning": The Evolution of the FCC's Net Neutrality Nondiscrimination Principle for Broadband Internet Services and Its Necessary Demise, 62 *Admin. L. Rev.* 1217 (1244 *et seq.*) (2010), and Barbara van Schewick, Analysis of Proposed Network Neutrality Rules (18 February 2015, available at <http://cyberlaw.stanford.edu/downloads/vanSchewick2015AnalysisofProposedNetworkNeutralityRules.pdf>).

25 For an analysis of the U.S. public debate on network neutrality: Aspen Institute/FOCAS, Network Neutrality Public Narratives (11 August 2014, available at http://www.aspeninstitute.org/sites/default/files/content/upload/20140810_Knight_Aspen%20FOCUS_Quid%20analysis_vF.pdf).

26 Wall Street Journal on-line, 1 March 2014, G. Keith Gamberon – Commentary, Net Neutrality: Good for Google, Not Consumers (available at <http://www.wsj.com/articles/SB10001424052702304393704579528172386010640>).

27 European Commission Press Release, Antitrust: European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe, Brussels, 9 January 2008 (IP/08/22, available at http://europa.eu/rapid/press-release_IP-08-22_en.htm).

28 *Ibid.*

29 *Ibid.*

Apple to introduce equal prices throughout the EU³⁰. Two years later, the Commission challenged Apple's licensing agreement system with independent developers who were obliged to use Apple's native programming tools when writing iPhone apps³¹. In order to facilitate competition from devices running non-Apple platforms, Apple pledged to open up and to allow for the use of third-party layers³².

b) IBM

The Commission's anti-monopoly investigation against IBM proceeded along traditional lines. IBM was charged to have breached art. 102 TFEU on the market for mainframe computers³³. IBM allegedly tied its mainframe hardware products to its mainframe operating systems, thereby shutting out competitors developing applications on non-IBM hardware³⁴. Moreover, IBM was accused of foreclosing the market for mainframe services by restricting or delaying access to spare parts³⁵. IBM offered commitments to supply spare parts and technological information on reasonable and non-discriminatory terms³⁶. The tying allegations were not pursued since the rival software sellers had withdrawn their complaint³⁷.

30 Cf. Chris Fonteyn/Jarig van Sinderem, "Economic Analysis as a Tool to Improve Decision-Making", 11 (1) *Competition L. Int'l* 61 (62) (2015).

31 European Commission Press Release, Antitrust: Statement on Apple's iPhone policy changes, Brussels, 25 September 2010 (IP/10/1175, available at http://europa.eu/rapid/press-release_IP-10-1175_en.htm).

32 *Ibid.*

33 European Commission Press Release, Antitrust: Commission initiates formal investigations against IBM in two cases of suspected abuse of dominant market position, Brussels, 26 July 2010 (IP/10/1006, available at http://europa.eu/rapid/press-release_IP-10-1006_en.htm).

34 *Ibid.*

35 *Ibid.*

36 European Commission Press Release, Antitrust: Commission market tests IBM's commitments on mainframe maintenance and closes separate case into alleged unlawful tying, Brussels, 20 September 2011 (IP/11/1044, available at http://europa.eu/rapid/press-release_IP-11-1044_en.htm) and Commission Decision of 13 December 2011 addressed to IBM Corporation relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement, Case COMP/C-3/39.692-IBM Maintenance Services (C(2011) 9245 final, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39692/39692_1304_3.pdf) (Summary in O.J. C 18/6 of 21 January 2012).

37 European Commission Press Release Antitrust: Commission makes IBM's commitments legally binding to ensure competition in mainframe maintenance market, Brussels, 14 December 2011 (IP/11/1539, available at http://europa.eu/rapid/press-release_IP-11-1539_en.htm).

c) Microsoft

The Commission adopted the Microsoft decision after five years of investigating the markets for PC operating systems, work group operating systems and streaming media players³⁸. Like Google, Microsoft was found to hold a dominant position by occupying a market share of at least 90 percent on the market for PC operating systems³⁹. Although Microsoft's 60 – 70 percent market share on the work server group operating market was significantly lower, the Commission found nonetheless for a dominant position. Microsoft had been able to extend its dominance to adjacent markets by upholding significant entry barriers. Abuse of a dominant position was found in restrictions on interoperability between Windows PCs and non-Microsoft work group servers and in typing practices which linked Windows Media Player s to the Windows operating system. In addressing Microsoft's refusal to ensure interoperability the Commission imposed a duty to disclose interface information to allow non-Windows work group servers to establish full interoperability with Windows⁴⁰. With respect to tying, Windows was required to offer a version of its Windows PC operating system product without its media player⁴¹. Moreover, the Commission imposed a fine of 497m €⁴². Both, the European Court of First Instance⁴³ and the General Court of the European Union accepted the basic findings when Microsoft appealed the amount of the fine and the periodic payments⁴⁴.

38 European Commission Press Release, Commission concludes on Microsoft investigation, imposes conduct remedies and fine, Brussels, 24 March 2004 (IP/04/382, available at http://europa.eu/rapid/press-release_IP-04-382_en.htm).

39 Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792-Microsoft), *O.J. L* 32/23 of 6 February 2007.

40 See also European Commission Press Release, Competition: Commission appoints Trustee to advise on Microsoft's compliance with 2004 Decision, Brussels, 5 October 2005 (IP/05/1215, available at http://europa.eu/rapid/press-release_IP-05-1215_en.htm).

41 *Ibid.*

42 *Ibid.*

43 European Court of First Instance (Grand Chamber), judgment of 17 September 2007, case no. T-201/04, Microsoft Corporation v. Commission of the European Communities. See also European Commission Press Release, Antitrust: Commission welcomes CFI ruling upholding Commission's position on Microsoft's abuse of dominant market position, Brussels, 17 September 2007 (MEMO/07/359, available at http://europa.eu/rapid/press-release_MEMO-07-359_en.htm).

44 ECJ (General Court (Second Chamber)), judgment of 27 June 2012, case no. T-167/08, Microsoft Corp. v. European Commission.

II Google – Just another Monopoly Problem?

1. The Litigation Scenario

Google's legal problems are threefold. First and foremost, they are fighting against the analogy with the monopoly charges raised against Apple, IBM and Microsoft. But in view of the specific economics of search engines and internet platforms such an antitrust analogy is less compelling than the Commission's rhetoric seems to suggest⁴⁵. Apart from the antitrust scenario Google has to be mindful of potential liability as search engine operator from the perspective of trademark protection⁴⁶ and of an individual's right to have his data eliminated from the internet data storage systems⁴⁷.

a) Foundem I

Google operates a horizontal search engine which provides users with a list of web pages which search algorithms 'consider' to be most relevant to the user's search terms. Moreover, Google offers search results directing to 'sponsored links' which are generated due to advertisers' payments⁴⁸. Google's advertising service AdWords rates advertisements on a 'cost-per-click' basis: Frequent clicks will reduce the price for advertising and increase the advertiser's 'quality score'⁴⁹. Google's antitrust troubles began in 2010 when Foundem, a United Kingdom search engine company, filed a complaint with the European Commission⁵⁰. Foundem accused Google of stifling innovation for vertical search services by discriminating against rivals in search results⁵¹. Foundem claims to have sustained damages by being downgraded on Google's

45 Switching costs play an important role in the antitrust assessment: cf. A.S. Edlin/R.G. Harris, "The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google", 15 *Yale J. L. & Tech.* 169 (171 et seq.) (2012-2013).

46 See European Court of Justice (Grand Chamber), judgment of 21 March 2010, joined cases no. C-236/08 to C-238/08, Google France SARL and Google Inc. *et al.* v. Louis Vuitton Malletier SA *et al.*

47 See European Court of Justice (Grand Chamber), judgment of 13 May 2014, case no. C-131/12, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González.

48 S. van Loon, in: A. Lopez-Tarruella (ed.), *Google and the Law*, 9 (17 et seq.)

49 *Ibid.* See also Infederation Ltd. v. Google Inc., *et al.*, [2013] EWHC 2295 (Ch).

50 Wall Street Journal on-line, 15 April 2015, The British Couple Who Began Google's Antitrust Battle – Founders of small U.K.-based price-comparison website filed first antitrust complaint against Google (available at <http://www.wsj.com/articles/foundem-the-unlikely-instigator-of-googles-antitrust-battle-with-the-eu-1429094448>).

51 BloombergBusiness on-line, 10 January 2013, Google Sued by Foundem in U.K. for Anti-Competitive Behavior (available at <http://www.bloomberg.com/news/articles/2013-01-10/google-sued-by-foundem-in-u-k-for-anti-competitive-behavior>).

‘quality scores’. In order to maintain market visibility Foundem allegedly had to incur additional cost to advertise its website via Google’s AdWords service⁵². In November 2010, the European Commission opened an antitrust investigation⁵³ which has not been closed yet. Foundem brought a stand-alone action for damages for breach of EU and U.K. competition laws which has not proceeded beyond the disclosure stage⁵⁴.

The Commission’s antitrust probe focuses on both, unpaid and paid search results⁵⁵. With respect to unpaid search results the Commission investigates whether Google discriminated against vertical search services (price comparisons) by allegedly downgrading their rank and affording preferential treatment to its own vertical search services⁵⁶. In view of paid search results the Commission plans to scrutinise Google’s practice on ‘quality scores’, believed to eliminate competing services⁵⁷. The Commission’s analysis is to include potential exclusivity stipulations assumed by Google’s advertising partners⁵⁸. In March 2013, the Commission published a preliminary finding that Google had abused a dominant market position by discriminating against competing vertical services, using third-party content from external websites, and relying on tying and other restrictive agreements⁵⁹. In order to escape formal antitrust proceedings Google offered commitments to separate promoted (‘sponsored’) links from natural web search results⁶⁰. Moreover, Google would display links to three rival search services and practise an opt-out regime for non-Google websites and their content from being used in Google’s specialised search services⁶¹.

52 See *Integration Ltd. v. Google Inc., Google Ireland Ltd. and Google UK Ltd.* [2013] EWHC 2295 (Ch).

53 European Commission Press Release, Antitrust: Commission probes allegations of antitrust violations by Google, Brussels, 30 November 2010 (IP/10/1624, available at http://europa.eu/rapid/press-release_IP-10-1624_en.htm).

54 *Integration Ltd. v. Google, Inc. et al.* [2013] EWHC 2295 (Ch); [2015] EWHC 3705 (Ch).

55 Commission Press Release (IP/10/1624) of 30 November 2010, *supra* FN 53.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 European Commission, Communication published in Case AT.39740 – Google, *O.J. C 120/22* of 26 April 2013.

60 Commitments in Case COMP/C-3/39.740 – Foundem and Others (3 April 2013, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_8608_5.pdf); European Commission Press Release, Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns, Brussels, 25 April 2013 (IP/13/371, available at http://europa.eu/rapid/press-release_IP-13-371_en.htm).

61 *Ibid.*

Tying and other restrictive stipulations with publishers or advertisers would cease to be practised⁶². The commitments offered by Google unleashed a series of negotiations in which the Commission sought to ensure better visibility of rival links without unduly diverting internet traffic, and insisted on adjustment mechanisms if both, the market and Google services should change⁶³. In February 2014, the then Commissioner for Competition Almunia rejected pleas for a new market test, pleading instead to initiate discussions with the complainants on the viability of the commitments negotiated with Google⁶⁴. The more conciliatory approach of outgoing Commissioner Almunia did not lead to the acceptance of Google's offered commitment. Instead, the new Commission decided to toughen its stance on dominant search engines and issued a Statement of Objections to Google on its comparison shopping services⁶⁵.

b) Foundem II (Comparison Shopping) and Android

Contrary to the 2010 announcement⁶⁶, the statement of objections of 15 April 2015 focuses exclusively on comparison shopping⁶⁷. Google is described by the Commission as systematically positioning its comparison shopping service on its general search sites irrespective of the merits⁶⁸. Moreover, Google allegedly exempts its own comparison shopping from a system of penalties which determines the future ranking of shopping services⁶⁹. As Google shopping comparison practices are believed to be contributing to higher growth rates of its own services, the Commission fears for a negative impact on consumers and innovation⁷⁰. While Google is working on its defence strategy, it has criticised the Commission as classifying it wrongly as an essential facility or a

62 *Ibid.*

63 Statement by Vice President Joaquín Almunia on the Google Investigation on a press conference in Brussels, 5 February 2014 (SPEECH/14/93, available at europa.eu/rapid/press-release_SPEECH-14-93_en.pdf).

64 *Ibid.*

65 European Commission Press Release, Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation, Brussels, 15 April 2015 (IP/15/4780, available at http://europa.eu/rapid/press-release_IP-15-4780_en.htm).

66 Commission Press Release (IP/10/1624) of 30 November 2010, *supra* FN 53.

67 See European Commission Fact Sheet, Antitrust: Commission sends Statement of Objections to Google on comparison shopping service, Brussels, 15 April 2015 (MEMO/15/4781, available at http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm).

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

public utility which is under a duty to supply rivals⁷¹. In a separate investigation the European Commission will look into whether Google forecloses rivals from gaining access to its Android mobile operating system by either relying on its market dominance or by practising a network of restrictive agreements⁷². It would seem that the Commission's Android investigation requires more time for a positive finding of dominant market behaviour than the comparison shopping case⁷³.

2. Search Engines and Internet Platforms as a Matter for Antitrust Scrutiny

An outsider has to surmount considerable difficulties to establish that Google is practising search bias: Google's search algorithm is a business secret and it is unclear whether Google really has an interest in systematically discriminating against competitors⁷⁴. Consumers can easily switch to other search engines and search becomes more and more personal⁷⁵. The Commission's statement of objections against Google is less conclusive than it looks as user behaviour has not been taken into account⁷⁶. Moreover, although Google's current market share looks impressive, disruptive innovation from other internet platforms may quickly shake Google's position⁷⁷. Comparable difficulties have been experienced when the U.S. Federal Trade Commission had to ascertain whether Google could be accused of exclusio-

71 See Wall Street Journal on-line, 27 August 2015, Google Rebuffs European Union on Antitrust Charges (available at <http://www.wsj.com/articles/google-responds-to-european-union-antitrust-charges-1440691150>); Financial Times on-line, 27 August 2015, Google rejects European Commission's 'incorrect' antitrust charges (available at <http://www.ft.com/cms/s/0/4f7f236e-4ccb-11e5-b558-8a9722977189.html#axzz43BCilaEy>).

72 European Commission Press Release, 15 April 2015 (IP/15/4780, *supra* FN 8).

73 Cf. Reuters.com, 8 September 2015, EU still open whether it will charge Google over Android (available at <http://www.reuters.com/article/us-google-eu-idUSKCN0R81TL20150908>); BloombergBusiness on-line, 22 February 2016, Google AdBusiness Under Scrutiny as EU Said to Revive Probe (available at <http://www.bloomberg.com/news/articles/2016-02-22/google-ad-business-under-scrutiny-as-eu-said-to-revive-probe-ikxydulu>).

74 Justus Haucap/Torben Stühmeier, Competition and Antitrust in Internet Markets, Düsseldorf Institute for Competition Economics, Discussion Paper No. 199 (October 2015) (available at http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/199_Haucap_Stuehmeier.pdf).

75 *Ibid.* (incl. further references).

76 *Ibid.*

77 Inge Graef, "Stretching EU competition law tools for search engines and social networks", 4 (3) *Internet Policy Review – Journal on Internet Regulation* 1 (2015).

nary conduct⁷⁸. The use of ‘quality scores’ does not amount to an antitrust duty to deal, and consumer awareness changes with innovation⁷⁹. It would therefore seem that the Commission will have to part with drawing a sheer analogy with previous dominance cases in the electronic communication sector and appreciate the specificities of digital markets⁸⁰ with multi-sided business platforms instead⁸¹. In analysing internet platforms it has to be borne in mind that direct and indirect network effects are of crucial importance⁸². The bigger an internet platform is the more information will be available. In spite of their size dominant positions of platforms will only be transitory since innovation from other platforms might redraw the market⁸³. Although there is an asymmetric distribution of data, high concentration does not necessarily translate into an abuse of dominance⁸⁴. The intensity of competition is determined by network effects. An ever increasing number of users render a platform more attractive for the other side⁸⁵. Pricing asymmetries are typical for multi-sided platforms and may create welfare-increasing effects if networks expand their manoeuvring space and manage balancing prices⁸⁶. The more potent network effects are on concentrated markets, the greater the likelihood that concentrated markets are efficient⁸⁷. Thus, high market shares do not automatically call for intervention by antitrust agencies. Search engines and internet platform cannot be classified as essential fa-

78 See Ronny Hauck, in: Gintarė Surblytė (ed.), *Competition on the Internet* (Springer Heidelberg 2015), 53 *et seq.*; Geoffrey A. Manne and William Rinehart, “The Market Realities that Undermined the FTC’s Antitrust Case Against Google”, *Harvard Journal of Law & Technology Occasional Paper Series* (July 2013), 1 *et seq.*, 14 *et seq.* (available at <http://jolt.law.harvard.edu/antitrust/articles/ManneRinehart.pdf>); Andreas Heinemann, *Google als kartellrechtliches Problem?* (Universität Bonn – Zentrum für Europäisches Wirtschaftsrecht 2015), 7 *et seq.*

79 Geoffrey A. Manne/Joshua D. Wright, “Google and the Limits of Antitrust: The Case Against the Case Against Google”, 34 *Harv. J. L. & Pub. Pol’y* 171 (203 *et seq.*, 239 *et seq.*) (2011).

80 See the analysis by the German Monopolies Commission, Monopolkommission, Special Report 68, Competition Policy – The challenge of digital markets (1 June 2015) (available at http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf).

81 See the comprehensive analysis by David S. Evans/Richard Schmalensee, *The Antitrust Analysis of Multi-Sided-Business Platforms*, Chicago Institute for Law and Economics Working Paper No. 623 (2nd series) (December 2012) (available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1482&context=law_and_economics).

82 *Ibid.*; Andreas Heinemann, *supra* FN 78, 13 *et seq.*

83 German Monopolies Commission, Digital markets, FN 80.

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

cilities as a substantial number of users and business gain access to a particular websites via different venues⁸⁸. Although internet platform companies have a margin of discretion in granting access, there is a risk that competition will be foreclosed⁸⁹. On the other hand, it should not be overlooked that a foreclosure of competition and tampering with the search algorithm may affect the reputation of the search engine and the internet platform⁹⁰.

III Conclusion

The history of high profile antitrust cases in the IT sector offers little guidance for an assessment of the competitive effects of Google's business practices. Instead, the European Commission should make an effort to disentangle antitrust scrutiny from politics on global search engines⁹¹. The Google investigations demonstrate that the economics of multi-sided internet platforms and their network effects call for a more realistic assessment of the market dominance charge. Large market shares do not automatically translate into market power and the ability for foreclose access for competitors as switching costs for consumers are negligible⁹². Search neutrality is impossible⁹³ and EU law needs to harmonise its concepts on net neutrality with its anti-monopoly policy⁹⁴.

A more realistic approach towards multi-sided platforms does not automatically exempt Google from potential antitrust liability⁹⁵. But the focus is not on exploiting legislative uncertainty to the detriment of internet platform companies providing special services. Instead, the emphasis is on identifying factual situations where restrictive practices, infringement of intellectual property rights and camouflage prevail.

88 Andreas Heinemann, *supra* FN 78, 39 *et seq.*

89 Andreas Heinemann, *supra* FN 78, 48 *et seq.*; German Monopolies Commission

90 German Monopolies Commission, Digital Markets, FN 80.

91 See Torsten Körber, "Common errors regarding search engine regulation – and how to avoid them", 36 *E.C.L.P.* 239 *et seq.* (2015), and *The Economist* 18 April 2015, *Europe v. Google – Nothing to stand on* (available at <http://www.economist.com/news/business-and-finance/21648606-google>).

92 See German Monopolies Commission, Digital Markets, FN 80.

93 Torsten Körber, 36 *E.C.L.P.* 239 (242 *et seq.*) (2015).

94 See *supra*, sub I.1.

95 See comments by Andreas Heinemann, *supra* FN 78, 41 *et seq.*, on the Foundem I investigation.

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ЕВРОПСКА КОМИСИЈА, GOOGLE И ДИГИТАЛНО ЈЕДИНСТВЕНО ТРЖИШТЕ

Резиме

Европска комисија је посвећена повезаном дигиталном јединственом тржишту. Имајући у виду да Европа нема свој глобални претраживач, сматра се да Google злоупотребљава доминантни положај у претраживању интернета. У овом раду процењује се став Комисије према доминантним тржишним учесницима у ИТ сектору и Google-у. Уместо комбиновања политике са применом антимонополских прописа, требало би применити економију претраживача, вишестране интернет платформе и њихова дејства на мрежу.

Кључне речи: *чл. 102 УФЕУ, дигитално јединствено тржиште, Google, претраживачи, вишестране интернет платформе.*