Commission's Google Shopping case: Quest for a "new type of abuse"?

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Abstract

After 8 years of investigation, the European Commission has decided that Google has abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service. Google has abused its dominance in the general internet search market by giving its own comparison shopping service an illegal advantage. It gave prominent placement in its search results only to its own comparison shopping service, whilst demoting rival services. In this paper we shall discuss the first of these allegations that of Google's prominent placement in its search results only of its own comparison shopping service. The paper shall assess whether the approach the Commission seems to have taken in the Google shopping case, on the one hand ensures legal certainty and on the other minimises the risk of a Type I error in its enforcement. The paper will also assess the alleged harm arising from Google's conduct on consumers, merchants, and aggregators and will also discuss the importance of innovation on which the search engine market and incumbents depend on. Finally, the paper will briefly present the remedies for Google's conduct.

Introduction

The European Commission in the 8th year of its investigation of Google's conduct in relation to comparison shopping service, concluded that Google *has abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service.*[1] The Commission argues that Google's comparison shopping service is much more visible to consumers in Google's search results, whilst rival comparison shopping services are much less visible. Thus, it contends that Google has abused its dominance in the general internet search market by giving its own comparison shopping service an illegal advantage. It gave prominent placement in its search results only to its own comparison shopping service, whilst demoting rival services.

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[1] http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

In this paper we shall discuss the first of these allegations that of Google's prominent placement in its search results only of its own comparison shopping service.

Google was targeted by the Federal Trade Commission ("FTC") in the US with regard to whether its conduct could qualify and be sanctioned as abusive and infringing US antitrust law. The investigation lasted nearly two years, and as is mentioned in the FTC's statement,[2] it involved an extensive review of evidence and of relevant submissions by Google and its competitors as well as additional stakeholders, such as e.g. consumer organisations.[3] The result of this investigation was a unanimous vote to close the case as the FTC concluded that "*Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose. While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common by-product of 'competition on the merits' and the competitive process that the law encourages*".[4]

The aim of this paper is to discuss Google's woes before the European Commission in relation to Google's comparison shopping service.[5] The paper shall assess whether the approach the Commission seems to have taken in the Google shopping service case, on the one hand ensures legal certainty and on the other minimises the risk of a Type I error in its enforcement. The paper will discuss the issue of causality which is essential in the finding of an abuse and will analyse the Streetmap case.[6] This case before the UK High Court bears similarities to the European Commission case and provides a useful exposition of competition assessment that pertains to the Commission case.

The paper will also assess the potential alleged harm arising from Google's conduct on consumers, merchants, and aggregators and will also discuss the importance of innovation on which the search engine market and incumbents depend on. Finally, the paper will present the remedies for Google's conduct.

Prominent placement of its own comparison shopping service

The Commission argues that Google has *systematically given prominent placement to its own comparison shopping service: when a consumer enters a query into the Google search engine in relation to which Google's comparison shopping service wants to show results, these are displayed at or near the top of the search results*. In order for the Commission to allege that Google has indeed engaged in an abusive conduct it needs to ensure it has set out a clear analysis of the criteria it took

[2] See the Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc., FTC File Number 111-0163, January 3, 2013, 1, available at <https//www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf > accessed 20 September 2016.
[3] Ibid.
[4] Ibid. 3-4.
[5] This paper will initially analyse Google's conduct that relates to the *prominent placement of its own comparison shopping service*, i.e. to the Google's Shopping Unit that appears on the general search results.
[6] Streetmap EU Ltd v Google Inc. & Ors [2016] EWHC 253 (Ch) (12 February 2016).

into account in rendering Google's conduct abusive. This is the only way to ensure legal certainty in "expanding" the abuse toolkit to new types of conducts.

Art. 102 TFEU provides a non-exhaustive list of abusive conducts. We should stress that we do not attempt to impose a "straightjacket" on the Commission's approach to abusive conducts. The Commission notes in its press release that dominant firms must not leverage the dominance they have in one market into separate markets. Most findings of abuse that resemble Google's conduct, as displayed in the decisional practice of the European Commission and the jurisprudence of the European Courts, fall under categories comprising inter alia tying (bundling), predatory pricing, duty/refusal to deal and/or the essential facilities doctrine, as shaped in EU antitrust. There has been intense discussion[7] regarding the emergence of a potential novel kind of abuse, namely whether Google in its capacity as a dominant firm has to observe a duty to refrain from favouring its own search results over those of its competitors offering similar services.[8]

It is highly unlikely that Google's conduct falls within one of the established categories of anticompetitive leveraging however, the list of practices contained in Article 102 TFEU does not exhaust the types of abuse of dominance.[9] The European Commission seems to have assessed its conduct under a new type of exclusionary abuse, that is encapsulated in the prominent placement of its own comparison shopping service in its general search results.[10]

Such a behaviour would constitute an exclusionary abuse under Article 102 TFEU if it falls outside competition on the merits, results in exclusion of as efficient competitors from the market or deprivation of their possibility to grow to the detriment of consumers (anticompetitive foreclosure) and is lacking of objective justification.[11] In order to proceed with an evaluation of the above requirements, the specific circumstances of this case should be taken into account.

In Commission's own words Google's conduct is abusive because it indeed falls outside the scope of competition on the merits as "it diverts traffic in the sense that it decreases traffic from Google's general search results pages to competing comparison shopping services and increases traffic from Google's general search results to Google's own comparison shopping service; and it is capable of having, or likely to

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[7] Akman has conducted an exhaustive analysis of the various types of abuse that Google's conduct could fall under. See Akman, The Theory of Abuse in *Google Search*: A Positive and Normative Assessment under EU, https://papers.ssrn.com/abstract=2811789. See also Kokkoris I., The Google Case in the EU Is There a Case? Antitrust Bulletin, http://journals.sagepub.com/doi/abs/10.1177/0003603X17708362

[8] Cf. Vesterdorf, Theories of self-preferencing and duty to deal – two sides of the same coin, 1 *Competition Law & Policy Debate* 1 (2015) 5 and the relevant passage by the European Commission (Communication from the Commission pursuant to Article 27(4) of Council Regulation 1/2003 in AT 39740 – Google, OJ C20, 26.4.2013, 22, regarding the Commission's objections to the favourable treatment '[…] within Google's horizontal Web search results, of links to Google's own vertical web search services as compared to links to competing vertical Web search services.'

[9] C-280/08P, Deutsche Telekom [2010] ECR I-9555, para. 173.

[10] See European Commission, MEMO 27 June 2017, available at < http://europa.eu/rapid/press-release_IP-17-1784_en.htm >.

[11] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, C (2009) 864 final Brussels [2009].

have, anti-competitive effects in the national markets for comparison shopping services and general search services. [12]

Moving to the anticompetitive effects of the alleged abuse, in order for foreclosure to be deemed as anticompetitive, the Commission needed to prove that it leads to consumer harm resulting from excluding at least equally efficient or innovative competitors from the market. [13] Even if some competitors have been harmed by Google's innovations in the online search market, consumers have strongly benefited from the development of Google's shopping services.[14] The meaning of the above is that the alleged abuse constitutes at its core a product improvement. The combination of specialized and general results that Google has introduced, and is also used by other search engines, including Microsoft's Bing and Yahoo!, is more effective for users as it enables access to a direct response, in the sense that the user gets access to the product itself and not an intermediary. This kind of a product improvement is expected to affect competitors, which are not able to provide an equally efficient service or a good alternative. Therefore, before condemning a conduct as exclusionary an assessment of the procompetitive effects should be made.

The crux of the issue is whether a dominant search engine has to refrain from favouring its own search services as the Commission alleges. [15] In dynamic online markets, [16] where perceived dominant positions or monopolies can be eroded very quickly through technical innovation[17] antitrust intervention may prove particularly detrimental both in terms of its impact on consumer welfare,[18] its dubious effectiveness (risk of Type I errors),[19] as well as its stifling effect on incentives for firms to invest in innovation.

The Commission's press release outlines that "*Google's conduct would in any event have been abusive, even if comparison shopping services and merchant platforms were considered to be part of the same market: comparison shopping services would be the closest competitors in such a broader market and Google's practices have significantly distorted competition between Google's product and comparison shopping service*". We have one conceptual and one analytical concern with this argument of the Commission.

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[12] Paragraph 341

[13] Kellerbauer, *The Commission's new enforcement priorities in applying article 82 EC to dominant companies' exclusionary conduct a shift towards a more economic approach?* ECLR 2010, 31(5), 175-186.

[14] Körber, *Common errors regarding search engine regulation - and how to avoid them*, 36 ECLR 6 (2015), 243.

[15] The Commission argues that Google has systematically given prominent placement to its own comparison shopping service thus we shall assess whether such a behaviour constitutes an abuse of dominance under article 102 TFEU;

[16] See for example in the context of the European Commission's Discussion Paper on [then] Art. 82, Geradin, Ahlborn, Denicolo, Padilla, DG Comp's Discussion Paper on Article 82 Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries (2006), available at <http//papers.ssrn.com/sol3/papers.cfm?abstract_id=894466> accessed 20 September 2016. See also Verhaert, The challenges involved with the application of article 102 TFEU to the new economy a study of Google, ECLR 2014, 265 et seq.

[17] Geradin, Ahlborn, Denicolo, Padilla, Ibid.

[18] Ibid.

[19] Ibid.

The Commission seems to be using the closeness of competition argument, that is a major assessment factor in unilateral effects of horizontal mergers, to imply that if a dominant firm's conduct adversely affects its closest competitors then such conduct is abusive. Is the Commission suggesting that harming closest competitors is an adequate factor for alleging a dominant firm's conduct as being anticompetitive? If yes, the Commission should incorporate in its analysis some of the other assessment factors of unilateral effects of a horizontal merger such as constraints in customer switching,[20] ability of competitors to expand their products/services etc.

The analytical concern is the Commission's argument that even if Amazon, EBay and other merchant platforms were in the same market, then Google would still be a dominant entity. The Commission argues that merchants and comparison shopping services are mostly partners in a vertical relationship rather than competitors. The argument is vague and supported by documents/press releases when what is important is what the market analysis shows (what the users believe). [21] we shall not assess the existence of Google's market power in the market at hand.[22]

The Commission states that the Conduct would be capable of having or likely to have anticompetitive effects even if merchants were included in the same relevant market as comparison shopping services as the second would still be Google's closest competitors and irrespective of the fact that merchants gained traffic from Google's generic search results. To support the above the Commission does not have further arguments but two analyses that it conducted, taking into account 380 competing services, and which resulted that during the period 2011-2016 traffic from Google's general search results increased towards Google Shopping, decreased towards other comparison shopping services and remained the same or increased at a lower rate towards merchants.

It is important to note that all cases, up to now, involving product design where the latter has been deemed abusive, share a finding of quality reduction of the product. For example in the *Microsoft* case, the General Court, upholding the Commission's prohibition decision, stated that "the significant growth in the use of Windows Media Player has not come about because that player is of better quality than competing players or because those media players, and particularly RealPlayer, have certain defects" but because of the abusive tying practice.'[23] In Microsoft what would be a rational practice for the company is to welcome the reliance of software developers on its Operating System, yet Microsoft's conduct supported the allegation that it aimed at foreclosure of competition rather than at primarily the improvement of its own product(s). Similar focus and findings have characterised the Commission's reasoning in the past, in *Racal Decca*,[24] where the Commission focused on the fact that the dominant company did not proceed to a change in the design of its product with the

[20] An actual example of switching occurred when Google's search engine faced technical issues and could not operate properly for a period of approximately one hour, proving that users did actually swift to other search engines up until the problem was solved.
[21] The paper shall not assess the market definition either.
[22] A large market share cannot act as an indicator of market power when the product is information and competitors are "one click away". Patterson, Google and Search Engine Market Power, Harv.J.L.& Tech. (2013), 6-7.
[23] Cf. *Microsoft v. Commission*, T-201/04, [2007] ECR 2007 II-3601, para. 1057. Cf. also COMP/C-3/37.792 *Microsoft*, para. 971 and para. 1057.
[24] Case IV/30.979 *Racal Decca.*

intention to bring about quality improvement but rendered its product (navigational system) qualitatively inferior to be able to foreclose is rivals in the adjacent market. In these terms, assuming there is a tie, Google's conduct needs to be juxtaposed against the treatment of product amelioration, as the latter is acknowledged as a manifestation of competition on the merits[25] and is linked to "methods that condition normal competition".[26]

The paper shall discuss below the Streetmap case, which is based on a similar factual context as the Google Shopping case. We shall discuss the issue of causality between the abusive conduct and its anticompetitive effects.

Importance of causality in finding an abuse

In February 2016, the High Court of England and Wales ruled on the dispute between Streetmap and Google[27] ("Streetmap"). The case related to two markets, the general online search, where Google is perceived as a dominant player, and the market for online maps, where both Streetmap, an online mapping service provider, and Google, through Google Map, are active. In the words of its author, Mr Justice Roth, the former product "seeks to search the whole of the World Wide Web for results relevant to a user's query" whereas the latter provides a 'cartographic representation of a particular area' depending on the area the user has queried about[28]. However, it was stressed that the two markets are "clearly related, in that online maps and online map websites may be accessed through a general engine".[29]

The case raises issues very similar to the European Commission's case as Streetmap argued that Google's prominent presentation of its mapping services in its organic search results amounted to abusive leveraging. The judgment offers an interesting analysis and rather important implications in relation to leveraging and causality. Specifically, the issue at hand was that Google triggered a OneBox containing a clickable thumbnail map generated in response to certain searches, which was populated exclusively by Google Maps (i.e. the new Google Maps OneBox), and was not providing "equal access" to its competitors. Streetmap claimed that this behaviour constituted an abuse of Google's dominance and requested[30] the addition of two blue links, one of Streetmap and one of an alternative provider, alongside Google's thumbnail map.[31]

Mr Justice Roth, identified as the essence of Streetmap's argument that Google's

[25] Cf. Guidance, supra note 11, para. 19.
[26] Cf. Vesterdorf, supra note 8, 5 'In its Guidance (…) the Commission has stated clearly that dominant undertakings are entitled to compete on the merits, noting the benefits of such competition for consumers, such as "lower prices, better quality and a wider choice of new or improved services". There can be hardly any doubt that competition on the merits includes competition on quality; price and design; innovation; marketing and sales efforts; pre- and after sales services, and producer-, product- or service reputation'. (emphasis added).
[27] Streetmap, supra note 6. The judgment has been appealed to the Supreme Court.
[28] Ibid. para. 10, 18.
[29] Ibid. para. 15.
[30] Even though Streetmap tried at first to put forward a number of alternatives, the only that managed to survive Google's objection was the addition of blue links of two other mapping providers alongside Google Maps thumbnail. See Streetmap, supra note 6, para. 55.
[31] Streetmap's request bears similarities to the remedies that were submitted by Google on the comparison shopping case to the European Commission in 2013.

conduct "had the potential or actual effect of foreclosing competitors of Google Maps in the market for online maps" and for this effect to be abusive he pointed that what should be determined is whether such a foreclosure should be deemed as anticompetitive or falls within the concept of competition on the merits. Mr Justice Roth argued that *the relative success of Google Maps in the UK in 2007-2008 is therefore readily explicable by a range of factors involving competition on the merits and wholly unrelated to the introduction of the new-style Maps OneBox on the Google SERP.*

He firstly assessed whether Google had the intent to foreclose its competitors. Even though intent is not a prerequisite for the establishment of anticompetitive foreclosure, as abuse is an "objective concept", it is a rather important indicator of the dominant undertaking's ultimate scope.[32] In Streetmap, Google's internal documents had been presented as evidence, to demonstrate deliberate exclusionary conduct in the introduction of Maps OneBox, rejected though by Mr Justice Roth who argued that Google's main purpose was to improve its services.[33]

Intention to favour one's services

Even though subjective factors cannot be the sole ones on which an abuse or its absence can be based on, yet their existence or lack of, accordingly, can and should be taken into account in determining whether the conduct increases consumer welfare and thus falls within competition on the merits. Google, as any other search engine, is generating its profits through advertising. Therefore, in order to have high revenues it has to be effective and efficient in delivering to the users what they are searching for. This ensures a wide base of satisfied users that leads to more companies wanting to be advertised through it and to a greater overall value for Google. If this cycle of success is considered thoroughly, Google does not appear to have a strong motive to favour its own results over its rivals at the expense of relevance and user satisfaction.[34]

Consequently, the pure pro-competitive intents of a company, i.e. provision of better services to users, even though not "immunizing" its conduct per se, leads to a paradox which is also relevant to the assessment of the Google's conduct. As the Streetmap judgment eloquently notes, "the unusual and challenging feature of this case is that conduct which was pro-competitive in the market in which the undertaking is dominant is alleged to be abusive on the grounds of an alleged anti-competitive effect in a distinct market in which it is not dominant".[35]

In assessing Google's conduct it is important to explore not only the existence of a link between the conduct of the dominant company and any alleged anticompetitive effects but also the characteristics that such a link should bear for the dominant undertaking's behaviour to be considered as abusive. When a behaviour is established

[32] Cf. Guidance, supra note 11, para. 20 and C-549/10 P Tomra and others v Commission, para. 19,20.
[33] Streetmap, supra note 6, para. 79.
[34] In the case of dynamic markets, competition is for the market itself and constitutes a race between enterprises constantly trying to find a way to introduce a better product. Encaoua and Hollander, Competition Policy and Innovation, Oxford Review of Economic Policy, (2002), 8(1), 65. Vitzilaiou, Google, European Commission. Anyone feeling lucky?, CPI, 2011, 2-3.
[35] Streetmap, supra note 6, para. 84.

as procompetitive in the primary market, meaning that it benefits the consumers and leads to a more efficient competitive process then the assessment of any anticompetitive effects of this very behaviour to a relevant market need to be balanced. In case a link is not proved to the adequate degree, it is highly possible that a dominant company heavily investing in innovation and providing quality services in the primary market is condemned for the results of its success on the competitors of a secondary market regardless of an anticompetitive behaviour to the detriment of consumers. Such an approach comes also in conflict with the Commission's own approach, which acknowledges the right of all companies to compete fiercely on the market if this competition is ultimately beneficial for consumers.[36]In the Commission's own words in its Guidelines a dominant undertaking is allowed to compete on the merits and "in doing so (the Commission) is mindful that that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market."[37]

Mr Justice Roth, taking into account this particularity, argued that under such circumstances a mere possibility of anti-competitive foreclosure in the non-dominant adjacent market is not sufficient to sustain an abuse.[38] Such a case cannot be assessed in the same way as cases where the conduct has a specifically anticompetitive object. As an example, cases of exclusivity rebates are thought by some to be by their very nature capable of negatively affect competition and therefore are more objectionable compared to a case where the conduct under scrutiny has actual pro competitive effects that consumers already benefit from.[39]

Consequently, Streetmap needed to prove that Google's conduct was reasonably likely to harm competition, taking into consideration what the actual effect of the conduct has been. [40] Interestingly, Mr Justice Roth, proceeded with a straight comparison of the two products, pointing that they are competing not on price, as they are free, but only on quality, which constitutes in such cases competition on the merits. Therefore, all business decisions of the competing companies aiming at improving their quality should be taken into account to decide whether it is the conduct of the dominant company that predominantly affects its rival performance, or it could be linked to the rival's internal and inherent difficulties in competing as efficiently as the dominant firm.[41]

This is common in dynamic markets, where the exclusion of rivals is not necessarily linked to an abusive behaviour of the dominant player but may be simply the result of their outdated business, innovation and technology models or the rapid change of users' preferences. This means that they would be driven out of the market independently of any conduct of the dominant company. For an abuse to arise, as clearly

[36] Peeperkorn and Viertio, Implementing an effects-based approach to Article 82, Competition Policy Newsletter, No 1, 2009, 17.
[37] Cf. Guidance, supra note 11, para. 6.
[38] Streetmap, supra note 6, paras. 89 and 90.
[39] See on exclusivity rebates T-286/09 Intel Corp v European Commission [2014] (GC, 12 June 2014), paras. 76 and 77, C-23/14, Post Danmark A/S v Konkurrencerådet (Post Danmark II), EU:C:2015:651, para. 27 on and on exclusive dealing see 85/76, Hoffman-La Roche v Commission [1979] ECR 461, para. 71.
[40] Streetmap, supra note 6, para. 88.
[41] Ibid. paras.

already stated in Post Danmark II, the "anti-competitive effects have to be attributable to the dominant firm".[42] Based on the above, the Commission in the Google Shopping case needed to show that the decline in the traffic of some price comparison websites is a consequence of Google's favouring practices and not a result of pure market evolution. If the Commission observes a decline in traffic it needs to disentangle the impact of Google's conduct from the impact of market factors or other company specific or industry specific factors that can explain this trend.

Even if the Commission attributes almost 60 pages to an analysis of traffic's fluctuations it yet fails to provide evidence that the loss of traffic of comparison shopping services was a result of Google's display of product ads. In the same context, an increase in the traffic of Google's shopping following the introduction of Product Universal and the Shopping Unit cannot and should not be attributed ipso facto to their positioning disregarding that they constituted an innovation through which consumers could benefit from richer formats and direct access to more relevant results. The Commission uses traffic data, user surveys, internal Google documents and responses to requests of information under Articles 18(2) and 18(3) of Regulation (EC) No 1/2003 to demonstrate that in each of the thirteen EEA countries in which Google's Conduct takes place, generic search traffic from Google's general search results pages decreased on a lasting basis to almost all competing comparison shopping services whereas traffic to Google's own comparison shopping service has increased on a lasting basis.[43] Even if we accept the data used by the Commission as adequate, regardless that they disregard, among others, the results of "Difference-in-Differences" analysis, they fail in any case to provide an assessment and ultimately evidence the aforementioned link.

The analysis of Mr Justice Roth in the Streetmap is relevant for the comparison shopping case as he proceeds with a thorough mapping of the features of the products, in terms of quality, which is the focal point they are competing on. This approach will enable the comparison between the different products in order to properly determine their differences and enable the assessment of whether these differences could justify Google's comparison shopping competitors' decrease in traffic numbers.

In addition to the above, Mr Justice Roth proceeded one step further in his analysis and answered the question of the type of effect that needs to be shown. Specifically, he requested not only proof that Google's conduct is reasonably likely to affect competition in the secondary market of online maps but also that this effect is serious and appreciable,[44] deviating from the point of the Court in Post Danmark II.[45]According to his view, in that case no appreciability threshold was required for the prohibition to apply as the conduct of the dominant undertaking took place in the same market that was already hampered by its market power. In a case of leveraging though where two markets are involved and the market affected is a downstream, non-dominated market it is important to establish such a de minimis threshold to ensure that what is protected is free competition and not competitors.[46] The above is essential specifically in the case of Google where in the primary market of organic search its

[42] Post Danmark II, supra note 66, para. 44-47.
[43] Par. 518
[44] Streetmap, supra note 6, para. 92-98
[45] C-209/10, Post Danmark A/S v Konkurrencerådet, EU:C:2012:172, para. 70-74.
[46] Ezrachi, EU Competition Law, An Analytical Guide to the Leading Cases, Bloomsbury, 2016, 262

product design evolution is enhancing the experience of consumers.[47] This view even though not followed by the Commission that relied on the Conduct being capable of having, or is likely to have, anti-competitive effects in the national markets for comparison shopping services and in the national market of general search services[48] should not be disregarded by the Court, keeping in mind the possible adverse effect on innovation.

An analysis of the harm

Google is acting as a two-sided market intermediary. Internet search engines operate two-sided platforms, one side being the search users and the other the advertisers who pay for search advertisements shown on the same page as the natural algorithmic search or "organic" results for a particular query. Search engines attract users by offering searches free-of-charge. As the Commission comments,[49] competition for the users mainly takes place on the basis of the quality of the search results (i.e. their relevance to the users' needs but also the speed of returning results) and the user interface. For a search result to be considered relevant then it should be tailored to answer the user's query adequately and thus the search engine has to provide organic and/or specialized results according to the user's information type and needs to meet the above goal. Relevance is based on providing the most relevant results to the user's query – whether that's in the organic search results or specialised results that are tailored to providing highly relevant results for different information types.

On the one side of the market there are consumers with pre-existing preferences for goods and services while on the other side there are merchants and website operators who seek customers. To simplify the analysis we assume that advertisers are a subcategory of the merchants, with their difference being that they are paying for the whole system based on an auction mechanism when merchants, as users, "enjoy" the benefits of the search engines for free. The search engine generates economic welfare through a procedure of matching a customer who is willing to search for a product and service with a merchant who is willing to promote the sale of this very product or service. The availability of these two complementary types of "willingness" is critical for the exchange to occur.[50] This externality derived for the two-sided dimension is an indirect network effect, as one side of the market exerts an externality over the other one. Both the user, who is putting the search term, and the merchant act as customers and the search platform is expected to address their needs.

On the other hand the relationship between Google and the sites that want to appear in its organic results, amongst which vertical comparison shopping search engines, is fundamentally different from the relationship it has with merchants and consumers. These sites are Google's rivals actively competing in the comparison shopping market whose possible harm has to be assessed, in order to allege anticompetitive foreclosure under Article 102 TFEU.

[47] Parcu, Monti, Botta, Abuse of Dominance in EU Competition Law: Emerging trends, Edward Elgar, 2017, 47-49.
[48] Par. 589
[49] M.5727 – Microsoft / Yahoo! Search Business, para 101.
[50] Economides, Network Economics with Applications to Finance, Financial Markets, Institutions and Instruments, 2(5), 1993, 4.

Impact on Consumers

As already mentioned above, consumer harm may result indirectly from the exclusion of as efficient competitors from the market which would reduce consumer choices yet it may also result directly as a self-standing limitation in choice. In the Commission's own word, concerns are raised in the Google investigation that "users do not necessarily see the most relevant results in response to queries".[51]

However Google search creates consumer benefit by responding to users' needs and relying on innovation to develop a better link between users' search needs and the offered results in a manner that constitutes a clear qualitative advance in comparison to the way users were able to conduct search online in the past not to mention directly on their own. Specifically, users receive answers that are relevant and timely. The above would not have been possible if Google hadn't proceeded with the alteration of the nature of online search through merging online search with the provision of more "direct" information such as the map thumbnail, which was the one of the main issues of the Streetmap case or other vertical search results.

In such circumstances when consumer benefit is generated by innovative product design, the question arises whether it is possible to claim that competition has been distorted. In an analogy with the Streetmap case, when there is obvious consumer benefit from the conduct of the dominant company in the primary market, the actual effects of the behaviour under scrutiny need to be taken into account.[52] The Commission's reference to what the users get to see in terms of most relevant responses to their queries needs to be placed in the context of the market reality in the related market.

It is important thus to note that Google argues that it shows the most relevant shopping results according to Google's algorithms and competitors' results do appear on this Google search to they extent that they are relevant to the user's query. It argues, effectively, that while formats inevitably change -- as a dynamic parameter of competition – the underlying rules that everything must compete on relevance have not changed.

However, the Commission failed to take into account that this is a case where discarding a more economic approach and not taking sufficiently into account the impact of intervention on incentives to innovate might led to worse outcome for consumers. The Commission believes that Google's conduct is likely to reduce the ability of consumers to access the most relevant comparison shopping services. To support this claim it uses two arguments, the first being that users tend to consider that search results that are ranked highly in generic search results on Google's general search results pages are the most relevant for their queries and click on them irrespective of whether they actually are the most relevant. The second argument is that Google did not inform users that the Product Universal and the Shopping Unit were positioned and displayed in its general search results pages using different underlying

[51] See European Commission, press release 14 July 2016, available at http://europa.eu/rapid/press-release_IP-16-2532_en.htm.
[52] Streetmap, supra note 6, para. 89.

mechanisms than those used to rank generic search results, even if the second did bear a "sponsored label". [53]Both these arguments are wrong because they fail to understand that Google and its competitors innovate primarily to correspond to the user's evolving needs and therefore nowadays users of the Internet search should not be seen as pioneers of enterprises but as the more valuable players in the market. The cost for users of disincentivizing innovative firms, particularly in dynamic markets, can be significant. This is particularly the case following the CJEU's stance in the *Post Danmark* case, where the Court referred to the relevance of the effects of allegedly abusive practices for the consumers and whether they would prove detrimental to the latter.[54]

As regards the indirect harm to consumers because of anticompetitive foreclosure,[55] what is of interest is that even if such foreclosure is proven then consumer harm is presumed unless the defendant offers a demonstration of the positive impact of its conduct on consumer welfare as an objective justification.[56] Interestingly in the Streetmap case two elements were taken into account in the process of assessing whether Google's conduct was objectively justified: that the exclusionary effect of the abusive conduct is counter-balanced by the advantages benefiting consumers and that the conduct in question is proportionate to achieve those advantages.

As it regards the first element, according to an abstract from Post Danmark II judgment, cited also in the Streetmap case, "… it is for the dominant undertaking to show that the efficiency gains likely to *result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.*"[57]

The presentation of the thumbnail map introduced by Google in Streetmap was seen as a technical efficiency that leads to superior results for the user on the SERP and counter-balanced the exclusionary effect; as such could the Commission conceive the format of comparison shopping services as shown in the general search results. The facts in Streetmap consider the introduction by Google of a thumbnail map in place of the previous clickable shortcut link in geographical search queries, aiming to enhance the online user's experience, when in the comparison shopping case they have to do with the presentation of the Shopping Unit on Google's general search page with directly monetised listings from third- party sites which direct the user to the merchant's website compared to the previous version of one general link to the shopping website. There is similarity of the facts of the two cases as both have to do with new improved features, in the sense of technical efficiencies, that Google decided to add to its organic search to make the experience of users more satisfactory.

On the basis of the above analysis the abuse should not relate to the introduction of the improved feature (i.e. the thumbnail map or the Shopping Unit), which

[53] Par. 597-599
[54] C-209/10, Post Danmark A/S v Konkurrencerådet, EU:C:2012:172, paras. 22-25, 37, 44.
[55] A separate analysis will follow in the section referring to aggregators.
[56] Guidance, supra note 11, para. 28-30.
[57] Post Danmark, supra note 50, para. 42.

constitutes a technical development to the benefit of consumers, but the preferential treatment of Google's own services through this new feature.[58]

What needs to be determined is the existence of other means to obtain the same consumer experience enhancement without increasing greatly the cost or imposing an unreasonable burden to the dominant company.[59] Therefore, Google's alternatives should have been thoroughly examined taking into account whether the implementation of such alternatives would put a substantial burden and cost on Google, which could be disproportionate. In Streetmap the analysis showed that this was the case, i.e. any alternative had a disproportionately high burden for Google and was proved that Google had already conducted thorough research before launching any new format or product. It is also important to note that in the Streetmap decision, the claimant itself acknowledged that Google's addition of a clickable thumbnail map constituted a benefit for the users of its general search engine.[60]

An analogous analysis should have also taken place by the Commission when examining the objective justification. Due to the similarities of these two cases and taking into account that Google conducts an indepth analysis before launching a new feature in addition to the fact that the company's power is fragile in a dynamic market,[61] the Commission needs to be very cautious in imposing an alternative, ambiguous method of results generation, as this may lead to hampering consumer welfare. We should not assume that there may be a more inclusive way of presenting the Shopping Unit. Unless Google, at the time it was designing the Shopping Unit it could reasonably have foreseen a practical and proportionate way of achieving the same or better outcome with less exclusionary effect than the one alleged by the Commission, then a counterfactual based on that alternative scenario may not be appropriate. In its decision the Commission states that "the abuse […] concerns *simply* the fact that Google does not position and display in the same way results from Google's comparison shopping service and from competing comparison shopping services" [62] and that the implementation of an equal treatment remedy seems to be technically feasible [63], without taking into account though what an alternative may be and what the impact of this alternative to consumers would be.

Impact on Merchants

[58] Streetmap, supra note 6, para. 147.
[59] Streetmap, supra note 6, para. 149 referring to C-395/87 Ministère Public v Tournier para. 45.
[60] Streetmap, supra note 6, para 55.
[61] We should note that users face no switching costs, as they are always able to select an alternate search engine for free. An actual example of switching occurred when Google's search engine faced technical issues and could not operate properly for a period of approximately one hour, proving that users did actually swift to other search engines up until the problem was solved. This is equivalent to a "natural experiment" that is used in competition analysis to predict the outcome of a future event on the basis of the same or similar event occurring in the past.
[62] Par. 662
[63] Par. 671

On the other side of the two-sided market of web search, stand the merchants who are expecting their product or service to appear in the results of the user's query and consequently be able to source customers. If Google is demoting competing vertical search engines to positions where the user has to scroll down to spot them not because of their degree of relevance with the user's inquiry but in order to favour its own specialized services then not only direct consumer harm should be examined but also direct merchant harm, as the merchants will face reduced opportunity for returns. The merchants' ultimate goal is to reach as many users as possible and thus this is why they prefer, and in the case of advertisers pay, the search engine that has the wider base of consumers.[64]

The development of the Shopping Unit is not only beneficial for users but also beneficial for merchants. On the one hand, merchants take advantage of the positive externalities created by the deployment of a better search tool and on the other hand they are directly benefited by the new format, which enables users to be directed straight to third-party websites who sell the product in question. The above shows that the merchants and advertisers have been greatly benefited from Google's new features.

When proceeding to identify the effects of Google's abusive conduct to merchants the Commission was expected to take into account the above evidence. However, even if the Commission did accept that merchants were benefited from Google's conduct it relied only on potential effects to competitors and concluded that it may result to indirect harm to merchants from higher fees and consumers from higher prices[65].

We should also note that especially the advertisers' reaction, could be used as an indicator of harm as such a reduction in the quality of the service through the prominent listing of less relevant results should limit, at least to some extent, the number of companies wishing to be advertised with Google, because the deterioration of the results' relevance would drive users away and consequently advertisers would be less willing to advertise on Google. Google did claim that the positioning and display of Product Universals and Shopping Units was justified because it improved the quality of Google's search service for users and advertisers,[66] an argument that was not assessed by the Commission which relied on the restrictions that Google allegedly posed to its competitors in comparison shopping service and did not address the actual effects of the conduct under scrutiny.

It is rather important to add that consumer harm without merchant harm is unlikely to exist in these type of markets. Therefore the aforementioned evidence should be taken into account also in the assessment of consumer harm. However, an analysis of the two-sides of the market as a whole is what would provide an accurate and coherent idea of the effects of Google's conduct, not to mention that these effects had to be actual and appreciable.

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[64] In the case of advertisers in particular, in the relationship between them and viewers, the search engine is of utmost importance, as for the first, advertising is their source of income and for the second successful search engines command a high share of searches, making them an unavoidable partner 85/76, Hoffman – La Roche [1979], ECR 461, para. 41.

[65] Par. 593-594.

[66] Par. 656

To conclude, we shall mention that not all merchants should be regarded as "customers" as the variety of different services that can be provided simultaneously by merchants may have turned them into competitors. For example, Amazon and Ebay do constrain Google's behaviour by providing their own comparison shopping services, even if their core business is not entirely overlapping with Google's. [67] Consequently, such companies' potential harm will be assessed below where we discuss the impact on aggregators.

Impact on Aggregators

If no direct consumer harm is established, as already stated above, to claim that competition has been distorted, there should be an anticompetitive foreclosure of competitors, emanating from Google's conduct. As anticompetitive foreclosure, the Commission describes a situation where the actual or potential effective competitors' access is hampered because of the conduct of the dominant company to the detriment of consumers.[68]

In the case at hand, the conduct is the favouring of Google's own comparison shopping services, which according to the Commission has an effect of diverting traffic from its rivals. [69] Google's alleged conduct of favouring its own product can be considered anticompetitive only if it falls outside of competition on the merits. There can be hardly any doubt that competition on the merits includes, among others, competition on quality, design, innovation and marketing. As already stated above Google's conduct had as a goal to improve to the "search engine results page" and deliver the most accurate result to consumers on the basis of their preferences, which is the essence of competition on the merits. There is no support to be found in either the Commission's decisions or the Courts' that a dominant company has any obligation when advertising, displaying or promoting its own products or services, or enhancing their design, to equally promote the products or services of its competitors.[70] Any such obligation would deprive the company of its very right to compete effectively and on equal terms with its competitors and would create a distorted market environment, to the detriment of consumers and innovation. The above was emphasized in the US FTC's Closing Statement concerning the corresponding case across the Atlantic: "While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common byproduct of "competition on the merits" and the competitive process that the law encourages".[71]

Additionally, it has been observed that companies active in high tech markets compete for the future developments in the market, as they have to be ready to confront not only the present but also any future players who may appear in the market with a

[67] Renda A., Searching for Harm or Harming Search? A look at the European Commission's Antitrust Investigation against Google, CEPS Special Report No. 118, (2015), 16-17.
[68] Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para. 19.
[69] See European Commission, press release, supra note 2.
[70] Except if it is recognized as an essential facility, which is though not the case as already mentioned above.
[71] US Federal Trade Commission, Statement of the Federal Trade Commission Regarding Google's Search Practices In the Matter of Inc, FTC File Number 111-0163 (2013) 2.

new idea or new technology and change the balance of market power in their favour. In dynamic markets, innovation is what defines market power so the Commission should be cautious before alleging that a company, which legitimately enjoys high market shares because of its research and development investment, can be found to have abused its dominance for exactly the same reason.[72] If we accept that Google's conduct falls within normal competition then any diversion in traffic can be the result of its more efficient services towards consumers.

Furthermore, we should reiterate that Google search results are based on the relevance of users' own inquiry but at the same time users are free to choose the search engine they prefer. Therefore, they will choose naturally the one that they trust the most or provides them with better services in price, quality or choice. The Commission has already recognized in Microsoft/Skype that consumers can switch between products easily because the communication services are offered for free, thus lock-in is not a significant issue; the same stands for search engines.[73]

Independently though of Google's practice and even to argue that Google had been favouring its own services, the diversion of traffic can be an indicator of harm if such harm can be attributed to an anticompetitive conduct of the dominant firm. A causal link should have been identified and quantified as we analyzed above in the Streetmap case. The conduct shall be considered anticompetitive only if it is reasonably likely to lead to competitor's foreclosure based on the actual observations in the market. The influence of other causal factors ought to be taken into account.

In the case at hand, evolution and consequent instability in market shares is rife, This follows, in particular, the entry of new big players, such as Amazon and EBay. The Commission needs to prove that the new appearance of comparison shopping in Google's general search results is the sole cause of foreclosure of its competitors in the secondary market. In any case, vertical search engines do not receive traffic exclusively from search engine result pages but also directly through their own webpages or apps or via third parties' websites. They do have ways of reaching users other than via Google.[74]

The Commission argues that *traffic to Google's comparison shopping service increased significantly, whilst rivals have suffered very substantial losses of traffic on a lasting basis*. Mr Justice Roth in Streetmap emphasized the requirement of an appreciable effect on competition that is needed when the dominant firm's conduct has an impact on a separate market where the undertaking is not dominant.[75] The Commission needed thus to prove that the effect on competitors is appreciable bearing *in mind that the purpose of competition law is to prevent arrangements or practices which distort competition and to safeguard the interests of consumers.*[76]

[72] Renda, supra note 59, 39-40.
[73] M. 6281-Microsoft / Skype, para 92.
[74] Bork and Sidak, What Does the Chicago School Teach about Internet Search and the Antitrust Treatment of Google?, Journal of Competition Law & Economics 8(4), 2012, 671-673.
[75] In my view, it does not follow that conduct will constitute an abuse where the effect is on a separate market where the undertaking is not dominant, if that effect is not serious or appreciable, para 96.
[76] Streetmap, supra note 6, para 96.

Even in a scenario where some competitors are likely to be foreclosed from the market because of Google's behaviour, this does not necessarily constitute an abuse under article 102 TFEU. In this case Google is blamed for a leveraging strategy affecting a non-dominated market when in the primary market its behaviour is beneficial for the consumers. Google has also argued that the conduct under investigation can be beneficial for competitors as well. In such conditions, the de minimis threshold of appreciable harm introduced in the Streetmap decision, seems an essential safeguard for the finding of an abusive behavior in the non-dominated market. If such an appreciability threshold is not met, then an erroneous decision based on a false positive might be reached pursuant to which, not as efficient competitors will be protected to the detriment of consumers and innovation.

The Commission stated that it was not required to prove that the Conduct has the actual effect of decreasing traffic to competing comparison shopping services and increasing traffic to Google's comparison shopping service as it is sufficient to demonstrate that the Conduct is capable of having, or likely to have, such effects.

"Equal treatment" as a Remedy

During the Commission's lengthy investigation Google has offered consecutive remedy packages to the Commission to alleviate the Commission's anticompetitive concerns. As mentioned above, the remedy the Commission is asking is for Google *to give equal treatment to rival comparison shopping services and its own service. Google has to apply the same processes and methods to position and display rival comparison shopping services in Google's search results pages as it gives to its own comparison shopping service.*

The Commission in its Tender Specification[77] provides an example or its expectation of what the remedy would be. *Google would maintain the Shopping Unit in response to product-related queries, or would display an equivalent of the Shopping Unit, grouping results from, or links to, comparison shopping services. Comparison shopping services (both Google's own and competing services) would therefore appear in that Shopping Unit or equivalent, but also potentially in generic search results (in the form of blue links with or without enriched graphical features) and/or AdWords results.*

In imposing remedies in market settings like the ones within which Google operates, the Commission needs to consider that an imposition of onerous duties to undertakings, would have to observe the particularly narrowly defined conditions that EU antitrust has set in that context. Even assuming that an abuse has taken place, the collateral damage on innovation, and the indirect ensuing adverse impact on consumer welfare, that can incur from over-enforcing Article 102 in such a dynamic market needs to be carefully assessed before remedies are imposed.

[77] CALL FOR TENDERS COMP/2017/012 Technical expertise to support the Commission on issues relating to an antitrust case in the IT sector.

For the Commission to define the appropriate remedy it has to decide firstly on the type of the abuse. In its initial Statement of Objections the Commission took the preliminary view that to remedy its conduct Google should treat its own comparison shopping services and those of competitors in the same way[78]. In the press release on its decision the Commission, notes that Google must give equal treatment to rival comparison shopping services and its own service. *Google has to apply the same processes and methods to position and display rival comparison shopping services in Google's search results pages as it gives to its own comparison shopping service.*

The Commission though has stated that it will not interfere with Google's algorithms or design to achieve the above. In the Commission's own words what is expected is that "when Google shows comparison shopping services in response to a user's query, the most relevant service or services would be selected to appear in Google's search results pages".[79]

Taking the above as an indicator, the Commission seems to propose a scenario equivalent to "search neutrality" in the form of a "duty to deal with competitors" remedy, under which Google will have to deal with and display competing sites under certain terms that are equivalent to its own comparison shopping service. Pasquale and Bracha[80] were pioneers in advocating for "search neutrality" in 2007. There are however vocal advocates against search neutrality.[81] Manne and Wright define search neutrality as the *a priori restriction of search engines against delivering search results intended to benefit affiliated content or harm rival content.*[82] Search neutrality presupposes that mandatory neutrality or some imposition of restrictions on search engine bias is desirable.[83]

As already analyzed above, the EU Courts have defined a set of strict criteria that have to be fulfilled cumulatively for an obligation of such a compulsory access to arise which are not fulfilled in the case at hand. Consequently, the Commission seems to

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[78] European Commission, MEMO, supra note 1.
[79] European Commission, MEMO, supra note 1.
[80] Bracha and Pasquale, "Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*,"* 93 *Cornell L. Rev*. 1149 (2007). Telecommunications and cable companies, such as AT&T, Comcast, and Time Warner Cable, proposed undefined "search neutrality" mandates in unrelated FCC dockets regarding network neutrality. *See* Anderson, "Search neutrality? How Google became a "neutrality" target," *Ars Technica*, Apr. 29, 2010. *See also,* "Comments of Time Warner Cable Inc.," GN Docket No. 09-191 (filed Jan. 14, 2010), "Comments of AT&T Inc.," GN Docket No. 09-191 (filed Jan. 14, 2010), and "Comments of Comcast Corporation," GN Docket No. 09-191 (filed Jan. 14, 2010): "Hearings Before the Federal Trade Commission in the Matter of Preserving the Open Internet: Broadband Industry Practices."; Pasquale, "Dominant Search Engines: An Essential Cultural & Political Facility," *in The Next Digital Decade: Essays on the Future of the Internet* 401, 415 (Szoka & Marcus, eds., 2010). In Ammori, Marvin and Pelican, Proposed Remedies for Search Bias 'Search Neutrality' and Other Proposals in the Google Inquiry (2012), 6, available at <http//ssrn.com/abstract=2058159> accessed on 20 September 2016.
[81] Goldman, "Search Engine Bias and the Demise of Search Engine Utopianism," 8 *Yale J.L. & Tech*. 188 (2006); Daniel A. Crane, "Search Neutrality as an Antitrust Principle," University of Michigan Law School, Law & Economics Working Paper 40, *available at bit.ly/yBfyor*
[82] Manne and Wright, *Innovation and the Limits of Antitrust*, (2010) 6(1) J. Competition L. & Econ. 153. They add that *in law and policy, neutrality implies system-wide indifference.1 Describing search neutrality presumes both a natural and correct conclusion to search outcomes as well as some biasing of those outcomes. Search neutrality, for good or ill, embraces a variety of policies designed to restore equipoise from distortion; it is a proposed remedy to the presumed problem of search bias.*
[83] Ibid.

introduce a "sui generis" abuse where a duty to deal may be imposed even if the service is not considered an essential facility. This approach could be detrimental not only for the dominant company, which will have to share its product with competitors even if it is not indispensable to them, but also for consumers, who may be deprived from the market leader's future innovative efforts, rendering the remedy disproportionate. Therefore, it is essential for authorities, especially in high technology markets that are relying on research and development, to take into account that such an intervention will not ensure conditions of free competition to the benefit of users and the market itself.

Implications of Remedy for Innovation

Reuters have reported[84] that Google *in its proposal submitted to the European Commission on Aug. 29, the company said it would allow competitors to bid for any spot in its shopping section known as Product Listing Ads… Under that proposal, Google would reserve the first two places for its own ads. The new offer would also see Google set a floor price with its own bids minus operating costs.* At the time of writing the full details of the remedy have not been made public, so we can only discuss the remedies from a

Innovation has played a pivotal role in Google's growth. Its positioning in the online search market is a result of its investment in creating a search experience that consumers are attracted to because of its accuracy and effectiveness. However, in dynamic markets, "everything flows."[85] Innovative markets are characterized by a constant and eternal flux. "Standards" are born and then dissipate. They become obsolete because new and more innovative products appear that become the new "standards". Thus, dominant companies need to keep innovating in order to maintain their market power.

The Commission has noted that Google's alleged practices could cause consumer harm by means of the reduction of choice consumers would be confronted with. It further pointed out that the practices in question could threaten to stifle innovation in the fields of specialised search services and online search advertising. [86] The Commission would need to show that the competitor that have been foreclosed were considered to or to offer important choices to consumers as well as that they were contributing to innovative products/services. Elimination of choice and innovation are adverse effects arising from an abusive conduct, but the Commission would need to ensure, as mentioned above that the impact on choice and innovation is appreciable.

In innovative markets, as Crane eloquently emphasizes, "antitrust law should never seek to destroy dominance by prohibiting dominant firms from innovating to keep up with their customers' changing demands."[87] Bork and Sidak add that "search engines epitomize dynamic competition the virtuous cycle in which innovation drives

[84] https://www.reuters.com/article/legal-uk-eu-google-antitrust/google-offers-to-treat-rivals-equally-via-auction-sources-idUSKCN1BT2MZ
[85] Simplicios summarizes Heraclitus' philosophy in just two words, "panta rei", or "everything flows", meaning that everything is constantly changing.
[86] http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm
[87] Crane, *Search neutrality and referral dominance,* J.C.L.& E. (2012) 8 (3) 459-468.

competition, which further drives consumer-welfare-enhancing innovation."[88] They correctly add that antitrust intervention that mitigates Google's innovation drive would harm consumers as a result of lower quality products and services.[89] They also emphasize that antitrust enforcement by the Commission in the comparison shopping case would harm consumers and would chill dynamic competition and innovation in both general and specialized searches.[90] Manne and Rinehart emphasize the importance for antitrust jurisprudence of avoiding the costly error of over-deterring welfare-enhancing product innovations.[91] Such innovation drive is what makes the market competitive, as in dynamic markets innovation drives competition.[92]

The Commission claims that Google's conduct is to blame for a negative impact on innovation, to the extent that "incentives to innovate from rivals are lowered as they know that however good their product, they will not benefit from the same prominence as Google's product."[93]

In order to decide whether innovation is harmed by Google's behaviour, we should take also into account the pivotal role that research and development has played in Google's growth and its extensive investments aiming at providing a search experience that consumers are attracted to because of its accuracy and effectiveness. The FTC in its decision found that Google's innovations should be viewed "as an improvement in the overall quality of Google's search product".[94]

If the consequence of intervention is to deprive consumers of an innovation designed to match a user query with the most relevant results for the particular user, then the Commission should be cautious with such intervention. It will also reduce Google's innovation drive in other areas of search and ads. Even if the Commission has declared that it will not interfere with Google's algorithm, it is difficult to imagine how the relevance of results could be altered with the algorithm[95] remaining intact. As has been discussed above, in the absence of a reasonably foreseeable and proportionate way of providing these new units in a more inclusive way, it is hard to avoid the conclusion that Google is being asked to turn the units off. Therefore, the real question for the Commission could be reversed: What would be the impact of a reduction in Google's innovative efforts in the market?

To provide an adequate answer to the above question we should take into account the special characteristics of high-tech markets where companies accept the high costs of research and development not only because they are expecting a high gain from the

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[88] Bork and Sidak, supra note 66, 663-700.
[89] Ibid.
[90] Ibid. 12.
[91] Manne and Rinehart, *The Market Realities that Undermined the FTC's Antitrust Case Against Google*, Harvard Journal of Law & Technology Occasional Paper Series, July 2013, 12.
[92] As Waller and Sag argue the insights of Schumpeter in relation to innovation being the key to growth and that creative destruction is a vital source of innovation are well accepted. Schumpeter has noted that the process of creative destruction relates to a powerful incumbent firm, which is being overwhelmed by new forms of innovation that radically changed the nature of competition. In Weber Waller and Sag, *Promoting Innovation*, 100 U.Iowa L.Rev., 2226.
[93] European Commission, MEMO 25 April 2013, available at <http//europa.eu/rapid/press-release_MEMO-13-383_en.htm>.
[94] US Federal Trade Commission, supra note 2, 3.
[95] See European Commission, MEMO 15 April 2015

results of their efforts but most of all because the volatility and the evolution in the new economy is what enables them to become the new leaders in the market by being innovative and matching customers' needs. Limiting rewards for current market leaders, especially when they have gained their position in the market as a result of pure innovative efforts, as Google has, will eventually hinder the incentives to innovate not only for the infringer but also for the potential innovative pretender, who will tend to rely on free riding of "abusive" conducts than try to create more sophisticated products of their own to win over consumers.[96] It is not uncommon for competitors to try to hamper successful innovative efforts through legal means.[97]

In the search market where there is a deviation from the two dimensional model of competition (price-quantity) not only because of its dynamic character but also because its services are primarily provided for free, the evolution of different strategies for the maintenance of market power should be carefully assessed by the authorities. The companies operating in them need to implement such strategies in their general business model so as to maximize their profits, to attract new customers or even maintain their customer base.[98] Therefore, competition authorities need to strike a balance when enforcing competition rules in such demanding circumstances, as it is very easy to cause the opposite effect of hampering present and future innovation due to overenforcement.

Galloway argues[99] that we should not adopt a *per se* approach or tough sanctions (e.g. large fines) in dynamic markets, as there are clear reasons to approach innovative and novel practices with caution. Several commentators[100] strongly argue that there are greater social costs with Type I errors than Type II errors, as the market should self-correct Type II errors more readily than Type I errors.[101]

The case against Google

The preceding analysis has shown that Google's conduct does not meet the requirements of any traditional legal tests for abusive leveraging, at least without the Commission altering the existing parameters already shaped by EU case law. The Commission assesses Google's conduct under an abuse of giving prominent placement to its own comparison shopping service. This fact, combined with the special characteristics of dynamic markets, generally counsels cautious enforcement, to avoid Type-I errors.[102]

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[96] Rato and Petit, "Abuse of Dominance in Technology-Enabled Markets: Establishment Standards Reconsidered?", (2013), 4 ECJ, 3.

[97] Vexatious litigation has been a form of abuse of dominance in the Commission's practice.

[98] Arrezzo, Is there a Role for Market Definition and Dominance in an effects-based approach?, in «Abuse Of Dominant Position: New Interpretation, New Enforcement Mechanism?», MPI Studies on Intellectual Property, Competition and Tax Law, Vol. 5, Mackenrodt, Conde Gallego & Enchelmaier (eds), Springer, 2008, 25-26.

[99] Galloway, *Driving Innovation a case for targeted competition policy in dynamic markets,* http//ssrn.com/abstract=1763676

[100] Easterbrook, *The Limits of Antitrust*, (1984) 63 Texas L. Rev. 1, and Manne and Wright, supra note 102, 153.

[101] Galloway, supra n 91.

[102] Diez, Promoting competition in digital markets; a case against the Google case, and the futile search "neutrality" in on-line searches, <https://www.competitionpolicyinternational.com/promoting-

The Commission in its own Guidance Paper requests, for any conduct of a dominant undertaking to be considered as abusive, both foreclosure of as efficient competitors and harm to consumers to be caused by the behaviour in question. Consequently, the Commission should prove that foreclosure of as efficient competitors is reasonably likely to occur as a result of Google's conduct. To assess the above, the actual effects of Google's conduct should be taken into account. As already analysed in this paper, the Commission must ensure that any foreclosure possibly occurring in the market is not a result of Google's innovation drive and inability of the rivals to respond to this innovation, but the result of its allegedly abusive conduct.

To complement the previous argument, following the Streetmap case, the allegedly dominant undertaking's conduct cannot be considered as abusive in a related market when the same behaviour is pro-competitive in the market where the company is considered dominant, unless the anticompetitive effect attributed to this behaviour is serious or appreciable.

If the Commission has introduced "favouring its own services" as a "sui generis" type of abuse without meeting the above standard of proof, it is likely that the Commission will risk making a Type I error in its enforcement, as not as efficient competitors will be protected to the detriment of consumers and innovation. In any case, the above will create a very uncertain environment for all companies operating in dynamic sectors. Keeping in mind that any company in such sectors may instantly possess dominance through the creation of a new innovative product, the introduction of novel abuses without a specified legal test to support them would deteriorate primarily the incentives for innovation. The fear that the results of innovative efforts may be considered as abusive will make the firms reluctant to bear the high cost related to such innovative efforts. What should be borne in mind is that Google has managed to deliver innovative services to consumers and create a base of users who prefer this search engine from others even if they know that they can access an alternative one with "one-click".

Legal certainty requires that the dominant company is able to determine whether a conduct is abusive in order to refrain from such conducts.[103] The Commission in its approach to the Google Shopping case, may be risking legal certainty as well as consumer welfare enhancement by stifling innovation incentives.

competition- in-digital-markets-a-case-against-the-google-case-and-the-futile-search-of-neutrality-in-on-line-searches/> accessed on 27 July 2016.

[103] Lang, GCLC, Restriction of Competition and Exclusionary Abuse under Article 102 – The Solution, (2016), available at https://ssrn.com/abstract=2736331.