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I. INTRODUCTION

On November 30, 2010, the European Commission issued a press release which many were worried about, others looking forward to, but almost everyone anticipated: Google is under formal antitrust investigation with regard to an alleged abuse of dominance in the online search market.[2]

The Commission will investigate three main issues. The first is whether Google has manipulated its unpaid or "algorithmic" search results by giving preferential placement to its own results while lowering the ranking of those offered by competitors, i.e. vertical search engines. The second issue is whether Google has imposed exclusivity contracts on its advertising partners, preventing them from placing ads on competitive websites. Finally, the Commission will look into whether Google has restricted the portability of online advertising campaign data to competing online advertising platforms.

This development was expected by most, not only because Google has recently been the center of attention for many national competition authorities (the latest being the Italian antitrust investigation in the Google News Service which ended by compromise)[3] but also because the Commission seems to have lately targeted powerful technology companies. Since 2004, when Microsoft was fined EUR 497 million for abuse of dominance, to 2008 when a further EUR 899 million penalty was imposed for failure to comply with the 2004 ruling, up to 2009 when Intel was fined a historic EUR 1.1 billion, also for abuse of dominance, the Commission has shown a strong interest in the high-tech industry, apparently feeling confident it has the sophistication to tackle the complex issues arising in such innovative markets.

This Commission investigation targets the core of the Google business, i.e. its search engine, and naturally has attracted a lot of controversy. For example, there is speculation that this is an attack partly assisted by Microsoft, which recently merged its search business with Yahoo's in order to challenge Google's market lead.[4]This assertion is based on the fact that Microsoft owns one of the plaintiffs (Ciao!) as well as a price comparison service in Germany, and it sponsors a trade grouping called ICOM, a member of which is another plaintiff called Fodem,

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[2] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624&format=HTML&aged=0&language=EN&guiLanguage=en.

[3] http://www.agcm.it/stampa/comunicati/5194-a420-as787-antitrust-accetta-impegni-di-google-e-chiede-al-parlamento-di-adeguare-le-norme-sul-diritto-dautore.html.

[4] http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article7040174.ece.

a British price comparison service.[5]If this is the case, then there might be more competition in the search engine market than initially appears.

Also controversially, Benjamin Edelman, an assistant professor at Harvard Business School, recently published the results of a study conducted of Google's search engine, which allegedly show that there exists what he calls a "hard coded bias[6]" that overrides the normal algorithmic results in order to put a Google answer first. In another study,[7] he suggests that this "distortion" is identified with almost all leading search engines, including Yahoo!, but supposedly Google promotes its own services significantly more than others.

Google can be expected to bring forth evidence to contest such arguments. As we are not yet in a position to reach solid conclusions on such complex technical issues to answer the core question of whether Google tampers with its search results or not, it is safer to look at the available facts and pose some other questions also relevant to the competition analysis.

The first question is whether Google has a motive to tamper with its search results, in view of the two-sided platform market it operates. The second question is whether it is Google or the Commission who should "be feeling lucky" in the present dispute. And finally, if the "holy grail" of a neutral search engine is behind the Commission investigation, is this a realistic pursuit?

II. DOES GOOGLE HAVE A MOTIVE TO TAMPER WITH ITS SEARCH RESULTS?

Google allegedly holds an 80 percent market share in web searches in Europe, according to research firm ComScore.[8] Google has tendered a claim that its high share of searches does not equal a position of dominance on the Internet, due to the rise of companies like Facebook and Twitter which, like search, also source links to other websites.[9] For the sake of the current analysis, though, we will assume that Google is dominant in the web search market.

This particular market is a two-sided platform market, where Internet users account for one side and advertisers for the other. As in all two-sided markets, the owner of the platform has to determine both which side of the market is more price-sensitive and, hence, may require being subsidized to some extent, and also which is the side that gives the platform its value, namely creates positive network effects. In the search engine case, the response to both questions is the user side of the platform; users are more likely to leave the platform when faced with a price increase in online search, while the same does not hold for advertisers. Similarly, a search engine does not increase its value when it has many advertisers, but it definitely does when it attracts many users. Google, therefore, has correctly applied asymmetric pricing to its search engine, making web search free for its users while charging advertisers, who indirectly subsidize users/receivers of the ads.

Google makes most of its money through advertising. The ad market is also two-sided, where the advertiser brings together buyers and sellers. A good advertisement achieves a good

[5]http://www.guardian.co.uk/technology/2010/feb/24/google-monopoly-probe-european-commission.
[6]http://www.benedelman.org/hardcoding/.
[7]http://www.benedelman.org/searchbias/.
[8]http://www.time.com/time/business/article/0,8599,2034138,00.html.
[9]http://www.nytimes.com/2010/12/01/technology/01google.html.

match between the seller and the individuals who are most likely to respond and become buyers. The chances of a match being successful inevitably increase by the number of the users who receive the ad. If you ensure a wide user platform, have the know-how to divert the right ad to the right user, and deliver the ad sufficiently fast, you have a win-win-win situation—for the advertiser, the user, and the operator who gets the money from the advertisers.

Google has proven that it does this job very well. Although it is relatively difficult to measure the success of ads, it is fairly easy to measure the size of the user platform, which is the search engine platform component most difficult to attract, increase, and maintain. All the more so, since the online search market is not a traditional market where the product brand favors loyalty as, for example, in the luxury product market. In the online search market, each provider is constantly tested by its results, literally and metaphorically, as the switching costs for an unhappy user are virtually zero. Further, the user choice does not seem to be significantly affected by the network effects, as it is the case with particular applications, e.g. G-talk or MSN Messenger, where the users' choice depends on the popularity of such applications among their friends. From that aspect, search engines are a "lonely" tool and one must exert continuous efforts to keep its users happy.

Besides, in such an innovative area as the web, the pace of innovation "should give one pause on how secure a dominant position is."[10] As David Evans correctly points out, no one predicted in the early 2000's that Microsoft would be complaining about someone else leveraging their monopoly power.[11] Therefore, in such highly innovative markets, one cannot be too secure about the sustainability of their dominance, or even their market share; therefore, any business behavior which is independent of one's competitors, customers, or consumers does not seem to be an option, or at least a reasonable one.

For these reasons, one may conclude that Google has every reason to provide a good service to its users, not only in order to maintain them but also to increase their number. A strong user audience will, in turn, result in an increase of advertisers and the overall value of the system. Viewed from this angle, Google does not appear to have a motive to tamper with its search results and unfavorably rank rival services when their results are better than Google's. Such a biased ranking of results would inevitably jeopardize the efficiency of Google's search engine which, in turn, would cost it users and subsequently advertisers, who normally follow the users.

A potential motive for tampering could, nevertheless, arise where a competing vertical search engine provides just-as-good results as Google's. In that case, Google may have a motive to lower the ranking of the competing service in order to promote its own product and benefit from the ads; such lowering would not jeopardize the efficiency of its service. Assuming this is the case, is this that bad? Does this action necessarily constitute an abuse of dominance or is it merely rational business behavior, which is allowed to dominant undertakings?

In the author's view, it is not easy to prove that this favoritism is a case of abuse for two reasons. First, if Google results are just-as-good as the ones of competing search engines, then there is, in principle, no reason for competing search engine results to rank higher than Google's; nor is there obvious consumer harm by giving a favorable ranking to Google's. Second, the mere

[10] Evans, David S., The Web Economy, Two-Sided Markets and Competition Policy (April 4, 2010). Available at SSRN: http://ssrn.com/abstract=1584363.

[11] *Id.*

appearance of the competitor on a Google search apparently constitutes a free advertisement of the competitor's services which, in turn, generates profit for the latter through the ads displayed on the competitor's sites. Therefore, if said competitor provides just-as-good results as Google, and given that they both compete for advertisers, it seems an irrational business practice to favor the competitor's results by ranking them higher than Google's own results. To put it another way, it seems rational from a business perspective to lower the rankings of an as-efficient-competitor, whose services are promoted for free by appearing in the Google search results, in order for Google to safeguard its own interests. Does this equal an abuse? Hardly so.

III. WHO SHOULD BE FEELING LUCKY?

It is clear that Google has arguments to support its business conduct, but that does not necessarily mean it should be feeling lucky. But, given the perplexity of the case in question, the Commission should not be feeling lucky either.

The first issue which the Commission should tackle, before concluding that Google is dominant, is the fact that market shares in all innovative markets are quite volatile. On the one hand, such volatility is indicative of competition constraints, even potential ones, and, on the other, this same volatility could weaken any "sustainability over time" argument with regard to a player's market shares. Therefore, the Commission needs to be able to provide stronger evidence than usual to support a possible finding of dominance; the mere assessment of Google's market share is not enough to prove such a finding.

Another challenge which the Commission will inevitably face is the appropriate competition analysis, given that is a two-sided market. As mentioned above, Google applies asymmetric pricing to its search engine; namely, it gives users the service for free while charging advertisers. In a traditional market analysis, the competition authorities look at the market that pays, which is normally the market that also benefits, i.e. receives the product or service for a given price. In two-sided markets though, there may be a platform that merely benefits without incurring the associated cost (positive externalities). In such circumstances, an appropriate competition analysis must take such welfare into consideration before reaching any conclusions as to the pro- or anticompetitive character of a certain behavior, even if it initially appears that the behavior is unfavorable either to the platform that bears the cost or to the platform's competitors.

In this particular case, before identifying a possible Art. 102 TFEU breach, it is clear that the competition analysis has to: (i) take into account the value that consumers get from the free use of a very effective search engine, (ii) assess whether the same level of service and hence the same welfare could be achieved in another, less "anticompetitive" way, and (iii) then determine whether the consumer is actually harmed or not.

The two-sided nature of this market poses another question, associated with what could be considered a barrier to entry. One could suggest that the creation of an algorithm just-as-good, or even better, than Google's PageRank, does not seem to constitute a high barrier to entry for a potential competitor. Even if this holds true, it does not alter the fact that such an algorithm would be useless in practice if the competitor does not achieve enough critical mass on both sides of the market to have each side interact and allow the platform to operate.

Google has been accused of engaging in exclusivity agreements with its advertising partners, which allegedly results in a reduction of available customers for one side of the market and therefore impedes competitive platforms from operating effectively. True or not, one cannot

deny that Google can achieve the same exclusionary result by a perfectly legal method—by merely doing a good job in attracting and maintaining a wide user platform and delivering the right users to advertisers; namely by just being efficient. Although this constitutes pro-competitive business behavior, it does not alter the fact that competitors will still have difficulty in penetrating the market and advertisers will have high switching costs, two factors that keep advertisers preferring Google over its existing or potential competitors. Therefore, the Commission should take into account that an element of exclusion will naturally be present in the market in question, without being necessarily attributable to abusive business behavior. Only if particular exclusionary effects can be directly linked to abusive conduct, as opposed to mere efficiency, can an Art. 102 TFEU infringement be established.

Finally, even if it is proven that Google favors its own search results, the Commission will need not only to prove that the results of competing vertical search engines are better than Google's, but also that these results do not appear at their fair ranking to the detriment of consumers. It is not enough to merely show that Google's algorithm is somehow overridden, not only because such an assumption falsely presupposes that Google's algorithm is immaculate and were it not overridden it would show a fair ranking, but also because the Google results could indeed be better than others—or not. Only if a consistent inferiority of Google's "favored" results is proven can consumer harm or negative network externalities be solidly established. If the competing search results are merely just-as-good as Google's, then the Commission will have to justify why the preferential placement of Google's own results does not constitute rational business behavior, which all undertakings have the right to exercise—even incumbent ones.

IV. THE HOLY GRAIL OF A NEUTRAL SEARCH ENGINE?

If no sinister competitor is behind this targeting of Google, or if this is not a case of a European Commission tendency to target American-based market incumbents or high-tech markets, then could this investigation be motivated by the desire to pursue the holy grail of a neutral search engine? And, if this is so, can such a thing realistically exist?

In the author's view, this is extremely difficult, not to say utopian. Any given algorithm, pursuant to which the results are displayed, is just as good as its designer(s)created it to be. Google has its own algorithm, Yahoo! has another one, and Bing yet another one, all of which generate results in different sequences. Try searching for "dominance" on each one of these search engines and you will get the picture. Even if Google (or any of its competitors) do not somehow tamper with their search results, the mere fact that the sequence and, hence, the ranking of their search results are different, proves that any objectivity or neutrality is in the eye of the beholder. How can one define the right algorithm against which objectivity should be measured? Even if such a definition was remotely possible, the fact that both the user and the site administrator need to provide the same keywords in order to interact is a factor which any algorithm cannot directly control or regulate, and thus cannot take the blame for all and any mismatches.

If one cannot measure the level of neutrality of a given search engine, one can nevertheless measure the efficiency thereof. If a search engine attracts many users and, therefore, many advertisers, that is, if it has both platform markets onboard and both of them stick with it over the course of time, then it must be efficient. Facts show that however the PageRank algorithm works, tampered with or not, it works efficiently and this is an element of welfare which must be taken into account for any competition analysis—even if an exclusionary effect is established.