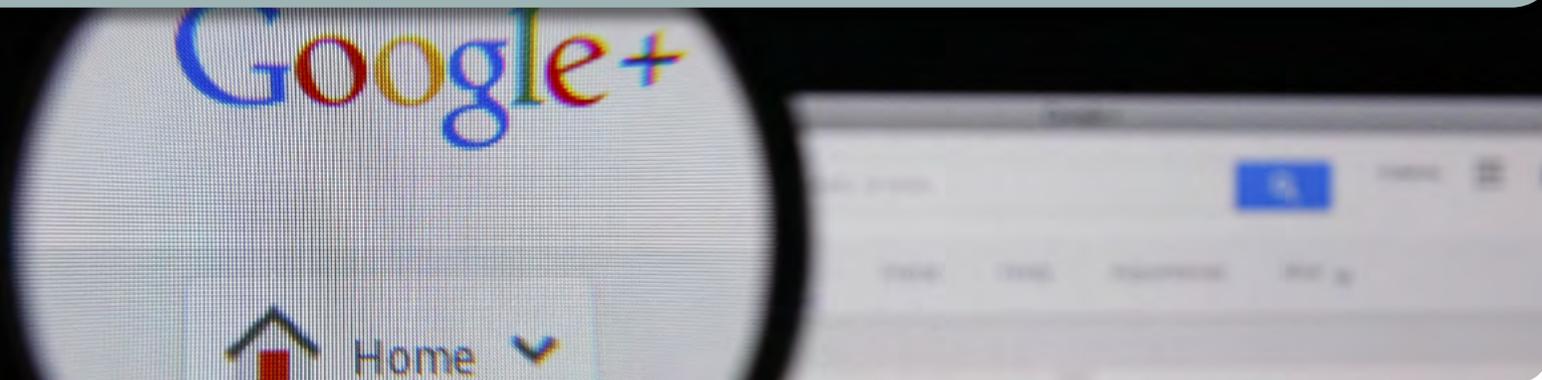


# A PRELIMINARY ASSESSMENT OF THE EUROPEAN COMMISSION'S GOOGLE SEARCH DECISION



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## I. INTRODUCTION

On June 27, 2017, the European Commission announced its decision to impose upon Google a record €2.42 billion fine for abusing its dominance as a search engine by giving illegal advantage to its own comparison shopping service.<sup>2</sup> The decision comes at the end of a 7-year-long period of investigations which at one point were almost closed with commitments.<sup>3</sup> The infringement, according to the European Commission, is that Google abused its dominant position on the internet search market to favor its own comparison shopping service over those of its rivals (i.e. comparison shopping sites such as Kelkoo, Idealo, etc.).<sup>4</sup> According to the Commission, the abuse consists in Google systematically giving prominent placement to its own comparison shopping service while subjecting comparison shopping services to Google's algorithm including demotions for organic results.<sup>5</sup> Notably, the Commission "does not object to the design of Google's generic search algorithms or to demotions as such, nor to the way that Google displays or organises its search results pages (e.g. the display of a box with comparison shopping results displayed prominently in a rich, attractive format)."<sup>6</sup> Rather, the Commission objects to the "fact that Google has leveraged its market dominance in general internet search into a separate market, comparison

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<sup>2</sup> See "Statement by Commissioner Vestager on Commission decision to fine Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service," 6/27/2017, [http://europa.eu/rapid/press-release\\_STATEMENT-17-1806\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-1806_en.htm).

<sup>3</sup> For then-Comm'r Almunia's statement that the commitments address the competition concerns of the Commission, see European Commission Press Release IP/14/116, "Antitrust: Commission obtains from Google comparable display of specialised search rivals," 2/5/2014, [http://europa.eu/rapid/press-release\\_IP-14-116\\_en.htm](http://europa.eu/rapid/press-release_IP-14-116_en.htm).

<sup>4</sup> "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service," 6/27/2017, [http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm).

<sup>5</sup> "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – Factsheet," 6/27/2017, [http://europa.eu/rapid/press-release\\_MEMO-17-1785\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm) 1-2.

<sup>6</sup> Factsheet (note 5) 2.

shopping.”<sup>7</sup> The Commission considers *Google Search* to be a test case potentially setting a precedent “which can be used as a framework” to analyze the legality of similar conduct that Google may have engaged in regarding other Google products than comparison shopping.<sup>8</sup> Pending a full review of the Commission’s decision which is yet to be published at the time of writing, some preliminary observations can be offered on the *Google Search* decision which saw the largest antitrust fine ever to be imposed on Google. This article will briefly examine in turn the pertinent issues on the basis of the publicly available information concerning the abuse, the theory of harm and the remedy in *Google Search*.

## II. THE ABUSE

The first striking aspect of the decision is that the Commission still has not spelled out what is the relevant “abuse.” As noted above, the Commission neither objects to Google’s design of its pages by which Google displays its search results nor to Google’s demotion of certain results.<sup>9</sup> Yet, when it explains how Google has abused its dominant position by giving its shopping product an “illegal advantage,” the Commission precisely lists these two practices in order to explain the abusive conduct.<sup>10</sup> Consequently, what exactly the abusive conduct is remains unclear.

The specific existing law upon which the case has been built is also unclear. Commissioner Vestager in the Press Conference announcing the Commission’s decision alluded to the practice not being a novel type of abuse by calling the decision “old school,” but as this author has argued elsewhere, it is impossible to fit the existing facts of this case within existing case law.<sup>11</sup> Neither the Commissioner nor any other official of the Commission has so far stated which existing case law and which existing type of abuse this case falls under. Although the list of abusive practices in Article 102 TFEU is not exhaustive<sup>12</sup> and novel practices can be found abusive, the question of novelty is not insignificant in the context of the record fine that was imposed in this case. Fining a company more than twice as much any other company has been fined for an abuse of a dominant position in the history of EU competition law in a case where the practice is at least arguably a novel type of abuse does not follow certain previous practice of the EU Commission where no fine was imposed due to the practice being a novel abuse.<sup>13</sup>

Although it is acknowledged that the fact that a practice is novel does not, in itself, prevent the Commission from imposing a fine, in *Motorola* the Commission chose not to impose a fine because (i) the conduct was novel, and (ii) national courts had reached diverging conclusions on the issue (of whether seeking and enforcing an injunction against a willing licensee by the holder of a standard essential patent was abusive).<sup>14</sup> It needs to be borne in mind that legal certainty is a fundamental principle of EU law,<sup>15</sup> and the Commission must be guided by the principle of proportionality in its enforcement.<sup>16</sup>

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7 Id.

8 Statement by Commissioner Vestager (note 2) 3.

9 See text to note 6, above.

10 See Factsheet (note 5) 2.

11 See Akman, “The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law,” (forthcoming) (2017) *Journal of Law, Technology and Policy*, available at: <http://illinoisjlt.com/journal/wp-content/uploads/2017/06/Akman.pdf>.

12 See Case 6/72 *Europemballage Corporation and Continental Can Company Inc v. EC Commission* [1973] ECR 215, [26].

13 See Commission Decision, Case AT.39985 *Motorola - Enforcement of GPRS Standard Essential Patents* (Motorola) (summary at [2014] OJ (C 344) 6), [ec.europa.eu/competition/antitrust/cases/dec\\_docs/39985/39985\\_928\\_16.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf). In *Motorola* there were German court decisions which found Motorola’s conduct to be lawful while a Dutch court had explicitly rejected the German approach; see *ibid* para 439.

14 *Motorola* (note 13) [560]-[561]. Similarly, in Google’s case, several courts around the world have dismissed claims identical in principle to those in *Google Search* for there not being an abuse of a dominant position. Of these, two have been decided by courts in EU Member States: *Verband Deutscher Wetterdienstleister eV v. Google*, Reference No. 408 HKO 36/13 (4/4/2013), Court of Hamburg in Germany and *Streetmap.EU Ltd v. Google Inc. and others* [2016] EWHC 253 (Ch) in the United Kingdom.

15 On legal certainty being a fundamental principle of EU law, see e.g. Case C-94/05 *Emsland-Stärke GmbH v. Landwirtschaftskammer Hannover* [2006] ECR I-2619, [43] and the cases cited therein; Case C-201/08 *Plantanol GmbH & Co KG v. Hauptzollamt Darmstadt* [2009] ECR I-08343, [46]; Case 348/85 *Kingdom of Denmark v. Commission* [1987] ECR 5225, [19].

16 Under Article 7(1) of “Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,” [2003] OJ L1/1, the Commission may only impose remedies that are “proportionate to the infringement committed.”

The previous practice of not fining a company in case of a novel abuse is preferable for legal certainty purposes in the context of the inherently vague prohibition of “abuse” which provides little guidance to dominant undertakings in advance of engaging in a certain practice as to whether the practice is lawful or not where the practice is neither listed in the provision nor held to be previously abusive in the case law.

This is all the more so where a novel abuse is also not clearly a practice that does not constitute “competition on the merits” as is arguably the case in *Google Search* given that, for example, the U.S. FTC found the same practices to be product improvement to the benefit of consumers.<sup>17</sup> Indeed, the European Courts have noted that while “the use of imprecise legal concepts in making rules, breach of which entails the civil, administrative or even criminal liability of the person who contravenes them, does not mean that it is impossible to impose the remedial measures provided by law,” this is only the case “provided that the individual concerned is in a position, on the basis of the wording of the relevant provision and, if need be, with the help of the interpretation of it given by the courts, to know which acts or omissions will make him liable.”<sup>18</sup>

Thus, the relevance of existing case law on the same conduct is obvious given that by the European Courts’ own admission, Article 102 itself is drawn up “using imprecise legal concepts, such as ... ‘abuse.’”<sup>19</sup> Consequently, where there is no means of establishing on the basis of the provision itself and relevant case law on the topic that the conduct in question is unlawful, it becomes questionable whether liability and remedial measures can be imposed without infringing the principle of legal certainty.

### III. THE THEORY OF HARM

Similarly to the type of abuse, and perhaps more importantly, the theory of harm in *Google Search* is also unclear. It is disappointing to see that the decision appears to revolve around harm to a group of competitors and in particular, how Google’s practice led to a loss of traffic to some websites. There is practically no discussion of how the practice has affected Google’s only trading partners – advertisers – and there is little convincing discussion of how the users – consumers – (might) have been harmed as a result of Google’s practice. The suggestion that the practice leads to lack of innovation on both Google’s and the comparison shopping sites’ part and thereby harms consumers by reducing choice does not hold water. First, according to the EU’s own statistics, Google is the world’s fourth R&D investor, which has increased its investment in R&D by over 20 percent in 2016.<sup>20</sup> Second, the comparison shopping sites have likely lost business as a result of the normal dynamics of competition as they could not innovate to catch up with Amazon’s numerous offerings to consumers. This factor raises questions about the causal link between Google’s practices and the loss of business experienced by the comparison shopping sites in question. Whether the Commission has proven that in the absence of Google’s relevant practices the comparison shopping sites would have thrived despite the growing prominence of Amazon (i.e. the assessment of the counterfactual) can only be scrutinized once the full decision is published. Third, comparison shopping sites remain fully accessible to consumers who value their offerings, irrespective of where Google ranks them in its results. Fourth, as noted by this author elsewhere,<sup>21</sup> any space that was used to display results of comparison shopping services that no longer displays those results on Google’s results pages, is taken up by links to other products/services, most notably to Amazon and eBay. This not only suggests a lack of harm to *competition* given that Amazon and eBay are also Google’s competitors, but also represents an improvement in product design by increasing the diversity of results to the benefit of consumers, as noted by the FTC.<sup>22</sup> All in all, a robust theory of harm that demonstrates harm to consumers from Google’s practices in this case appears to be still missing.

<sup>17</sup> See “Statement of Federal Trade Commission Regarding Google’s Search Practices,” *In the Matter of Google Inc.*, FTC File Number 111-0163, 3/1/2013 [https://www.ftc.gov/system/files/documents/public\\_statements/295971/130103googlesearchstmtofcomm.pdf](https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf) 3.

<sup>18</sup> Case T-167/08 *Microsoft Corp v. European Commission*, 27/6/2012, ECLI:EU:T:2012:323, [84] with reference to Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633 and Case C-266/06 P *Evonik Degussa v. Commission* (22/5/2008) (not published in the ECR) [39].

<sup>19</sup> *Microsoft* (note 18) [91].

<sup>20</sup> See “The 2016 EU Industrial R&D Investment Scoreboard,” <http://iri.jrc.ec.europa.eu/documents/10180/1030082/The%202016%20EU%20Industrial%20%26D%20Investment%20Scoreboard> as noted in Petit, “My 2 cents on the EC decision against Google,” [https://medium.com/@nicolaspetit\\_89712/my-2-cents-on-the-ec-decision-against-google-683651adee](https://medium.com/@nicolaspetit_89712/my-2-cents-on-the-ec-decision-against-google-683651adee).

<sup>21</sup> Akman (note 11) 72.

<sup>22</sup> See FTC Statement (note 17) 3.

## IV. THE REMEDY

The final striking aspect of the decision is the “remedy” that the Commission proposes (or fails to propose): the Commission states that Google must stop its illegal conduct within 90 days and it can do so by respecting “a simple principle: [i]t has to give **equal treatment** to rival comparison shopping services and to its own.”<sup>23</sup> This is nothing but simple. Ordering a company which vehemently argues that it does indeed treat all equivalent services equally, falls well short of what would have been expected of the Commission in terms of identifying with sufficient legal certainty what the company should do to stop infringing the law. Further, the Commission notes that in order to comply with the principle of equal treatment, Google “has to apply the same methods and processes to position and display its own and rival comparison shopping services in its search results.”<sup>24</sup>

Once one appreciates the fact that Google’s shopping results are simply ads for products and Google treats all ads with the same ad-relevant algorithm and all organic results with the same organic-relevant algorithm, the Commission’s order becomes impossible to comprehend. Is the Commission imposing on Google a duty to treat non-sponsored results in the same way that it treats sponsored results? If so, does this not provide an unfair advantage to comparison shopping sites over, for example, Google’s advertising partners as well as over Amazon, eBay, various retailers, etc. which are the competitors of the comparison shopping sites but which do not receive such favorable treatment from Google but compete with them? In any case, the imposition of such a duty on Google implies that Google should forego the revenues which it could generate using its proprietary product in order to pay for the promotion of some of its rivals which can ultimately lead to more distortion of competition on the relevant markets due to distorted incentives and unequal treatment.

It is not even clear as of yet whether the remedy that is potentially being imposed on Google is a behavioral or structural one given that the “comparison shopping” function is an integrated part of Google’s search engine for queries that do generate shopping results. For example, if Google has to close down its (comparison) shopping product in Europe or separate the comparison shopping business from the search engine to comply with the Commission’s decision, the remedy can be considered to be structural.<sup>25</sup> By not spelling out precisely what the remedy should be, the Commission can indirectly avoid the burden to justify the imposition of structural remedies under Regulation 1/2003 which can only be imposed “either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy.”<sup>26</sup>

In an *ex-post* scenario where the allegedly harmful conduct has already taken place as opposed to, for example, an *ex-ante* merger situation, it is unjustifiable for the Commission to fail to precisely set out what needs to be done by the infringing undertaking to bring an end to the infringement, not least because lack of compliance with the decision also risks periodic fines.<sup>27</sup> The remedy prescribed by the Commission is also significant because “[i]n many respects the remedy is an important cross-check on the coherence of the substantive case on abuse, as well as the enforcement justification for intervention. A bad remedy will usually mean a bad theory of harm in the case.”<sup>28</sup>

*Argumentum a fortiori*, a remedy that has not been spelled out beyond an order to stop the infringing conduct which the alleged infringer argues not to have engaged in in the first place, does not fare well in terms of deciphering the abuse in the first place. Finally, the principle of legal certainty also applies in the imposition of remedies; any remedy must be clear and precise so that the undertaking may know without ambiguity its rights and obligations and take steps accordingly.<sup>29</sup> It is questionable whether the lack of a prescribed remedy in *Google Search* complies with the principle of legal certainty.

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23 Statement by Commissioner (note 2) 2.

24 *Id.*

25 Structural remedies involve permanent changes to the structure of the dominant undertaking (e.g. an obligation to divest, a requirement to split up a dominant undertaking into independent units) while a behavioral remedy requires an undertaking to act or to refrain from acting in a specified way; see O’Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (2<sup>nd</sup> ed, Hart Publishing, 2014) 880.

26 Article 7(1) Regulation 1/2003.

27 See Article 24 Regulation 1/2003.

28 O’Donoghue & Padilla (note 25) 927.

29 Hellstroem, Maier-Rigaud & Bulst “Remedies in European Antitrust Law,” (2009) 76 (1) *Antitrust Law Journal* 43, 51 with reference to Joined Cases 92 & 93/87 *Commission v. French Republic et al* [1989] ECR 405, [22].

## V. CONCLUSION

This article has briefly set out some of the problems that the currently available information on the European Commission's decision in *Google Search* presents, in particular, relating to the abuse, theory of harm and remedy aspects of the decision. Clearly, a fully-informed debate on the merits of the decision can only take place once the full decision is published. Yet, the investigation has taken over seven years and numerous statements, including a commitment proposal, have already been made publicly available. The central arguments of the case against Google have been set out, but how and why these constitute an infringement of the law prohibiting an abuse of a dominant position remain unclear. A convincing theory of harm that shows ultimate harm to consumers as opposed to some competitors of Google has not yet been established. Similarly, it remains unanswered how Google may remedy the abuse without either completely removing a service which arguably benefits European consumers or practically *paying* some of its rivals to use its own proprietary product to their benefit to the detriment of Google's own property rights as well as the detriment of other competitors on the market. Given all these controversies, it is unlikely that the *Google Search* decision will be the end of this legal story.

