

# **Lessons from the Recent Commission's Decision on Google. To Favour Oneself or Not, That is the Question**

Working paper

Beata Mäihäniemi (LL.D.)

Post-doctoral researcher in law and digitalization

The Legal Tech Lab

University of Helsinki

[beata.maihaniemi@helsinki.fi](mailto:beata.maihaniemi@helsinki.fi)

@beatamaihaniemi

## Table of Contents

1. Intro.....	3
2. Establishing dominance.....	5
3. ‘Search Bias’ as an Algorithm-Based Abuse?.....	6
4. Hybrid theory of harm.....	10
4.1. Do we need new kinds of abuses in digital markets?.....	10
4.2. Exclusionary discrimination.....	12
5. Criteria for exclusionary discrimination.....	14
5.1. Appreciable effect on the market.....	15
5.2. Potential foreclosure.....	15
5.3. Harm to innovation.....	17
5.4. Existence of less distortive alternatives.....	18
6. Conclusions.....	21

## 1. Intro

According to the Commission, digital markets should not be left to themselves as they are fast-changing and market forces are unable to address issues such as e.g. bias.<sup>1</sup> It also points out that

established online platforms (...) are subject to very low competitive pressure both inside the market or from potential new entrants are unlikely to pay a price in terms of loss of users if they increase participation costs, change their privacy settings, or even if their reputations is compromised in such a context' and they have 'too few incentives to swiftly correct the implicit bias of their algorithms.'<sup>2</sup>

Is it really so? Should we then intervene to ensure more competition? What should be done to ensure competition? The debate on whether to intervene or not is especially vivid in digital markets. Some claim that there is no need to intervene as there is a constant threat of disruptive innovation even on dominant firms but others claim that gatekeepers' behaviour affects privacy, well-being and democracy.<sup>3</sup> Is the goal of antitrust promoting economic efficiency (that could be understood as interest of powerful utilitarians) or the 'welfare of powerless' (that could be understood as the welfare of most of the citizens who are marginalised both by government and dominant firms)?<sup>4</sup> According to Stucke and Ezechia, competition law is something that is being designed by us (lawyers?) and this design should be based on core values of competition law that is, it is dependant on 'what do we, as a society, want to promote.'<sup>5</sup> In this article, whether fairness

---

<sup>1</sup> European Commission, 'The Age of Artificial Intelligence, Towards a European Strategy for Human-Centric Machines' 29 European Political Strategy Centre, 27 March 2018, <[https://ec.europa.eu/epsc/sites/epsc/files/epsc\\_strategicnote\\_ai.pdf](https://ec.europa.eu/epsc/sites/epsc/files/epsc_strategicnote_ai.pdf)> last accessed 28.4.2018, 7.

<sup>2</sup> *ibid.*

<sup>3</sup> Ezechia, Ariel, Maurice E., Stucke. 'The Fight Over Antitrust Soul (2018) 9(1) Journal of European Competition Law & Practice 1.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*, 2.

considerations could be seen as an accompanying goal of competition law and consequently as the reason for antitrust intervention.

One particular case in which the Commission decided to intervene is the Google case where it concluded that Google's algorithm is self-preferring its own services and/or degrading quality of information provided to consumers (the so-called 'search bias'). The issue of search bias is ambiguous, as it has been analysed in other jurisdictions such as the United States<sup>6</sup>, the United Kingdom<sup>7</sup>, Germany<sup>8</sup>, India (the only jurisdiction besides the European Union where Google has been found guilty of search bias)<sup>9</sup>, where they came to quite diverging outcomes. Google case is the new kind of competition case that occurs in digital markets. It is and will be a reference point for future cases just like Microsoft<sup>10</sup> was back in time. As the full version of the prohibition decision is now fully available, it calls for a detailed analysis.

What were the exact arguments the Commission has based its findings of search bias anticompetitive? In this paper, the role of an algorithm and characteristics in investigations on search bias are pondered upon. In particular, what is the role of algorithm in self-preferring?

This paper argues that the decision is not sufficiently articulating the theory of harm it is based its arguments on. It is unclear what this theory is, is it leveraging, exclusionary discrimination or something new? The Commission can create new forms of abuses of dominance to accommodate new kinds of competition issues. It seems that especially in the environment of digital platforms some kinds of similar anticompetitive behaviours of online platforms can be identified.

---

<sup>6</sup> United States of America before the Federal Trade Commission, In the Matter of Motorola LLC and Google Inc, Complaint 1210120, 1-2 accessed 22 March 2016.

<sup>7</sup> Streetmap.EU Limited and Google Inc., Google Ireland Limited, Google UK Limited. [2016] England and Wales High Court EWHC 253 (Ch).

<sup>8</sup> Verband against Google Inc. and Google Germany GmbH, The Order of the District Court of Hamburg (Chamber of 8 for Commercial Matters) (2013) ref: 408 HKO 36/13, unofficial translation accessed 22 March 2014.

<sup>9</sup> Aditya Kalra, Aditi Shah, India's antitrust watchdog fines Google for abusing dominant position, Reuters, Business News, February 8 2018 <<https://www.reuters.com/article/us-india-google-antitrust/indias-antitrust-watchdog-fines-google-for-abusing-dominant-position-idUSKBN1FS2AD>> accessed 6.6.2018.

<sup>10</sup> Case T-201/04 Microsoft Corp v Commission [2007] ECR II - 3601, [2007] 5 CMLR 11.

## 2. Establishing dominance

Before finding an abuse, the Commission has to prove that the company in question is in fact dominant. Article 102 focuses on both exploitative and exclusionary abuses, but only after the dominant position of an undertaking involved in an anticompetitive practice has been proved.<sup>11</sup> EU competition law<sup>12</sup> imposes a threat on firms with large market shares and dominance has been found in situations where the market share of an undertaking was at a 40% quote<sup>13</sup> of the relevant market.<sup>14</sup>

Google has been found dominant in general internet search markets throughout the European Economic Area (EEA), i.e. in all 31 EEA countries.<sup>15</sup> In the decision, the Commission stated that

the infringement started in each of the 13 national markets for general search services from the moment Google launched the Product Universal in that national market, or, if the Product Universal was never launched in that national market, from the moment Google launched the Shopping Unit in that market.<sup>16</sup>

Consequently, the abuse started in January 2008 in Germany and in the UK, in October 2010 in France, May 2011 in Italy, Netherlands and Spain; February 2013 in Czech Republic; November 2013 in Austria, Belgium Denmark, Norway,

---

<sup>11</sup> Consolidated version of the Treaty on the Functioning of the European Union, Article 102, 2010 O.J. C 83/47.

<sup>12</sup> The EU competition law unlike its American counterpart does not allow imposing criminal penalties in antitrust violations, although some of the Member States (UK, Austria, France, Germany and Ireland) do, however this is mainly done for cartel offences.

<sup>13</sup> The Commission found dominance below 40% in Virgin/British Airways (Case COMP/34.780) Commission Decision [2000] OJ L 30/1.

<sup>14</sup> Spencer Weber Waller, 'Antitrust and Social Networking' (2011) 2012 North Carolina Law Review 25 <<http://ssrn.com/abstract=1948690>> accessed 18 March 2016.

<sup>15</sup> European Commission, 'Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service' (Press release, Brussels, 27 June 2017) <[http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm)> accessed 20 July 2017.

<sup>16</sup> *Google*, para 686.

Poland and Sweden.<sup>17</sup> The Commission seemed right to find Google dominant and it would be difficult for Google to argue in front of the Commission that it is not. However, it is disputable whether the Commission was right in its definition of the relevant market both in a geographical and product dimensions. This is so, as the market is not necessary always national as regards comparison shopping services and consumers may order certain goods from other countries that e.g. speak the same language etc. What is more, as Google collects and monetises personal data gathered in return for offering free services, the market could also be possibly extended to the market for monetising personal data. What is more, the Commission did not use SSNIP test to assess Google's dominance.

### **3. 'Search Bias'<sup>18</sup> as an Algorithm-Based Abuse?**

Search bias denotes, according to the Commission 'more favourable positioning and display by Google, in its general search results pages, of its own comparison shopping service compared to competing comparison shopping services (...)'<sup>19</sup> that infringes Article 102 TFEU (...)'<sup>20</sup>. Consequently, were internet users searched for a particular product, say, for example a Gucci bag, they received a number of search results, but the top search results were the most visible and included Google's own comparison shopping service (that makes it easier for consumers to search and compare prices between different sellers) – Google Shopping.

According to the Commission, this practice is falling outside the scope of competition on the merits as it decreases traffic from Google's general search results pages to competing comparison shopping services and at the same time increases traffic from Google's general search results pages to Google's own

---

<sup>17</sup> *Google*, para 686.

<sup>18</sup> The detailed analysis of the Google case up to June 2017 can be found in Beata Mäihäniemi, *Imposing Access to Information in Digital Markets Based on Competition Law. In Search of a Possible Theory of Harm in the EU Google Search Investigations* (University of Helsinki, Helsinki 2017), see also Beata, Mäihäniemi, 'The Role of Innovation in the Analysis of Abuse of Dominance in Digital Market: The Analysis of Chosen Practices of Google Search' (2017) 1, 1 *Market and Competition Law Review* 111 – 143.

<sup>19</sup> *Google*, para 2.

<sup>20</sup> *ibid.*

comparison shopping service.<sup>21</sup> Competing comparison shopping services are downgraded by Google's algorithms, while Google's Google Shopping is displayed in a prominent way and is not subjected to this downgrading by algorithms.<sup>22</sup> Google's own comparison shopping service appears on its first general results page in a highly visible place,<sup>23</sup> and enjoys graphic features and dynamic information.<sup>24</sup> In the result of this preferential display of Google's own comparison shopping service users click on them more often than on the ones from its competitors.<sup>25</sup>

As search bias is a by-product of the use of algorithm, the anti-competitiveness of the practice is not all so clear-cut. Algorithms challenge the application of competition law as they create new kinds of abuses such as e.g. data capture, extraction, and co-opetition (between super platforms and applications developers).<sup>26</sup> However, the Commission has itself pointed out that

search algorithms and search engines by definition do not treat all information equally. While processes used to select and index information may be applied consistently, the search results will typically be ranked according to perceived relevance. (...) As a result, of data integration and profiling, search algorithms and search engines rank the advertisement of smaller companies that are registered in less affluent neighbourhoods lower than those of large entities, which may put them at a commercial advantage. Search engines and search algorithms also do not treat all users equally. Different users may be presented with different results, on the basis of behavioral or other profiles, including personal risk profiles (...).<sup>27</sup>

---

<sup>21</sup> Google, para 341.

<sup>22</sup> Google, para 344.

<sup>23</sup> Google, para 379.

<sup>24</sup> Google, para 397.

<sup>25</sup> Google, para 398.

<sup>26</sup> Nicolas Petit, Antitrust and Artificial Intelligence: A Research Agenda (2017) 8, 6 *Journal of European Competition Law & Practice*, 361, 361.

<sup>27</sup> European Commission, 'The Age of Artificial Intelligence, Towards a European Strategy for Human-Centric Machines'

It is therefore surprising that it does not acknowledge the ambiguity of an algorithm in the Google decision to a greater extent. Consequently, although Google's behaviour may be exclusionary, it is not necessary deliberate and may be due to the complicated structure of an algorithms it uses for improving its search experience. These algorithms are the way in which Google works that is 'crawls, triggers, ranks and displays search results'.<sup>28</sup> However, also due to these functions, algorithms can be subjected to in-built biases that in the result favour some of its content, not necessarily deliberately. That is not explicitly designed by its programmer, and she is not able to anticipate all the possible consequences.<sup>29</sup> This is especially true as regards to the self-learning algorithms.

Therefore, we need to acknowledge that artificial intelligence is nor impartial nor neutral. Technologies are still products and one should always take into account the context in which they are created. Therefore, even though algorithmic predictions and performance are made by machines, they are limited by decisions and values of their designers, developers and people who maintain these systems.<sup>30</sup>

The problem arising from algorithmic-based models of online platforms is asymmetry of power between the institutions that accumulate data and the people who generate these data.<sup>31</sup> Consequently, we can often observe here deception where large information intermediaries 'nudge consumers into exploitative transactions'.<sup>32</sup> This is so, as where large online platforms gather our personal information they hold this information as their business asset and monetise it. We, as users often do not even know what happens to that information, although we

---

<sup>28</sup> Nicolo Zingales, Google Shopping: beware of 'self-favouring' in a world of algorithmic nudging, Law, Politics and Sociology Blog <[https://lawpoliticsandsociology.wordpress.com/2018/03/03/google-shopping-beware-of-self-favouring-in-a-world-of-algorithmic-nudging/#\\_ftn4](https://lawpoliticsandsociology.wordpress.com/2018/03/03/google-shopping-beware-of-self-favouring-in-a-world-of-algorithmic-nudging/#_ftn4)> accessed 8.6.2018.

<sup>29</sup> *ibid.*

<sup>30</sup> Campolo *et al*, AI Now Report (2017) 18 <[https://ainowinstitute.org/AI\\_Now\\_2017\\_Report.pdf](https://ainowinstitute.org/AI_Now_2017_Report.pdf)> accessed 8.6.2018.

<sup>31</sup> See Bundeskartellamt, Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive (19.12.2017) <[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19\\_12\\_2017\\_Facebook.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html)> accessed 20.5.2018.

<sup>32</sup> Nicolas Petit, Antitrust and Artificial Intelligence: A Research Agenda (2017) 8, 6 Journal of European Competition Law & Practice, 361, 361.



give it away for free in exchange for free services. This situation of information asymmetry possibly even allows these large companies to manipulate us to some extent.

The problem derives largely from the fact that we do not know much how do algorithms of online platforms operate. This has been identified by Pasquale as a black box society.<sup>33</sup> It refers to such algorithms which modes of operations are unknown to consumers. Google is one of the most prominent examples of a black box algorithm.

Before Google, web navigation for consumers often meant cluttered portals, garish ads, and spam galore. Google took over the field by delivering clear, clean, and relevant results in fractions of a second. Even Silicon Valley sceptics credit Google with bringing order to chaos. For the skilled searcher, Google is a godsend, a dynamic Alexandrian Library of digital content. But commercial success has given the company almost inconceivable power, not least over what we find online.<sup>34</sup>

Therefore, doesn't search bias sound like a case of asymmetry of power?

The Commission claims that '(...) clever algorithms put (...) power (...) in our hands'<sup>35</sup> and make it harder for use to find products offered by competitors of dominant firms, that leads to a number of efficiencies such as higher prices, less choice of consumers.<sup>36</sup> According to Stucke and Ezechia, algorithmic exploitation creates such social costs that the problem could be in fact approached from the

---

<sup>33</sup> See Frank Pasquale, *The Black Box Society. The Secret Algorithms That Control Money and Information* (Harvard University Press 2015).

<sup>34</sup> *ibid*, 64.

<sup>35</sup> See Vestager's speech at Speech 16 March 2017 Bundeskartellamt 18th Conference on Competition, Berlin, 16 March 2017 <[https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en)> accessed 1.5.2018.

<sup>36</sup> *ibid*.

point of view of competition law. <sup>37</sup> Social costs could be measured by 'the deadweight loss by increasing distrust.'<sup>38</sup>

Can however intervention of competition law be based on fairness considerations?<sup>39</sup> Unfairness of the abuse is concerning and should not be left unaddressed, however, intervention by means of competition law should only be should be initiated where the 'conduct which is both unfair and inefficient'. <sup>40</sup> We should then resort to a two-fold test where we would first identify problems where fairness considerations arise and then assessing whether these behaviours are also inefficient.<sup>41</sup>

#### **4. Hybrid theory of harm**

##### 4.1. Do we need new kinds of abuses in digital markets?

Google claims that creating new categories of abuses can only be justified if these are consistent with the legal framework of Article 102 TFEU and these should be established in advance.<sup>42</sup> New kinds of abuses should be indeed consistent with the Article 102 TFEU, however, in Article 102 TFEU, the concept of an abuse is undefined; moreover, it 'merely provides examples of abusive conduct'.<sup>43</sup> It contains a non-exhaustive list of practices, and therefore both the Commission and Court

---

<sup>37</sup> Nicolas Petit, Antitrust and Artificial Intelligence: A Research Agenda (2017) 8, 6 Journal of European Competition Law & Practice, 361, 362.

<sup>38</sup> *ibid*, 363.

<sup>39</sup> See e.g. Ariel Ezrachi, EU Competition Law Goals and the Digital Economy <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3191766](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766)> accessed 25.5.2018.

<sup>40</sup> David Foster, Cry me a river. The concept of fairness in competition law (May 10, 2018) <<https://www.linkedin.com/pulse/cry-me-river-concept-fairness-competition-law-david-foster/>> accessed 18.5.2018.

<sup>41</sup> David Foster, Cry me a river. The concept of fairness in competition law (May 10, 2018) <<https://www.linkedin.com/pulse/cry-me-river-concept-fairness-competition-law-david-foster/>> accessed 18.5.2018.

<sup>42</sup> SO Response, paras 152-153, 159.

<sup>43</sup> Pinar Akman, *The Concept of Abuse in EU Competition Law Law and Economic Approaches* (Hart Publishing 2012) 1 – 2.

have condemned practices from outside of the list.<sup>44</sup> Moreover, Article 102 is silent on its precise objectives.<sup>45</sup>

However, is the theory the Commission is offering a some kind of hybrid of already new ones, existing legal theories? What is more, is it a problem with the fact that the theory cannot be classified as a one particular kind of theory of harm? After all, we are talking here about an abuse that occurs in a digital market which may be of difficult nature. The Commission in fact points this out in the decision stressing that 'the legal characterisation of an abusive practice does not depend on the name given to it, but on the substantive criteria used in that regards.'<sup>46</sup>

A number of different legal theories could be connected to the abuse of search bias, such as e.g. refusal to deal, the essential facilities doctrine, exclusionary discrimination. Google says there is no abuse but if it would be, it would be in fact refusal to deal as the most probable to be applied in this case under the so-called *Bronner* criteria.<sup>47</sup> The *Bronner* criteria need to be cumulatively fulfilled and these are (a) indispensability of the product for carrying on the business in question, (b) the fact that the refusal is preventing the appearance of a new product for which there is a potential consumer demand, (c) the refusal is likely to exclude all competition in the secondary market and (d) the refusal is not justified by objective justifications.<sup>48</sup> As the Commission is not applying these criteria it is, according to Google

imposing on Google a duty to promote competition by allowing competing comparison shopping services to have access to a significant proportion of its general search results pages, despite access to those page not being indispensable in order to compete.<sup>49</sup>

---

<sup>44</sup> Sandra Marco Colino, *Competition Law of the EU and UK* (7th edn, OUP 2011) 280.

<sup>45</sup> Pinar Akman, *The Concept of Abuse in EU Competition Law Law and Economic Approaches* (Hart Publishing 2012) 1.

<sup>46</sup> Google, para 335.

<sup>47</sup> Case C-7/97 Oscar Bronner GmbH Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG [1998] ECR I -7791, [1999] 4 CMLR 112

<sup>48</sup> *ibid*, paras 39 – 41.

<sup>49</sup> SO Response, paras 165-182 and Anex 7.

In its recent decision, the Commission has however explicitly stated that this behaviour has nothing to do with the refusal to deal as

the Conduct does not concern a passive refusal by Google to give competing comparison shopping services access to a proportion of its general search results pages, but active behaviour relating to the more favourable positioning and display by Google, in its general search results pages, of its own comparison shopping service compared to comparison shopping services.<sup>50</sup>

Moreover, the Commission points out that *Bronner* criteria are irrelevant here and in others situations where 'bringing to an end the infringement does not involve imposing a duty on the dominant undertaking to "transfer an asset or enter into agreements with persons with whom it has to chosen to contract".<sup>51</sup> The Commission is referring here to a number of case law.<sup>52</sup>

#### 4.2. Exclusionary discrimination

What is then the theory of harm proposed by the Commission as regards search bias? Exclusionary discrimination seems like something between discrimination and leveraging. Let us take a closer look at it. Self-preferencing is discriminating as 'the more favourable positioning and display, in Google's general search results

---

<sup>50</sup> Google, para 650, similarly Beata Mäihäniemi, *Imposing Access to Information in Digital Markets Based on Competition Law. In Search of a Possible Theory of Harm in the EU Google Search Investigations* (University of Helsinki, Helsinki 2017) 237-270. However, the pure refusal to deal and the essential facilities doctrine do not seem to work because it is unclear if there is any indispensable and difficult to duplicate facility to be identified as refused access to such as top search results, the whole search engine, certain standard of service. See Beata Mäihäniemi, *Imposing Access to Information in Digital Markets Based on Competition Law. In Search of a Possible Theory of Harm in the EU Google Search Investigations* (University of Helsinki, Helsinki 2017) 250.

<sup>51</sup> Google, para 651.

<sup>52</sup> Case T-65/98, *Van den Bergh Foods*, EU:t:2003:281, para 161, upheld on appeal in Case -552/03P *Unilever Bestfoods Ireland v Commission*, EU: C:2006:607, PARAS 113 AND 137. See also the Opinion of Advocate General Mazak delivered on 15 May 2012 in Case C-457/10 P, *AstraZeneca v Commission*, EU:C2012:293, paras 94-95.

pages, of Google's own comparison shopping service compared to competing comparison shopping services.<sup>53</sup> This could be seen as some kind of discrimination that could perhaps be analysed under the Article 102 (c) that is 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. This new theory of harm of the so-called 'exclusionary discrimination'<sup>54</sup> (also known as the 'theory of self-preferencing')<sup>55</sup> is however, difficult to apply this theory in practice, as one cannot find any direct case law on the issue in question. The Commission could create a precedent on the issue. Nevertheless, one could track the theory back to pure discrimination that is the *Post Danmark* case<sup>56</sup> and the Article 102 (c) TFEU. What is more, this theory could be also traced back to some national European cases.<sup>57</sup>

What is more, the Commission is here concerned only with such a discrimination that aims at leveraging as it states that it is concerned with such 'the use of a dominant position on one market to extend that dominant position to

---

<sup>53</sup> Google, part 7.2.

<sup>54</sup> Pablo Ibáñez Colomo, 'Exclusionary discrimination under Article 102 TFEU' (2014) 51 *Common Market Law Review*, Issue 1, 141–163.

<sup>55</sup> See Nicolas Petit, 'Theories of Self-Preferencing under Article 102 TFEU a Reply to Bo Vesterdorf' (2015) 2 accessed 26 March 2016, see also Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal - Two Sides of the Same coin?' (2015) 1, 1 *Competition Law and Policy Debate* 5 accessed 22 March 2016. Research done for Google.

<sup>56</sup> Case C 209/10 *Post Danmark A/S v Konkurrencerådet* [2012].

<sup>57</sup> See e.g. French Competition Authority, Decision n°13-D-20 of 17.12.2013, French Competition Authority, Decision n°13-D-20 of 17.12.2013 after *Autorité de la concurrence and Bundeskartellamt*, 'Competition Law and Data' Report (2016) 31 accessed 25 May 2017, French Competition Authority, Decision n°13-D-20 of 17.12.2013, confirmed on that points by the court of appeal on 21.05.2015. after *Autorité de la concurrence and Bundeskartellamt*, 'Competition Law and Data' Report (2016) 31 accessed 25 May 2017, 4 French Competition Authority, Decision n°13-D-20 of 17.12.2013, confirmed on that points by the court of appeal on 21.05.2015. See also *Cedgedim*, French Competition Authority, Decision n°12- DCC-20 of 07.02.2012 where patient data on medical information were refused access to on a discriminatory basis, Belgian Competition Authority, decision of 22 September 2015, see also See also Koen Platteau, 'Belgian National Lottery settles abuse of dominance case with Competition Authority' (Simmons & Simmons elexica, 10 October 2015) accessed 28 May 2017.

one or more adjacent markets.<sup>58</sup> Is this then monopoly leveraging?<sup>59</sup> The Commission claims that ‘such a form of conduct constitutes a well-established, independent, form of abuse falling outside the scope of competition on the merits.’<sup>60</sup> Leveraging is not a separate theory of harm in the EU order unlike in the US. It is more ‘an essential ingredient of each theory of harm that could be applied to the allegedly anticompetitive behaviour of information intermediaries.’<sup>61</sup> In the recent case in India, Google has been fined for self-preferencing its commercial flight search and in fact leveraging its dominance in the market for online general web search, which has been done to strengthen its position in the market for online syndicate search services.<sup>62</sup>

## 5. Criteria for exclusionary discrimination

The Commission did not specify under which conditions such self-favouring would be anticompetitive. It is also unclear if it would be forbidden *per se* or would it be accompanied by some conditions such as e.g. the negative effect of the practice on innovation. If self-preference would be forbidden *per se*, it could be seen as an additional and unnecessary burden for many companies, and should be therefore limited by some criteria such as consumer harm etc.<sup>63</sup> The criteria proposed here

---

<sup>58</sup> Google, para 649

<sup>59</sup> See Thomas Höppner. 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 3 European Competition and Regulatory Law Review 208 <http://catalog.hathitrust.org/Record/001030855>> 3.

<sup>60</sup> *ibid*, see also Pablo Ibáñez Colomo, 'Exclusionary Discrimination under Article 102 TFEU' (2014) 51 Common Market Law Review 141, 141 – 142.

<sup>61</sup> Beata Mäihäniemi, *Imposing Access to Information in Digital Markets Based on Competition Law. In Search of a Possible Theory of Harm in the EU Google Search Investigations* (University of Helsinki, Helsinki 2017), 102.

<sup>62</sup> Aditya Kalra, Aditi Shah, India's antitrust watchdog fines Google for abusing dominant position, Reuters, Business News, February 8 2018 <<https://www.reuters.com/article/us-india-google-antitrust/indias-antitrust-watchdog-fines-google-for-abusing-dominant-position-idUSKBN1FS2AD>> accessed 6.6.2018.

<sup>63</sup> Nicolo Zingales, Google Shopping: beware of 'self-favouring' in a world of algorithmic nudging <<https://www.competitionpolicyinternational.com/wp-content/uploads/2018/02/Europe-Column-February-Full.pdf>> accessed 8.6.2018.

as for exclusionary discrimination are appreciable effect on the market, potential foreclosure, harm to innovation and existence of less distortive alternatives.

### 5.1. Appreciable effect on the market

As regards leveraging one's digital market power to other markets for vertical services (in Google's case to the market for comparison shopping services), it should be visible and strong enough to constitute an abuse of dominance. For example, in the UK case on Google, *Streetmap* it has been stressed that the effect on a yet non-dominated market should be appreciable.<sup>64</sup> The UK Court came to the conclusion that leveraging effect of Google's behavior where it self-prefers its Google Maps in general search results is not appreciable and closed the case.

### 5.2. Potential foreclosure

Obviously, the behavior of the self-preferring company should lead to foreclosure or at least have a potential to foreclose. Consequently, according to the Commission search bias has or is likely to have anti-competitive effects<sup>65</sup> in the national markets for comparison shopping services and in the national markets for general search services.<sup>66</sup> The behaviour could foreclose competing comparison shopping services from the market and in the result of that merchants, consumers would pay higher prices for, and end up without more innovative services.<sup>67</sup> The conduct is likely to reduce the ability of consumers to access the most relevant comparison shopping services <sup>68</sup> as users consider search results that are marked high up in generic search results as the most relevant for their queries<sup>69</sup> and 'Google did not inform

---

<sup>64</sup> *Streetmap.EU Limited and Google Inc., Google Ireland Limited, Google UK Limited*. [2016] England and Wales High Court EWHC 253 (Ch), para 97.

<sup>65</sup> According to the Commission, it is 'sufficient (...) to demonstrate that the Conduct is capable of having, or likely to have anticompetitive effects', see Google decision, para 606.

<sup>66</sup> Google, para 589.

<sup>67</sup> Google, para 593.

<sup>68</sup> Google, para 597.

<sup>69</sup> Google, para 598.

users that Product Universal was positioned and displayed in its general search results pages using different underlying mechanisms.<sup>70</sup>

The Commission supports its findings with a number of evidence based on users' behaviour such as showing, among others that 'the ten highest ranking generic search results page together generally receive approximately 95% of all clicks on generic search results.'<sup>71</sup> It is also noting that the previous comparison shopping service, Froogle, that operated before October 2007, has been highly unsuccessful in gaining traffic.<sup>72</sup>

Google claims that it should be able to apply adjustments mechanisms so that it can preserve the usefulness of its generic search results.<sup>73</sup> However, the Commission responded that adjusting mechanisms used by Google are not a problem but the Commission is concerned with the fact that these mechanism are not applied in the same ways as regards to Google's comparison services.<sup>74</sup>

What is more, according to Google, it should be allowed to position and display its features of comparison shopping services, such as Product Universals and Shopping Units, since these features improve the quality of its search services and benefit users and advertisers.<sup>75</sup> However, according to the Commission, Google is allowed to improve its services by grouping certain search into categories such shopping results, but the problem here is rivals' comparison shopping services cannot benefit from such a preferential treatment and their results are not shown in the same way as ones owned by Google.<sup>76</sup>

However, the fact that users prefer to use Google instead of other services is not necessary the result of its behaviour and could be explained by a number of network effects. Some of these are e.g. trial-and-error effects, other spillover and snowball effects. Trial-and-error effects denote that is the situation where, on the basis of machine learning, each next outcome is more accurate, more efficient as

---

<sup>70</sup> Google, para 599

<sup>71</sup> Google, para 457.

<sup>72</sup> Google, para 490.

<sup>73</sup> Google, para 655.

<sup>74</sup> Google, para 661.

<sup>75</sup> Google, para 656.

<sup>76</sup> Google, para 662.



it learns on the basis previous actions.<sup>77</sup> For example every next search a user is conducting is better tailored to her needs and more accurate. Consequently, the better quality of search is tempting for new consumers to use the service All in all, free side is drawing paid side to the platform.<sup>78</sup>

### 5.3. Harm to innovation

Harm to innovation could be seen as one of the criteria for exclusionary discrimination. However, it is not yet possible to prove such a harm directly.<sup>79</sup> Such a harm could be however shown indirectly through affecting consumer harm that can have three dimension: too high prices, less choice and impeded innovation.<sup>80</sup> According to the Commission, Google's conduct could discourage both Google's competitors and Google itself from innovating by means of updating current services they offer and by means of offering totally new services, improve current ones and create new types of them if they are able to attract a sufficient volume of user traffic to compete with Google.<sup>81</sup> Google would also be discouraged from innovating because it does not need to compete on the merits at this point.<sup>82</sup>

In fact, Google claims that displaying its own comparison shopping in the same way as the ones of their competitors, would be detrimental to competition as search services actually compete by showing their results and it would be otherwise unable to monetise space in its general search results pages.<sup>83</sup> However, according to the Commission, Google did not in fact inform users about the way in which its Product Universal was positioned and displayed, and that it used different

---

<sup>77</sup> See, e.g., Maurice E. Stucke, 'Behavioural Antitrust and Monopolization' (2012) 8, 3 Journal of Competition Law & Economics, 545 – 574.

<sup>78</sup> Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition* (HUP 2017), 133-134. .

<sup>79</sup> Pablo Ibáñez Colomo, 'Exclusionary Discrimination under Article 102 TFEU' (2014) 51 Common Market Law Review 141, 141 – 142.

<sup>80</sup> Beata, Mäihäniemi, 'The Role of Innovation in the Analysis of Abuse of Dominance in Digital Market: The Analysis of Chosen Practices of Google Search' (2017) 1, 1 Market and Competition Law Review 111, 129.

<sup>81</sup> Google, para 595.

<sup>82</sup> Google, para 596.

<sup>83</sup> Google, para 657.

underlying mechanisms than those used to rank generic search results.<sup>84</sup> What is more, where Google is asked to treat its competing comparison shopping services in the same way as its own within its general search services, it is not in any way prevented from monetising its general search results pages. This is supported by the fact that the Commission, gives Google free hands as to measures it can undertake to respond to the decision.<sup>85</sup>

Moreover, where the Commission is asking Google to treat all services equally may affect innovation of both, Google and its rivals. It could also slow down the arrival of product improvements and evolution of search engines. In the result of this remedy of equal treatment Google's rivals would also be advertised for free. This remedy does not take into account the fact that many users do prefer to see Google's results and find them superior to the one's of its rivals. Consequently, consumers could be disadvantaged if Google decides to change its rich format display of own and rivals' shopping services.<sup>86</sup> Moreover, the regulation affecting the display of content in one of the primary gateways to the Internet would raise legitimate concerns of government control over access to information and speech.<sup>87</sup>

#### 5.4. Existence of less distortive alternatives

The fact that the Commission is taking into account leveraging is welcomed as it acknowledges the fast-pace changes in the market of online search and the fact that companies need to innovate and expand to other markets to survive. This could be seen as defensive leveraging in order to keep the dominant position. Is this however in fact competition on the merits so something that company has to do to survive in the market? Google claims that the Product Universal and the Shopping Unit are a product design improvement, so the reason why it leverages

---

<sup>84</sup> Google, para 663

<sup>85</sup> Google, para 664.

<sup>86</sup> Nicolas Petit, 'My 2 Cents on the EC Decision Against Google' (Medium, 27 June 2017) [https://medium.com/@nicolaspetit\\_89712/my-2-cents-on-the-ec-decision-against-google-683651adeee](https://medium.com/@nicolaspetit_89712/my-2-cents-on-the-ec-decision-against-google-683651adeee) accessed 14 July 2017.

<sup>87</sup> Albert A. Foer and Sandeep Vaheesan, 'Google: The Unique Case of the Monopolistic Search Engine,' (2013) 4, 3 Journal of European Competition Law & Practice 199, 199.

into vertical markets its to offer better services to consumers. It 'can be found abusive only in exceptional circumstances'.<sup>88</sup>

Are there however, less 'distortive alternatives' to the measures undertaken by Google to improve search experience to users? Are there?<sup>89</sup> The Commission says that there are not claiming that 'Google has failed to demonstrate that it cannot use the same underlying processes and methods in deciding the positioning and display of the results of its own comparison shopping service and for those of competing comparison shopping services'.<sup>90</sup>

Google claims that it is not technically possible to rank results of competitors in the same way it ranks its own. Moreover, 'ranking offers from inventories of competing comparison shopping services would turn their results into Google Shopping results'.<sup>91</sup> However, the Commission decided otherwise and in fact required Google to design a remedy that would rank results of competitors in the same way as Google's. Moreover, in doing so, the Commission have given Google only spare guidelines on how it should design this remedy, pointing out, among others that it 'should ensure that Google treats competing comparison shopping services no less favorably than its own comparison shopping service within its general search results pages'.<sup>92</sup>

The Commission therefore points out that 'it is for Google and Alphabet (...) to make a choice between the several possible lawful ways of positioning and displaying competing comparison shopping service in Google's general search results pages'.<sup>93</sup>

The measure to be designed by Google should then apply to all devices on which search is conducted and to all 13 EEA countries where Google's comparison shopping is used.<sup>94</sup> What is more, the measure should work in such a way that

---

<sup>88</sup> SO Response, para 158.

<sup>89</sup> Streetmap.EU Limited and Google Inc., Google Ireland Limited, Google UK Limited. [2016] England and Wales High Court EWHC 253 (Ch), para 1237.

<sup>90</sup> Google, para 671.

<sup>91</sup> Google, para 659.

<sup>92</sup> Google, para 699.

<sup>93</sup> Google, para 144

<sup>94</sup> Google, para 700.

would treat Google's own comparison shopping in the same way as the ones of its rivals, however they should not be charged a fee or any other kinds of consideration in return for similar treatment.<sup>95</sup> What is more, the Commission reserves itself a right to monitor the implementation of the remedies<sup>96</sup> as well as to require Google to submit periodic reports on how they comply with the decision.<sup>97</sup>

The Commission expects Google to adapt the remedy of the so-called equal treatment of own and rival comparison shopping products.<sup>98</sup> This denotes that when Google shows comparison shopping services in response to user's queries, the most relevant service or services would be selected to appear in Google's search results pages.

Leaving it up to Google to decide how to treat its rivals equally is a poor choice, however, it seems that the auction remedy that Google proposed, which is heavily criticised by its rivals, does in fact do the job. The auction remedy equals bidding on equal terms for ads in the shopping box. Google has actually offered such a solution already earlier in commitments it has offered but it has not been accepted.

All in all, the Commission claims that Google failed to demonstrate that there are objective justifications for the conduct in question and that the exclusionary effect created by the abuse could be in fact outweighed by efficiency gains for consumers.<sup>99</sup> The German case as well as the UK show that preferring own vertical services is not anticompetitive and does not amount to leveraging.<sup>100</sup>

---

<sup>95</sup> Google, para 700.

<sup>96</sup> Google, para 703

<sup>97</sup> Google, para 704.

<sup>98</sup> Google, para 699, see also European Commission; Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (Press release, Brussels, 27.6.2017) <[http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm)> accessed 20.4.2018, Vesterdorf, Bo ja Fountoukakos, Kyriakos: An Appraisal of the Remedy in the Commission's Google Search (Shopping) Decision and a Guide to its Interpretation in Light of an Analytical Reading of the Case Law, 2018, 9(1) Journal of European Competition Law & Practice, s. 3–18 <<https://doi.org/10.1093/jeclap/lpx087>> accessed 15.4.2018.

<sup>99</sup> Google, para 653.

<sup>100</sup> Beata Mäihäniemi, *Imposing Access to Information in Digital Markets Based on Competition Law. In Search of a Possible Theory of Harm in the EU Google Search Investigations* (University of Helsinki, Helsinki 2017) 260.

## 6. Conclusions

Trying to regulate something that is yet beyond the comprehension of a human-being is challenging. We should then focus on these aspect that can be understood and can be regulated. However, who should be responsible for actions of an algorithm? Given the challenges in predicting the nature and effects of algorithmic design decisions on the market, it is particularly significant that the Decision condemns a conduct resulting from algorithmic design choices.<sup>101</sup>

As algorithms themselves change constantly and adapt in the way that their creators cannot themselves explain the results these algorithms they create it is ambiguous whether this asymmetry is actually designed on purpose. It could be solved for example by better regulation of artificial intelligence and algorithms already at the design phase (as algorithms get stronger due to machine-learning). For example, by the so-called regulation by design – explain what it is and how it works.

The question that arises here is what kind of test (theory of harm) would allow us to identify both unfair and anticompetitive behaviours that arise in the consequence of the use of algorithms by online platforms? Is the theory of harm offered by the Commission in its recent decision able to address this dichotomy? This is so as digital markets revolve more rapidly and therefore it seems that objective justifications should be taken into account in such markets to a greater extent than in conventional markets, as many of the potentially anticompetitive behaviours may be the result of competition on the merits and eligible business behaviour. However, as we have already pointed out before, digital markets companies may become dominant much faster due to different kinds of network effects, first-mover advantage etc.

Finally, the case went to the Court. Google asks for at least annulling or reducing the fine and for the Commission to bear the Court expenses. Google and

---

<sup>101</sup> Nicolo Zingales, Google Shopping: beware of 'self-favouring' in a world of algorithmic nudging, Law, Politics and Sociology Blog <[https://lawpoliticsandsociology.wordpress.com/2018/03/03/google-shopping-beware-of-self-favouring-in-a-world-of-algorithmic-nudging/#\\_ftn4](https://lawpoliticsandsociology.wordpress.com/2018/03/03/google-shopping-beware-of-self-favouring-in-a-world-of-algorithmic-nudging/#_ftn4)> accessed 8.6.2018.

Alphabet raise six pleas in law: (1) alleging that the contested decision errs in finding that Google favoured a Google comparison shopping service by showing grouped product results (Product Universals); (2) alleging that the contested decision errs in finding that Google favours a Google comparison shopping service by showing grouped product ads (Shopping Units); (3) alleging that the contested decision errs in finding that the alleged abusive conduct diverted Google search traffic; (4) alleging that the contested decision errs in finding that the alleged abusive conduct is likely to have anticompetitive effects; (5) alleging that the contested decision errs by treating quality improvements that constitute competition on the merits as abusive; (6) alleging that the contested decision errs in imposing a fine.<sup>102</sup> Perhaps the Court, in its future ruling, could provide more specific conditions for self-preference as an abuse of dominance.

We will have to wait for the case to be solved by the Court in the nearest future.

---

<sup>102</sup> Action brought on 11 September 2017 – Google and Alphabet v Commission (Case T-612/17).