THE BATTLE OF THE SEARCH ENGINES: UNDERSTANDING GOOGLE’S (HOPEFULLY) FINAL COMMITMENT PROPOSAL WITH THE EUROPEAN COMMISSION

Kristine Bergman
Student Fellow
Institute for Consumer Antitrust Studies
LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW

I. INTRODUCTION

On February 4, 2014 Google finally prepared a proposed commitment agreement that appears likely to receive EC approval.1 Google has been under EC investigation for over three years for alleged abuses of its dominant position as a search engine with over 90% market power in Europe. If the agreement is approved, it will force Google to prominently display the results for its rival specialized search engines. (See Appendix A) It would also help Google protect its secret search algorithm and avoid a court battle or potential $5 billion fine.

II. SEARCH ENGINE GIANT VERSUS SMALLER COMPETITORS

Google, Inc. is an internationally used search engine with a United States market share of approximately 66%2 and an EU market share of over 90%.3 Google additionally provides operating systems for smartphones (Androids), a web browser (Google

---

1 Many U.S. sources refer to the Google/EC agreement as a “settlement.” A settlement in EU law is reserved for cartel cases only; commitments are regulated by Council Regulation, 1/2003, art. 9, 2002 O.J. (L 1/1) 1 (EC), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF.
2 Matt McGee, Bing Ends 2013 With All-Time High In US Market Share, But Google Also Up, SEARCH ENGINE LAND (Jan. 15, 2014, 7:40 PM), http://searchengineland.com/bing-ends-2013-with-all-time-high-in-us-market-share-but-google-also-up-comscore-181876
Chrome), and email service provider (Gmail), among many other services.\footnote{For total list of Google products, see List of Google Products, WIKIPEDIA http://en.wikipedia.org/wiki/List_of_Google_products (last visited Mar. 12, 2014).} Google’s main headquarters is in Silicon Valley (Mountain View), California and has hundreds of offices around the world.\footnote{Google Locations, GOOGLE, http://www.google.com/about/company/facts/locations/ (last visited Mar. 12, 2014).}


Among these additions was Microsoft, the provider of competitive search engine “Bing,” who filed a complaint in March 2011.\footnote{Brad Smith, Adding our Voice to Concerns about Search in Europe, TECHNET.COM (Mar. 30, 2011, 10:00 PM), http://blogs.technet.com/b/microsoft_on_the_issues/archive/2011/03/30/adding-our-voice-to-concerns-about-search-in-europe.aspx.} In a statement released by Brad Smith, Senior Vice President and General Counsel to Microsoft, Smith expressed Microsoft’s concern that Google’s dominant search engine position in Europe caused it to wall off access to content that competitors need to provide search results to consumers and attract
advertisers.¹¹ Later, competitors Expedia¹² and TripAdvisor¹³ added complaints of their own.

III. THE EUROPEAN COMMISSION’S SUSPICIONS AND INVESTIGATIONS

In May 2012, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, shared preliminary conclusions on the Google investigations, identifying four instances where Google potentially abused its dominant position.¹⁴ These included Google’s display of its own vertical search services in its general search display results, Google’s copying of content from third-party sites and Google’s exclusivity agreements with both advertisers and websites that provide search advertisements.¹⁵ Almunia urged Google to create an “outline of remedies” for the EC’s concerns in order to avoid formal legal action.¹⁶

In January 2013, Google submitted its first proposal to the EC.¹⁷ The EC market tested these proposals by issuing a press release that sought feedback from interested parties on the proposed commitments.¹⁸ Unfortunately for Google, the EC concluded that

¹¹ Id. This was, according to Smith, in contrast to Google’s usual role as an open web proponent. Id.
¹⁵ Id.
¹⁶ Id.
“substantial improvements of the commitments were necessary” before Google would be found to have adequately addressed the EC’s competition concerns.\footnote{Press Release, European Commission, Antitrust: Commission Obtains from Google Comparable Display of Specialised Search Rivals—Frequently Asked Questions (Feb. 5, 2014), http://europa.eu/rapid/press-release_MEMO-14-87_en.htm [hereinafter Press Release, FAQs].}

In March 2013, the EC informed Google of its formal Preliminary Assessment (PA), through which the EC officially determined four alleged abuses of dominant position: one, the favorable treatment of links to Google’s own specialized web search services in its search results; two, the unconsented use by Google of original content from third-party websites; three, conditions that prevent publishers from displaying search advertisements from Google’s competitors on their sites; and four, contractual restrictions with advertisers that restrict their search advertising campaign on Google’s and other competitor’s search advertising platforms.\footnote{Press Release, Joaquin Almunia, European Commission, The Google Antitrust case: What is at Stake? (Oct. 1, 2013), http://europa.eu/rapid/press-release_SPEECH-13-768_en.htm [hereinafter Press Release, What is at Stake?].}

Google submitted a revised proposal in October 2013; once again, after market test analyses, the EC felt the proposal did not adequately address its competition concerns.\footnote{Press Release, FAQs, supra note 19.} In his October 2013 speech, Almunia stated the EC “believe[s] there is a strong case for action under [their] antitrust rules.”\footnote{Id.} Almunia confirmed the antitrust mantra that “antitrust enforcement is about consumer welfare, innovation and choice, not about protecting competitors” and expressed concerns that these practices could inhibit consumer choice and stifle innovation.\footnote{Press Release, What is at Stake?, supra note 20.}
IV. **THE EC RECEIVES “IMPROVED COMMITMENTS” FROM GOOGLE**

Finally, on February 5, 2014 the EC announced it had obtained an “improved commitments proposal” from Google.\(^{24}\) The commitments proposal addresses each of the four concerns from the EC’s March 2013 PA.\(^{25}\)

First, Google proposes a three-fold remedy for its specialized search preferences. One, users will now see a specific label that indicates when Google’s specialized search services are being promoted.\(^{26}\) Two, Google’s specialized search services will be “graphically separated” from other search results, ensuring that users will see a clear distinction between the two services.\(^{27}\) And finally, Google will prominently display links to *three* other specialized search services in a way that is “visually comparable” to those links of Google’s own services.\(^{28}\) In its press release, the EC provided sample screenshots of the old versus new search results, which are included in Appendix A.

Second, Google addressed the concerns of the EC that Google was using competitor material in its specialized search material (like user reviews from the competitor websites) without the competitors’ permission and sometimes against their will.\(^{29}\) Google proposes an “opt-out” system that allows third parties to elect to opt-out of the use of their content on Google’s specialized search services.\(^{30}\) Further, the election

---


\(^{25}\) See generally Press Release, FAQs, supra note 19.

\(^{26}\) *Id.*

\(^{27}\) *Id.*

\(^{28}\) *Id.* Offering an example, the EC explains “For instance, if the Google links have images, the rival links will have images as well, including on mobile devices.” *Id.*

\(^{29}\) *Id.*

\(^{30}\) *Id.*
to opt-out will not cause an “undue impact” on their ranking in Google’s general search results of its AdWords program. 

Finally, Google’s proposal loosened the reigns on exclusivity agreements with website publishers and advertisers. Google proposes to no longer include exclusivity requirements in its agreements with publishers, requiring them to obtain all or most of their search advertisements on their websites from Google. Additionally, Google proposes to no longer impose obligations preventing advertisers from porting or managing search advertising campaigns from competing advertising campaigns. Both of these proposals would facilitate Internet freedom for websites, advertisers and competitors.

The EC has taken the preliminary view that these new proposals are adequate for a final binding commitment. However, the EC has now submitted the proposals to the complainants, who will provide comments that will help the EC determine whether to make the commitment binding. If this proposal becomes legally binding, the EC would monitor the commitments of Google by employing a “monitoring trustee.” A monitoring trustee, although unable to make legally binding decisions, would provide the Commission with technical advice and monitoring reports on the status of Google’s implementations of its commitments.

V. EU VERUS US POLICY: A LIKELY DIVERGENCE

This final proposed commitment is noteworthy for its contrast to Federal Trade Commission (FTC) investigations of Google for similar wrongs. In January 2013, the FTC called off its antitrust investigations against Google, allowing Google to continue to

31 Id.
present search results that feature its own services.\textsuperscript{32} It is unsurprising that the alleged abuse of dominant position was handled differently in the United States than the EU for policy and logistical reasons.

For one, Google does not have the same percentage of market share in the U.S. as it does in the EU. Google’s market power as a general search engine in the EU is over 90%, with a 97% market power as a mobile search engine as of 2012. Comparatively, in the U.S., Google’s search engine power is approximately 66%. Although this is still a large market presence, this market power is actively declining from the 78% Google held in 2012, likely due to the rise of competitor search engines like Bing. In the U.S. investigations, this may have been considered as evidence that consumers are given adequate access to search engine options, thereby defending allegations that Google was abusing its dominant position.

Additionally, the “duty to deal” is significantly more prevalent in the EU, as compared to the nearly defunct scope of the doctrine in a post-\textit{Trinko}\textsuperscript{33} system. If the FTC investigations had reached the point of litigation, it is unlikely that a United States court would have upheld an order requiring Google to include competing search engine results on its own specialized search service results.

\textbf{VI. CONCLUSION}

Although the commitment has not yet finalized, it seems likely that the EC will accept Google’s revised proposal to remedy its alleged abuse of a dominant position. This will relieve Google only of one of many ongoing legal investigations by the EU.


However, it will allow Google to protect its treasured search algorithm and is unlikely to fully overthrow its reign as the dominant search engine in the EU.

Appendix A

OLD:

All photographs in Appendix A are from Press Release, FAQs, supra note 19.
NEW:

Google search results for "gas grill"

NEW, MOBILE: