ICOMP
INITIATIVE FOR A
COMPETITIVE ONLINE
MARKETPLACE

GOOGLE UNDER THE ANTITRUST MICROSCOPE

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About ICOMP

ICOMP, the "Initiative for a Competitive Online Market Place", is a forum for all organisations, whatever their size or sector, to come together and to discuss the challenges they face in terms of online competition and how this affects intellectual property rights, privacy, security and transparency on the Internet.

ICOMP was founded in 2008 to unite like-minded participants and advocates from across industries to discuss these challenges and how they might be solved. ICOMP has over 70 members and signatories, including companies offering vertical search, online publishers, advertisers, Internet service and network providers, and agencies active in online advertising. Together, ICOMP's members support principles which they believe promote healthy competition. One of ICOMP's main goals is to encourage competition, transparency, and the adoption of best practices as part of an overall objective to promote sustainable Internet growth consistent with the rule of law. ICOMP is a forum for companies and individuals to inform and be informed about the issues facing online businesses including the legal and regulatory changes within the European Union, as well as overseas. These companies, together with ICOMP's advisors share their knowledge and expertise in pursuit of ICOMP's goals. ICOMP, its members and its friends, seek to facilitate and shape an open debate as to how businesses online can compete effectively in order to improve the quality and choice of services available to online users in Europe and around the world.

1. Introduction

Europe's future economic growth depends greatly on the ability of its businesses to be competitive in the online environment. This recognition lies behind much of Europe's 2020 Strategy and its Digital Agenda; the Commission has accepted that there are too many barriers impeding the free flow of online services across national borders.[1]

The Competition Commissioner and Vice-President of the European Commission, Joaquin Almunia, has himself highlighted the challenges ahead:

> *"… given the pace of technological change in the digital arena, we are all faced with challenging issues on "new markets". High growth, dynamic competition and innovation often make it difficult to predict the very near future. Still, effective competition policy is essential."*[2]

European competition policy in the online sphere has turned its attention in recent years to the behaviour of one overwhelmingly dominant online company – Google. Although dominance alone is not an abuse, Google is being investigated to determine if its business practices are contrary to Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits the abuse of a dominant position. At its simplest formulation, this means that an undertaking in a dominant position has a special responsibility to ensure that its conduct does not impair competition.

Google is facing many complaints that it has failed to adhere to this special responsibility, it has continued to increase its scale and entrench its dominance in the markets for search, search advertising and related markets and leverage this into newer markets, including in particular, into mobile search and advertising. Google has done this through a combination of aggressive acquisitions and exclusionary and exploitative practices.

The purpose of this paper is to assess the recent and current investigations into Google's anti-competitive conduct and provide the reader with a detailed understanding of how Google's anti-competitive practices have woven a web of competitor exclusion and exploitation, harming the online ecosystem and placing it in the hands of a single Internet giant, ultimately at the expense of the European businesses and consumers. This paper also considers how competition authorities have dealt with some of the complaints brought to date against Google and, in drawing on these lessons from the past, explores how competition policy and regulation might be used to limit Google's control of the web and remedy Google's past anti-competitive acts restoring conditions for a competitive online market place.

[1]http://ec.europa.eu/information_society/newsroom/cf/pillar.cfm
[2]Speech, 18 May 2011 at The Hague

2. The Case Against Google

There have been many official and unofficial complaints, both at national and EU level and further afield, which have raised concerns about Google's abusive conduct. There is a growing consensus among antitrust regulators that Google is dominant in search and search advertising (as discussed in detail later in this paper). The focus of on-going investigations is whether Google has been abusing this dominant position at the expense of competitors and consumers and in breach of laws designed to protect the competitive process.

It is understood that the European Commission has not limited itself in its investigation to one particular sector, but has scrutinised Google's practices across the entire online ecosystem.

The story began in February 2010, when Google announced that the European Commission had asked it to comment on complaints of abusive practices from Foundem, Ciao! and eJustice. In July 2010, the European Competition Commissioner Joaquin Almunia, announced that the European Commission's Directorate General for Competition was in the early stage of looking into allegations of anti-competitive conduct in relation to search.[3] Only a few months later, in November 2010, the European Commission announced that it had opened a formal investigation based on complaints that Google was abusing its dominant position through:

> *"… unfavourable treatment of their services in Google's unpaid and sponsored search results, coupled with an alleged preferential placement of Google's own services"*[4]

The Commission announced that it was investigating whether Google had abused a dominant position in breach of EU competition law by:

- lowering the ranking of unpaid search results of competing services such as price comparisons (so-called vertical search services).
- affording preferential placement to the results of its own vertical search services in order to shut out competing services.
- increasing the price per click for sponsored links of competing vertical search services.
- imposing exclusivity obligations on advertising partners, preventing them from placing certain types of competing ads on their web sites with the aim of shutting out competing search tools.
- imposing restrictions on the portability of online advertising campaign data to competing online advertising platforms.

In January 2011, press reports confirmed that formal questionnaires had been sent to a number of online players, including (according to the Commission) search engines and advertising agencies, as well as "others".[5] Shortly before these questionnaires were issued, in December 2010, the German Federal Cartel Office had passed a further two complaints to the European Commission, one lodged by the German mapping company, Euro-Cities and the other by two German Publisher Groups, the VDZ and the BDZV.

Then, in February 2011, the parent company of eJustice, 1plusV, raised fresh concerns, followed by Microsoft lodging a complaint against Google in March 2011. There have also been a number

[3]Speech on *Competition in Digital Media and the Internet*, UCL Jevons Lecture, London, 7 July 2010
[4]http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624
[5]http://www.mlex.com/EU/Content.aspx?ID=125792

of complaints that have been settled at national level; most notable are the decisions of the Italian and French Competition Authorities respectively in the FIEG and Navx cases. Civil proceedings have also raised concerns over Google's anti-competitive practices; among these include Skyhook's pending litigation against Google in mobile as well as the recent decision by a court in New York rejecting Google's proposed settlement of class-action litigation against Google's Book Search service, in part, on the ground that the proposed settlement was anti-competitive.

Beyond these official concerns, there have been a number of companies which have also publicly announced that they had fallen victim to Google's anti-competitive practices, such as One News Page.

All of the concerns raised to date, broadly speaking, relate to Google's exploitative and exclusionary conduct – the most pernicious of which can be summarised as follows:

A. Preferential Treatment of Google's Own Products and Penalisation of Rivals

A number of the complaints are based on evidence that Google uses its Universal Search function, among other things, to artificially favour its own offerings over competing services, distorting what are thought by consumers to be natural search rankings. In other words, instead of providing the best answer to what the user is looking for, Google manipulates the results for commercial purposes. This is compounded in some instances by the blacklisting of rival sites and has significant implications for competing services, which, if given an artificially low ranking on Google's search results will find it far more difficult to attract users. Commissioner Almunia himself recognised the dangers of search result manipulation even in the very early stages of the Commission's investigation:

> *"If results on a search engine, for instance, are being manipulated, it may well make a difference on the market if consumers know about it, but is transparency enough?"*[6]

B. Unauthorised Exploitation of Third Party Content

The French Competition Authority has confirmed that concerns have arisen in relation to the unauthorised exploitation of third party content in its recent *Opinion on Competition in Online Advertising*,[7] in which it discussed at length Google's acts of "parasitism", in particular, in the field of news aggregation.

C. Exclusionary and Exploitative Practices in Relation to Google's Advertising Services such as AdWords and AdSense

- Evidence of Google imposing penalties on its competitors has been presented by a number of complainants, in particular as regards its paid for search results, known as AdWords, which has increased advertising costs and reduced rivals' rankings.
- Exclusionary practices seeking to deprive Google's competitors of access to key content, for example, Google has been preventing competitors from accessing its key content, such as videos and books.
- Exclusionary practices denying competitors access to interoperability information, in particular, by prohibiting advertisers from multi-homing.

[6]Speech on *Competition in Digital Media and the Internet,* UCL Jevons Lecture, London, 7 July 2010
[7]Opinion no. 10-A-29 of December 14, 2010 regarding competition in online advertising

- Exclusionary practices establishing a web of exclusive agreements, for example, impeding website from distributing competing search boxes.

Many of these practices have prevented Google's competitors from producing relevant search results and attracting users.

3. Grievances from Across the Ecosystem

As noted above, companies from all walks of Internet life have complained about Google's practices, and below we give examples of some of these complaints, grouped into the following broad categories: mapping; publishers & news aggregators; competing search engines and advertising platforms; mobile platforms; and IPR complaints.

A. Mapping & Navigation Tools

Mapping and navigations tools have become extremely popular, not only for PC Internet use but also increasingly in mobile location technology (see subsection D below) and GPS. This month Google's own mapping tool, Google Maps, ranked as number one in the top ten most visited "travel sites", with other mapping sites, such as MapQuest, Bing Maps and Yahoo! Maps lagging behind.[8]

Euro-Cities

One of the first complaints against Google was lodged in August 2009 at the German Federal Cartel Office (FCO) by Dr. Hans Biermann, the owner of the mapping company Euro-Cities.

The core argument of Dr Biermann's complaint was that Google offers its mapping services for free – at a cost below the actual price of producing and processing mapping data. German laws on unfair competition forbid sale below cost, with a view to protecting SMEs from large industry players which can use cross-subsidisation to conquer new markets. The complaint also demonstrated how Google preferentially treats its own products. According to the complaint, Google links Google Maps and AdSense exclusively, allowing Google to provide its mapping services for free while excluding commercial rivals from the online platform. Google has also granted licenses to third-party companies to use mapping and routing material free of charge and entirely without advertisement. By contrast, Google's competitors in mapping, such as Euro-Cities, have been obliged to commercialise their services by advertising or selling maps. In this way mapping services are used to finance the costly purchase of mapping data. Since Google is undercutting the market, competitors are thus unable to compete.

In July 2010, Dr Biermann expanded his complaint, reporting "massive and unusual increases" in the cost of advertising search terms. He suggested that Google had taken retaliatory measures against Euro-Cities following the filing of its complaint.

The main thrust of the additional grounds of complaint was that Google had deprived Euro-Cities of access to Google's search results. The complaint was transferred to the Commission in December 2010.

In May 2011, Euro-Cities filed a second complaint. It accused Google of an anti-competitive agreement with the directory-service provider, Gelbe Seiten (the German equivalent of Yellow

[8]http://www.hitwise.com/us/datacenter/main/dashboard-10133.html 24 September 2011

Pages) which, according to Euro-Cities was contrary to German laws on concerted practices. The company's alleged grievances go back as far as June 2009, when Google and Gelbe Seiten sealed a co-operation deal. Under the terms of the deal, Google was allowed to use and display entries and offers from Gelbe Seiten in its maps and search results. In exchange for this, Gelbe Seiten was allowed to place ads on Google free of charge. In this way, Gelbe Seiten avoided having to take part in AdWords auctions under the same conditions as other companies; the result being that Euro-Cities would have to pay higher prices to meet the same levels as Gelbe Seiten. Initially, the German regulator transferred this complaint to the Commission, but in June 2011, the Commission confirmed that the grounds of complaint were not covered by its probe and transferred the case back to the German Federal Cartel Office. On 26 July, the German Federal Cartel Office informed Dr Biermann that after consideration of the case it had failed to conclude that the case warranted any public interest grounds. Nevertheless, it remains open to Dr Biermann to bring a case before the German courts.

Euro-Cities is not the only company to have been harmed by the free-of-charge mapping business model, such as Google Maps. According to press reports, the Munich-based mapping company, *United Maps*, filed a request for insolvency in May 2011. The company had developed a "Walk & Run" app for the iPhone which was eventually overtaken due to, according to United Maps, fast developments in this field, and most notably, the fact that various large providers, such as Google Maps offer their services free of charge.[9]

B. Publishers & News Aggregators

Publishers and news aggregators represent a large proportion of the complainants, be they from sites which aggregate news, newspapers or publishing associations. Below we have set out some examples of how Google has abused its dominant position in this field.

German Publishers – BDVZ & VDZ

Another case which was transferred by the German Federal Cartel Office in December last year is that of the German publisher associations, the Federation of German Newspaper Publishers (Bundesverband Deutscher Zeitungsverleger, (BDZV)) and the Association of German Magazine Publishers (Verband Deutscher Zeitschriftenverleger (VDZ)). The main thrust of the complaints lodged by the VDZ and BDZV focussed on Google's unauthorised exploitation of members' online content without offering them a fair share of advertising revenue.

In December 2009, the BDZV and the VDZ submitted a complaint to the German Federal Cartel Office that Google had abused its dominant position by profiting from their members' services without offering compensation in return. According to the associations, in its search results and on its dedicated news portal, Google News, Google had been using summaries of current news stories ("snippets") from other online news portals to complete its own range of news offerings. In this way, Google exploited the snippets, which usually reveal the core news content of a story, allowing it to save on correspondents and research costs. Readers could acquire the core information while staying on Google's homepage, thus allowing Google to reap revenues from readers and depriving those who had invested in the content creation from such revenues. The associations complained that Google earned advertising revenues by exploiting their content and that Google should have shared these revenues with publishers. Publishers, by contrast, lost out on advertising revenues because users no longer needed to click through onto the article, and thus

[9]http://www.rws-verlag.de/hauptnavigation/aktuell/news-detail/article/57/Pohlmann-Hofmann-Insolvenzverwalter-United-Maps-GmbH-sucht-Kaeufer-fuer-Technologie.html

spent longer on the Google News site, invariably giving Google more of an opportunity to show ads.[10] To make matters worse, the only way in which the publishers could prevent Google from exploiting their content was by accepting to be excluded from Google's search results all together; something which would be commercial suicide. To quote a spokesperson for the associations:

> *"Google says it brings us traffic, but the problem is that Google earns billions, and we earn nothing."*[11]

The associations also raised concerns that Google has been operating an exclusionary policy as regards its natural search results, discriminating against news rivals, by preferentially placing search results for its own content (such as Google News, Google Maps and Google Video) and the content of its partners (which in Germany include Deutsche Bahn AG and UEFA) above other sites.

One News Page

One News Page has also voiced its concerns about manipulation of search results, which echo those raised by BDVZ and VDZ, as well as those raised by vertical search engine, Foundem (see below). One News Page is a news navigator site and a member of ICOMP. Between May 2009 and February 2010 it suffered an unexplained nine month penalty inflicted by Google resulting in a 90 percent drop in its organic traffic. Just before the penalty the website saw its visitor traffic peak at 18,000 a day but then traffic collapsed to around 700 a day. Google went from indexing almost half a million pages to as few as 900. It could not have come at a worse time for One News Page as the company had just completed a funding round and was forced to revise its business plan as a direct result of the unexpected and unexplained Google penalty. As with Foundem, despite attempts to enter dialogue with Google, the company received no confirmation or explanation.[12]

As a result of this downgrading, One News Page's owner, Marc Pinter-Krainer has set up, with the help of ICOMP, a campaign for greater search engine transparency, *www.HaveIBeenPenalized.com.* One initiative organised by One News Page has included a survey of more than 1,000 UK and US companies, which found that 24 percent had suffered a large unexplained fall in their site traffic with only one in ten of the respondents were aware that such falls could be a result of obscure search engine penalties.[13] The "Have I been penalized?" campaign seeks to encourage search engines, to increase transparency, especially as regards penalties. Website owners should have the right to know whether their site has been subjected to a penalty and why. HaveIBeenPenalized.com also calls for a clear and timely appeals process and invites companies and individuals alike to join its campaign for fairer transparency to join its mailing list and its debates on Twitter.

Copiepresse

On Saturday 16 July, Le Soir, Belgium's leading Francophone daily newspaper, had a rather unusual front page. News of one long-running saga – how to form a new federal government more than a year after the parliamentary elections – was replaced by another: the battle between Google on one side and Belgium's Francophone newspapers on the other. The front page illustration was a Google search screen with the text 'Belgian Francophone newspapers censored' ('les journaux francophone belges censurés') in the search box.

[10]http://www.moz.de/artikel-ansicht/dg/0/1/126289/
[11]http://www.nytimes.com/2010/01/19/technology/19antitrust.html
[12]http://www.telegraph.co.uk/finance/yourbusiness/6752836/Website-at-a-loss-as-to-why-it-disappeared-from-Google.html
[13]See video available at http://www.i-comp.org/members/view/139

The previous day Google had removed French-language Belgian newspapers from its search engine results. The move by Google looked like a retaliatory measure following the most recent decision in a long-running legal battle between Google and Belgium's French- and German-language newspaper copyright management company, Copiepresse.

Copiepresse had challenged Google's use of its members' articles in Google News without permission. After a succession of victories for Copiepresse in the Belgian Courts, the Brussels Court of Appeal found against Google at the end of May 2011 and banned Google from publishing articles from the Belgian newspapers on its Google News service, on pain of a daily fine of €25,000 and pending calculation of damages.

Google's response was dramatic – to remove the Belgian newspapers from its search results, and not just from Google News. Google claimed that it did this in order to comply with the Court's judgment even though it appeared clear that the judgment was directed just at content theft rather than listing the website of the newspaper publishers. The Belgian newspapers, however, saw this as retaliation and reacted with threats of filing a legal complaint with the Belgian Competition Council.

Le Soir ran the story on its front page, as its leader and on the front of the business section, reminding readers that Google is also "the world's largest ad agency". La Libre Belgique (another leading French-language Belgian daily newspaper) provided a guide to finding its articles, instructing readers to type in its website URL and not to use Google.

However, by the Monday, Google's 'boycott' was over. The newspapers reappeared on Google's search results, with Google saying that it had received permission from Copiepresse to add its sites back to Google search results, as well as assurances that Copiepresse would not enforce the penalty for copyright infringement.

FIEG

FIEG is the Italian Federation of Newspaper publishers. In August 2009, FIEG submitted a formal complaint to the Italian antitrust authorities (AGCM) arguing that Google would only index the sites of FIEG's members on the condition that they consented to allowing their content to be used for free on Google's news aggregation service, Google News.[14] This, according to FIEG, had a negative impact on a publisher's ability to attract advertisers and users to its homepage.

In March 2010, the AGCM extended its investigation to include the contractual conditions imposed on websites for their online advertising.[15] In particular, it examined Google's AdSense terms and conditions, which were designed in a way which lacked transparency for publishers in terms of what percentage revenue was due to them from the advertising sold by Google on their sites through AdSense. The AGCM also considered the fact that the terms & conditions allowed Google to change the pricing structure unilaterally at any time and at its sole discretion.

On 17 January 2010, the AGCM accepted commitments from Google to address the competition concerns raised by FIEG. The undertakings included a commitment to permit publishers to select or remove their content from Google News Italy, without affecting their indexing by Google's search engines or their ranking on Google search results. Google also undertook to inform publishers of

[14]http://www.agcm.it/stampa/comunicati/3602-a420-avviata-istruttoria-nei-confronti-di-google-italia-a-seguito-di-una-denuncia-della-fieg.html

[15]http://www.agcm.it/stampa/comunicati/4902-a420-fieg-federazione-italiana-editori-giornaligoogle.html

the proportions of revenues they receive out of what Google earns from selling advertising on their sites. Google also committed to removing the ban on third party surveys relating to the number of clicks made by users on individual advertisements.[16]

The FIEG case, like the German publishers' complaint, demonstrates how Google exploits its position as market leader in the fields of search and search advertising in order to leverage its market power into other related services, such as mapping and news. However, the Copiepresse example described above demonstrates that settlements and solutions found in one country (in the FIEG case, Italy) are not necessarily applied elsewhere, even when they have been brokered by a national competition authority.

C. Competing Search Engines & Advertising Platforms

As discussed in more detail below, Google is dominant in search and search advertising. It is therefore unsurprising that a number of its complainants, being direct or potential future competitors to Google, have been harmed by Google's behaviour. Consumer portals, vertical search engines and competing advertising platforms are just some examples of Google's victims.

Ciao!

Ciao! was one of the first companies to bring its concerns to competition authorities in Europe. Ciao! is one of Europe's leading providers of comparison shopping and consumer portals. It was acquired by Microsoft in 2008. It provides consumers, in a variety of countries and languages, with detailed information and comparison pricing for over 10 million products. In 2009, Ciao! complained to the German Federal Cartel Office about Google's abuse of dominance, the thrust of the complaint being that Google had taken retaliatory measures against Ciao! following its acquisition by Microsoft in:

- requiring Ciao! to deal exclusively with Google's AdSense ad network, thus prohibiting Ciao! and others upon whom Google has similar exclusivity obligations from doing business with other ad networks.
- restricting Ciao!'s access to AdSense data which Google had previously provided access and that had enabled Ciao! to maximise revenue in the sale of its ad inventory by optimising the performance of its advertising programme; and
- preventing Ciao! from engaging in click-tracking of AdSense ads, which Google likewise previously had permitted and that had allowed Ciao! to optimise performance of its AdSense programme and to verify the number of reported clicks to advertisements supplied by Google, preventing Ciao! from analysing its performance.

These practices were highly anti-competitive. According to Ciao!, they weakened it as a competitor in the markets for search and search advertising space by preventing it from maximising its online advertising. The conduct also had the effect of preventing other ad intermediation platforms from offering their services to Ciao!. In December 2010, the German Federal Cartel Office transferred the case to the European Commission, given that it was already looking into a number of similar cases.

[16]AGMC Press Release, 17 January 2010

Foundem

Foundem, a technology start up founded by Shivaun and Adam Raff in 2005, was the second ICOMP member to bring a formal complaint against Google. Foundem is one of the UK's leading price comparison sites offering comparison services in jobs, electric goods, flights, hotels, computing, property, books, etc.[17] Foundem's patented vertical search technology provides state of the art price comparison services on its own site and to many of the UK's leading media companies, including Bauer, IPC Media, and Future. In December 2008, Foundem was named the UK's best price comparison site by The Gadget Show (the UK's leading technology television programme).

Foundem made the first direct formal complaint to the European Commission about Google's online practices in the markets of search and search advertising in February 2010. The practices complained of relate to Google's current Universal Search rankings and penalties imposed on Foundem between 2006 and 2009 in relation to search and AdWords.

In May 2007, Google introduced Universal Search, through which Google prominently features its own services at or near the top of its search results for certain kinds of queries, bypassing the algorithms that apply to all other websites and thus distorting natural search rankings. Google referred to the first stage of Universal Search as being *"an upgraded ranking mechanism that automatically and objectively compares different types of information"*. As part of its complaint, Foundem presented compelling evidence of how Google had favoured its own vertical search offering, Google Product Search (previously Froogle), at the expense of other competing verticals who saw their traffic significantly reduced; not only Foundem, but also Shopping.com, Pricerunner, Nextag, Dealtime, Ciao.co.uk and Kelkoo.[18] In fact, Google's Vice President, Marissa Anne Mayer has come close to admitting that verticals pose a particular threat to Google's business, because Google considers that it gains a competitive advantage through scale:

> *"While many of our competitors are still busy building small, vertical search engines where you have to remember they have them, we're busy doing a very difficult computer science problem: How do you stitch all of these disparate mediums together into one coherent set of answers, and how do you synthesize all of that?*[19]

However, Foundem's problems did not stop here. In addition to Google's distortion of its natural search results, Foundem also found itself to have been the victim of penalties imposed by Google in search and search advertising.

Before June 2006, Foundem ranked normally in Google's search results but as of June 2006, Google imposed a search penalty on Foundem systematically excluding it from Google's search results, except if a search was carried out for the word "Foundem". Foundem submitted a series of reconsideration requests to Google, in particular to its Quality Team but received no meaningful response. At no point did a representative of Google acknowledge the existence of a search penalty nor was there any manual intervention by Google (i.e. "whitelisting") available to escape application of the penalty. Following significant interest from journalists, Foundem was finally able to get Google to enter into a dialogue and was whitelisted in December 2009.

[17]http://www.foundem.co.uk/

[18]ComputerWorld, http://www.computerworld.com/s/article/9140630/Google_VP_Mayer_describes_the_perfect_search_engine?taxonomyId=16&pageNumber=1

[19]This aspect of Foundemís complaint very recently became the subject of a US Senate hearing in which Senator Michael Lee put up a chart from a study comparing Google Product Search result rankings to those from product-comparison sites including NextTag and PriceGrabber, in which Google Product Search results consistently ranked third. Senator Lee accused Google of having *"cooked it so you are always third"*

In August 2006, Foundem was also hit by an AdWord penalty (a penalty on its sponsored links) which increased its cost per click by an incredibly prohibitive 10,000 percent. Foundem witnessed its Quality Scores reduce overnight from 10/10 to 1/10, pricing Foundem out of the market. Foundem embarked on a series of appeals through Google's AdWords support team for over a year. Again, as before, Foundem's requests to lift the penalty were routinely rejected, until August 2007, when Google manually whitelisted Foundem, informing Foundem that it had been automatically downgraded by a new algorithm which Google admitted was designed to detect and penalise vertical search services such as price comparison and travel search.

eJustice & 1plusV

eJustice is a French legal search engine which is offered completely free of charge and is funded solely by advertising. eJustice is owned by 1plusV, which is the creator of an "innovative hybrid search technology" called VSearch and has launched a series of vertical search engines based on this technology. In March 2010, eJustice.fr complained about Google to the Commission, denouncing Google's attempt to squeeze it out of the market, by delisting the legal search engine and therefore blocking it from appearing in Google's search results.

It is understood that the main ground for complaint at the time was that, as in Foundem's case, search penalties had been imposed on eJustice in 2007 which had a significant negative impact on the number of people logging on to the site, as well as reducing its advertising revenues. eJustice complained that Google also placed pressure on eJustice to adopt Google's algorithm and advertising network.

On 30 November, the Commission announced that it had opened a formal investigation into Google's online practices, including those complained of by eJustice. Shortly thereafter, in February 2011, 1plusV, filed a new complaint, building on points also raised in Foundem's case. The main concerns raised were as follows:

- Google had delisted other sites owned by 1plusV as retaliation against the eJustice complaint. These sites were then relisted after the Commission formally opened its investigation in November 2010, despite the fact that 1plusV made no changes to its content. This provides further evidence of the manual whitelisting, which was also referred to in Foundem's complaint.

- Google had prevented 1plusV from using its advertising service, AdSense, making it difficult to monetise its free service through advertising between 2006 and 2010.

- Google preferentially listed its own services in natural search rankings. In particular, 1plusV raised the fact that Google publishes millions of links to pages of one of its own vertical search businesses, Google Books, while refusing to list similar pages on competing search engines because of their alleged lack of original content.

Following this complaint to the Commission, on 28 June 1plusV filed a €295 million claim for damages against Google before the Paris Commercial Court. The claim is thought to be the largest ever damages claim filed against Google in Europe for antitrust infringements.

The main elements of the claim echo 1plusV's pending complaint before the Commission. 1plusV alleges that between 2007 and 2010, thirty vertical search engines created by 1plusV were blacklisted (a few being recently whitelisted) which resulted in irreparable damage. If all of these thirty search engines had been allowed to compete, yearly sales, according to 1plusV, would have amounted to over €30 million.

Court proceedings are expected to last between 16-24 months and we should expect to see more and more damages claims against Google in courts throughout the European Union, given the number of online companies losing out on profits as a result of anti-competitive foreclosure. Such claims may be in the form of follow-on actions from regulators' decisions finding anti-competitive conduct or stand-alone claims.[20]

Navx

Another case which has resulted in litigation in a national court is the decision of the French Competition Authority in Navx. Navx sells databases for use on GPS navigation devices. For example, Navx will sell databases that will show a user of a TomTom or Garmin device the fuel prices at different gas stations and the location of speed cameras on the road, all of which is legal in France. On 13 November 2009, without any prior warning, Google abruptly terminated Navx's ability to advertise on Google's AdWords advertising platform, under the premise that Navx had violated Google's "content policy", which apparently prohibited sites which offered services intended to avoid traffic controls. However, Google did not prohibit other GPS service providers, including market leaders in France, from offering their services, thereby engaging in unlawful discrimination against Navx.

On 30th June 2010, the French Competition Authority adopted a detailed interim decision finding that Google's behaviour vis-à-vis Navx had been opaque, discriminatory and abusive, and had amounted to an unlawful breach of EU competition rules. The lack of transparency was not only unfair, it restricted commercial freedom by depriving Navx and others of the means to choose which advertising partner to work with. Further, the discrimination deprived Navx of the ability to advertise on the dominant search platform. In turn, this lack of transparency – and still more the discrimination – deprived consumers of choice in terms of the GPS services they use. Google was ordered to correct its behaviour within a short deadline.[21]

On 13 July 2010, Google offered a number of remedies which were market tested and subsequently modified to reflect observations submitted during the market test. On 4 October 2010, the French Competition Authority accepted the following binding undertakings applicable to Google's AdWords clients which advertise in France:

- Google will provide more details as regards its AdWord policy, in particular: specifying how its policy relating to traffic controls applies in France to warning devices and databases indicating the location of radars; and defining the scope of application of such a policy, for example, whether it applies to the text of the advert, to key words or the actual website linked to the advert.

- Google will give advance notice of three months and will put in place a system of notification relating to any changes restricting its AdWords policy in relation to traffic controls in France. This period can be circumvented where there is a serious and immediate risk for advertisers, Google users or Google.

- Google will set out the reasons and the circumstances which can lead to a suspension of an AdWords account for traffic control in France, including a system of prior and final warning. As above, Google can bypass this commitment in the case of serious and immediate risks.

[20]http://www.ejustice.fr/Pdf/1plusV%20-%20EN%20QandA%20-%2028%20June%202011.pdf
[21]http://www.autoritedelaconcurrence.fr/pdf/avis/10mc01.pdf 30 June 2010

The undertakings came into force on 1 January 2011 and will remain in place until December 2013. Many respondents to the market investigation were disappointed by these undertakings, including Navx itself. We will address this in more detail in Section VI below, but it is interesting to note that Navx argued the undertakings should provide it with financial compensation, something which the French Competition Authority rejected. This has led to Navx filing a claim for damages before the Paris Commercial Court in October 2010 for €7 Million, based on the grounds that Google had blocked its AdWords account.

Microsoft

In March 2011, Microsoft lodged a complaint at the European Commission which goes further than the complaints already discussed. It focuses on interoperability and advertising, and not just search manipulation and content. The complaint also raises a very important question; that of how to build a sufficiently competitive search engine.

In answering this question, Microsoft, like many of the respondents to the Commission market investigation in the *Microsoft/Yahoo! Search Business* decision, points towards the need for scale to effectively compete online. Returns of scale rise rapidly when a search platform is small, but as a search engine's scale increases, the returns it can achieve from additional scale diminish and level off. Google, realising this, has engaged in a number of exclusionary practices designed to deprive its competitors of the scale they need to compete effectively, even though such additional scale brings far smaller (and indeed marginal) benefits to Google itself. Some examples of steps Google has taken to deprive its competitors of the ability to achieve additional scale include the following:

- Google has restricted other players from accessing key content which is under Google's control, such as video (especially Youtube) and scanned books, keeping this content walled off. This has had the effect of preventing competing search engines from returning relevant results, of raising costs and hampering their ability to offer competitive services, while at the same time intentionally sacrificing traffic to its YouTube and book sites. Google has also blocked Microsoft's new Windows Phone, which competes with Google Android, from operating properly with YouTube.

- Google has formed a network of non-economic long-term exclusive agreements with publishers and distributors, contractually blocking leading websites from utilising competing search services and from distributing competing search toolbars. This hampers rivals' ability to attract users and tends to lock computer users into Google services.

- Google has contractually restricted advertisers from using data in an interoperable way, which has discouraged advertisers from running advertising campaigns on competing platforms, known as "multi-homing".

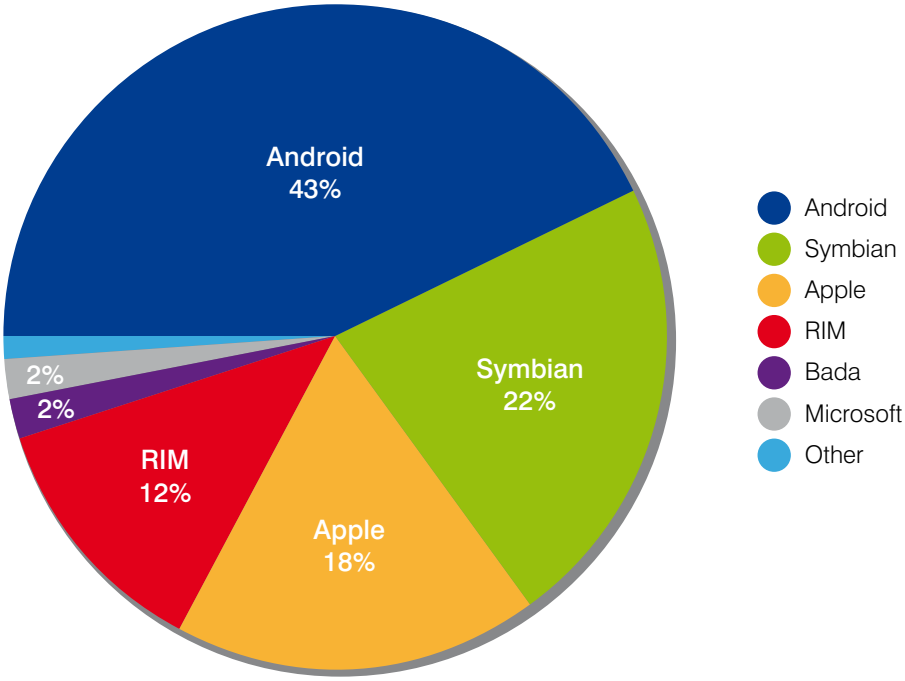
- Google manipulates natural search results, discriminating against would-be competitors by making it more costly for them to attain prominent placing for their advertisers and attract users.

These practices have ensured that Google's dominance remains unchallengeable, by foregoing profit-maximising opportunities, in order to deprive competing search engines of crucial input, limiting advertiser options and degrading the overall end user experience – ultimately having the effect of smothering innovation.

D. Mobile Operating Platforms

The mobile phone platform is clearly the place to be with the number of mobile searches and ads growing rapidly. The future of the Internet lies here with approximately 10-15% of traffic on average in the US deriving from mobile devices and with this figure set to increase.[22] It is therefore unsurprising that Google has been conducting itself in a manner which seeks to guarantee that it (and only it) controls the mobile operating platform going forward.

As already touched on briefly above, in relation to the *Microsoft* complaint, Google's anti-competitive practices are no longer limited to more traditional mediums, such as pc-based Internet; they are now becoming ubiquitous on its mobile phone platform. Google has developed a mobile operating system called "Android". Mobile operating systems are what controls a mobile phone and perform a similar function to that carried out by Windows, Mac OS X, or Linux for PCs and laptops. Since the launch of Android, its popularity, in particular among end users has soared and this trend is set to continue:



Source: Gartner Worldwide Smartphone Sales to End Users by Operating System in 2Q11.[23]

The success of Google's Android phones has come however at a significant cost. When Google launched Android, its stated goal was to create an "open platform" that carriers, OEMs and developers could use to make their innovative ideas a reality and to ensure that *"no industry player can restrict or control the innovations of any other"*. Google continues to represent that its Android operating system is managed according to this principle of openness. Yet despite these claims that its Android mobile operating system is "open source," Google has walled off into closed-source, proprietary modules many of the services and applications that are critical to the Android experience, including Google Search, Google Maps, YouTube, Google Voice and the Android.

Google has systematically foreclosed rivals from obtaining the volume of search queries and ad revenues they need in order to compete by executing a series of exclusive mobile search

[22]http://www.efrontier.com/research/whitepapers/mobile-search-scaling-fast-google-dominating and http://www.stateofsearch.com/the-growth-of-mobile-search-huge-in-numbers-not-in-ctr-research/

[23]http://www.gartner.com/it/page.jsp?id=1764714. This data certainly over-estimates the likely competitive influence of Symbian going forward as the platform is no longer being developed

agreements with key actors, starting initially with Apple for its iPhone and then adding a network of similar agreements with mobile carriers, including Vodafone, France Telecom/Orange, and Deutsche Telekom. These exclusive agreements have made Google the default search engine not only on all Android and Apple devices, but also on a range of other mobile devices distributed by these carriers, such as Blackberry RIM, Nokia phones, and Windows Phone 7. As a result, Google captures some 95 percent of mobile queries even on mobile devices *other* than Android and the iPhone. Google has been able to capture these deals by offering carriers generous ad revenue shares – shares that are made possible because of the monopoly profits that Google generates through its illegally acquired monopoly in PC-based search and search advertising.

Google also lured mobile carriers and device manufacturers into using Android based on misleading promises of openness and freedom and then used various anti-competitive tactics to block them from dealing with competitors. It is understood that the US Federal Trade Commission's probe into Google has included questions as to whether Google has prevented smartphone manufacturers using Android from utilising competitor services.[24] One prime example of this is Google's use of its "Android Compatibility Program" – a vague set of requirements that gives Google broad latitude to prohibit device makers and carriers from using the Android name or certain key Android services – to block them from using any search engine or other service or technology that competes with Google.

Compatibility has been the subject of a legal dispute in the US. In September 2010, *Skyhook Wireless Inc*. launched parallel lawsuits against Google; a patent action in the US District Court of Massachusetts and an unfair competition suit in the Massachusetts Superior court. Skyhook sells smartphone positioning technology used to pin down the location of mobile device users for map services and other applications. Its technology, "XPS", uses triangulation with Wi-Fi routers to help GPS enabled devices better establish a user's location, by tapping into a database that has the details of the whereabouts of some 250 million known Wi-Fi access points.[25]

The main thrust of Skyhook's case is that Google tried to force Skyhook out of the market *"...once Google realized its positioning technology was not competitive, it chose other means to undermine Skyhook and damage and attempt to destroy its position in the market place."*

In particular, Skyhook complained that Google wielded its control over, among others, Android and Google Maps, to push device manufacturers to use its technology over that of Skyhook's. Google collects massive amounts of information from search and Gmail as well as other applications, and according to Skyhook, Google recognised the immense value of location information. Therefore, to catch up with Skyhook, Google began offering Google Locations free of charge, with the aim of monetising its ad revenues.[26]

Skyhook also alleged in its complaint that Google had forced device manufacturers to terminate contractual obligations, in particular, by disrupting Skyhook's agreements with Motorola and Samsung – manufacturers of mobile phones which use Google's Android operating systems. Google dissuaded Motorola and Samsung from offering Android devices that used XPS and instead forced them to use Google's service – even though Skyhook's technology was regarded by many as superior. Skyhook alleges that because Google was unable to prevent OEMs from using XPS, it invented a "compatibility" issue.

[24]Wall Street Journal, *"FTC Sharpens Google Probe"*, 11 August 2011

[25]See Law 360, *"Skyhook sues Google over cell phone GPS technology"* 16 September 2010

[26]It is interesting to note that this took place in the backdrop of the outbreak of Google's Spy-Fi scandal, in which Google used its Street View Cars to collect data from unsecured wireless networks – See http://news.cnet.com/8301-30684_3-20007277-265.html

In a recently discovered email, a Google manager admitted that Google uses compatibility as a *"club"* to make phone makers *"do what they want"* and as an excuse to deny approval of third-party applications even when Google has *"no clear basis for saying [the applications] violate the Android security model."* In another email, a different Google manager described how *"awful"* it would be for Google if Motorola and Samsung's use of Skyhook's technology attracted other companies to Skyhook:

> *"[I]t will cut off our ability to continue collecting data to maintain and improve our location database."*

Google's moves to have the case thrown out of court have been, in light of this evidence, resisted so far by the US Courts. As Judge Judith Fabricant recognised, in dismissing Google's application for summary judgement, Skyhook's case does not, on the face of it, lack viability as a matter of law.[27]

Not only has Google hidden behind "compatibility" issues to force competitors from the market, Google has used this concept to deny competitors access to the interoperability information they need in order to provide attractive mobile access to key online content. High-quality access to YouTube content is a key competitive differentiator among mobile platforms. YouTube is the leading online video site by far, with more than 540 million average monthly unique visitors. The number of YouTube video views streamed to mobile devices increased by 160 percent in 2009, and YouTube had 100 million mobile views per day in mid-2010. Google's repeated refusal to disclose YouTube interoperability information has left Windows phones at a substantial competitive disadvantage to Android phones and the Apple iPhone, both of which use Google as their default search engine.

Through these and other anti-competitive practices, Google has extended its monopoly in search and search advertising to mobile Internet.

E. IPR – Google Book Settlement

As already noted above, Google has developed a thirst for information and data – the Google Book Settlement is an example of Google's attempt to gain access to and in fact dominate a relatively untapped source – books. Although not a formal antitrust complaint as such, the proposed Google Book Settlement has also raised considerable competition concerns – concerns that are on-going and have yet to be resolved.

Google's original vision was to digitally copy books in order to use snippets and bibliographic information. In 2004, it announced that it had entered into agreements with several major international libraries to digitally copy books and other documents, to set up the so-called "Google Books Library Project", an extension of its Google Print Initiative.[28] It is important to bear in mind that while libraries may store and make books accessible they are normally not the owners of the copyright in those books. Google started scanning these documents when the project was launched and it is estimated that by now it has more than fifteen million books in its databases.

In 2005, Google began to face opposition in the USA in the form of a class action on the behalf of a number of authors and publishers. The plaintiffs accused Google of copyright infringement given that no prior copyright permission had been obtained in order to scan and to show snippets of the million books which were still under copyright. As a result, they sought damages and injunctive relief.

[27]See the American Lawyer.com, *"Google Loses Bid to Dismiss Skyhook Antitrust Claims",* David Bario, 11 May 2011
[28]http://www.google.com/press/pressrel/print_library.html and http://googleblog.blogspot.com/2004/12/all-booked-up.html

In 2006, the parties began settlement negotiations. Under US rules, a settlement of a class action requires court approval; the Court must find the agreement to be "fair, adequate and reasonable, and not a product of collusion." What caused concern was that the proposed draft settlement agreement far exceeded the aims of the class action and, in fact, magnified the copyright and antitrust issues which were initially the subject of complaints.

The effect of the settlement was in fact to turn copyright on its head, as under normal copyright rules it is necessary to obtain consent in advance. Under the terms of the settlement agreement a distinction was drawn between "commercially available books", which Google could use for non-display purposes, and "non-commercially available books", which Google could use for display. Non-display purposes could include for example, under the terms of the settlement, algorithmic listings of key terms, display of bibliographic information, and research; while display purposes allowed Google to show (among other things) snippets, indices and even the actual content of the work.

Google's determination of whether a book was commercially available effectively boiled down to whether a book was "in-print" or "out-of-print". This meant Google could scan all works for non-display purposes and out-of-print works for display uses. The only protection available for the rights-holder would be to either request the removal of their work from the database all together or direct Google that their book should only be used for non-display uses.[29] The upshot of this was that in contrast to the normal laws of copyright, Google was not required to request permission before using a work and there were very limited means for rights-holders to protect their interests.

This raised particular issues in the case of orphaned works (i.e. works that are in copyright but whose rightsholders cannot be identified or located). Due process in US class actions require that notice describing the class be publicised to the class members. This meant that no amount of notice of the settlement between the parties would likely protect orphan works rightsholders who would be unaware of their rights.[30]

Over four hundred third parties submitted objections and statements of interest on the proposed settlement to the Court. These included not only civil parties (such as authors and publishers), rivals to Google in the online world (such as Yahoo! and Amazon) and private sector associations (such as the Open Book Alliance), but also the US Department of Justice (DoJ) and the French and German governments. The French Republic, for example, argued that the settlement would be contrary to French Copyright Law, European Union Directives, and the World Copyright Treaty.[31] But it was the DoJ's submission which provoked the most interest and had the greatest impact. It was surprisingly hard-hitting.

The DoJ's statement of interest on the proposed settlement made the preliminary point that the settlement sought to resolve *"matter[s] of public, not merely private, concern"* that are *"typically the kind of policy change implemented through legislation, not through a private judicial settlement"*.[32] Further, the DoJ concluded that the proposed settlement raised at least two *"serious"* competition issues.

First, the settlement would *"grant Google de facto exclusive rights for the digital distribution of*

[29]Settlement Agreement, Authors Guild v. Google, Inc., 05 CIV 8136 ECF Case, dated 28 October 2008
[30]*Op. Cit*
[31]Memorandum Of Law In Opposition To The Settlement Proposal On Behalf Of The French Republic, Authors Guild v. Google, Inc., 05 CIV 8136 ECF
[32]Statement of Interest of the USA, Authors Guild v. Google, Inc., 05 CIV 8136 ECF Case, dated 18 September 2009

orphan works" and *"create a dangerous probability that only Google would have the ability to market ... a comprehensive digital book subscription". This "is precisely the kind of competitive effect the Sherman Act [US Antitrust Law] is designed to address".*

Second, the settlement appeared to restrict price competition by: (1) creating an industry-wide revenue-sharing formula at wholesale level applicable to all works; (2) setting default prices and prohibiting discounts at the retail level; and (3) placing control over the pricing of orphan works with publishers and authors whose books might compete with these orphan works.

The DoJ also noted that the settlement *"bear[s] an uncomfortably close resemblance to the kinds of horizontal agreements found to be quintessential per se violations"* of US antitrust law.

Due to the large number of objections, the parties agreed to modify the agreement and the second draft received preliminary approval in November 2009. This new draft limited the settlement to English language books, i.e., books under US copyright, registered with the US Copyright office or published in Canada, the UK or Australia. It also established an unclaimed works fiduciary to represent the rights of orphan works in addition to the Registry set up under the first settlement agreement to protect rightsholders in general. This draft was followed by a fairness hearing in February 2011.

The DoJ submitted, after reviewing the Amended Settlement Agreement, an additional statement of interest.[33] Although the DoJ acknowledged that improvements had been made to the agreement, it maintained that the main issues remained – in particular the DoJ raised similar antitrust concerns to those put forward in its first statement of interest. One of the DoJ's most pressing concerns was that the Amended Settlement had failed to address the fact that no other entity would be able to obtain comparable rights in the same way as Google would in the market and thus Google's market power would go unchallenged. The DoJ recognised that Google already held a dominant position in Internet search and Internet search advertising and that *"that dominance may be further entrenched by [Google's] exclusive access to content through the ASA";* content which the DoJ felt could only be discovered by one search engine alone – Google – a search engine which it considered shielded from competition. The DoJ went on to say that such an outcome was not *"achieved by a technological advance in search or by operation of normal market forces"* but rather as *"the direct product of scanning millions of books without the copyright holders' consent".*

With regard to the terms of the settlement itself, the DoJ made a distinction between those provisions which dealt with "the specific allegations of the infringement", i.e. the past conduct of copying and showing small snippets of works, vis-à-vis those provisions which were forward looking. These forward looking provisions would enable Google *"open-ended exploitation of the works of all those who do not opt out from such exploitations".* It was this issue that strongly influenced Judge Denny Chin's decision to reject the Amended Settlement Agreement.

In 22 March 2011, New York Judge Denny Chin handed down a judgment finding that the Settlement Agreement could *"not survive as it was"*.[34] In his judgment, Judge Chin said that *"the [settlement agreement] would simply go too far"* as it reversed the burden of proof, such that the onus was on copyright owners to come forward to protect their rights – as opposed to Google asking for permission to use their works.

[33]Statement of Interest of the USA, Authors Guild v. Google, Inc., 05 CIV 8136 ECF Case, dated 4 February 2010
[34]Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011)

However, most notable was that Judge Chin's main concerns pivoted on the fact that the agreement would reinforce Google's dominant position in the market for search. According to Judge Chin, the agreement would allow Google a *"de facto monopoly over [at least] unclaimed works"* entrenching Google's market power in the search market. After having completed its scanning exercise Google would have the ability to exclude other competing databases which do not include orphan works and are as a result more incomplete. The settlement, if it had been allowed would have given Google a *"right, which no one else in the world [would] have"* by allowing it to use unclaimed works. Since any other entity wanting to use these documents would have to go through the *"painstaking"* and *"costly"* process, as the Judge called it, of obtaining permission and since it would be unlikely that rights could be obtained for orphan works given that their owners cannot be located, Judge Chin found that the opt-out system would have provided Google with the ability to license the most complete database, reinforcing its dominance.

Finally, Judge Chin noted that there was a difference between the Amended Settlement Agreement and settlement in other class actions; if class members are never heard from, they are merely releasing "claims" for damages for past grievances. By contrast, in the case of the Amended Settlement Agreement, if a rightsholder does not opt-out, not only does it forego claims for past conduct but also future conduct. For this reason, Judge Chin recommended that the parties convert the agreement from an opt-out settlement to an opt-in. Version three of the agreement is currently under negotiation and Google and the plaintiffs have indicated that they will submit a revised settlement offer to the court.

Although this decision was clearly a great outcome for authors, other rightsholders and those other organisations seeking to establish online libraries, there still remains considerable concern as Google is still scanning works into its database, almost entirely unchallenged. In fact, recently, in June this year, Google signed a deal with the British Library to make 250,000 books available online.[35]

Even more recently, in August this year, Google signed an agreement with France's largest publisher, Hachette Livre. Under the agreement, tens of thousands of French language books will be provided digitally, through Google's proposed eBook store, Google Editions. What is positive about this agreement is that, in contrast to the Amended Settlement, (under which Google would have been able to digitise any out of print works), under the terms of this agreement, Hachette will retain control over which books can be scanned and sold by Google. Nevertheless, this deal raises serious concerns across the publishing industry and further afield, as it affords Google access to approximately one quarter of books published in France.[36]

Google couples its Google Book Search product with its Universal Search project, to ensure that its services in books outrank those of its competitors. Google can also utilise these books in improving its translation service, which it also preferentially ranks above competing services. It also uses the word associations in the scanned works to improve its search algorithms and snippets from books to respond to search queries.

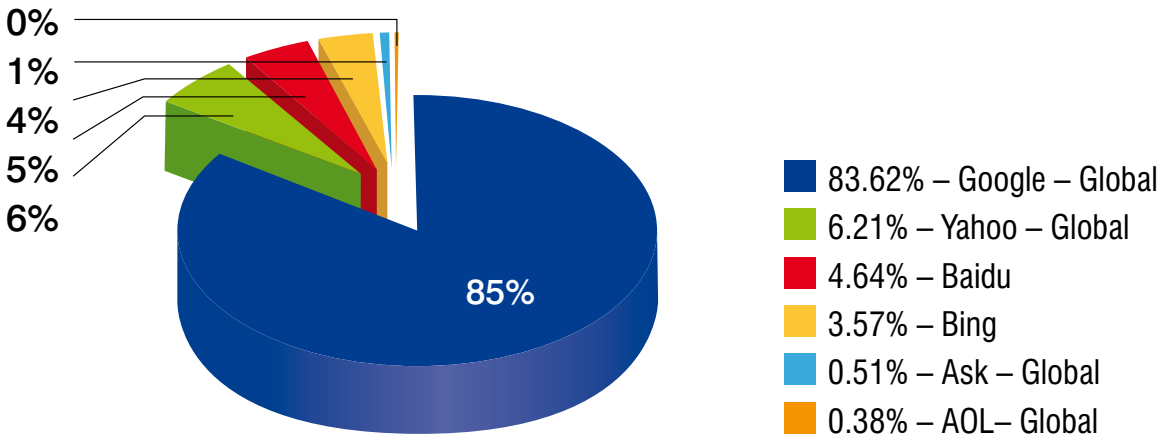
By making Google's search more comprehensive in ways Google's competitors cannot, Google is able to gain scale, to the detriment of those competitors, who act lawfully and respect copyright, who are unable to access such a wealth of information in the way Google can and are thus unable

[35]http://www.telegraph.co.uk/technology/google/8586824/Google-and-the-British-Library-seek-relevance-together.html
[36]http://www.nytimes.com/2011/08/08/technology/internet/after-much-ado-a-google-book-deal-in-france.html

to develop products and services online. This, in turn, results in fewer users carrying out searches on competing platforms, making such platforms less desirable to advertisers. The Google Book Search Settlement, like many of Google's projects, not only affects the market for search, but the entire online ecosystem.

4. Growing Dominance & Acquisition Strategy

Google has long been dominant in the fields of search and search advertising and its market share has grown significantly in display advertising, especially following its acquisition of DoubleClick in 2008. According to recent statistical data published in June 2011, Google has an 83.62 percent of all searches worldwide. At an EU-level, the picture is even bleaker, with Google having market shares more often than not exceeding 90 percent of national markets.



Source: NetMarketShares, June 2011

In addition to its very high shares of the search and search advertising markets, since 2001, Google has acquired 103 companies, 30 of which have been in the last twelve months, to August 2011.[37] Google has been pursuing an aggressive acquisition strategy for years, acquiring a whole range of innovative and promising companies, not only active in online search and search advertising but also in, for example, online intermediation, online display advertising technology; Internet search syndication, mobile advertising and price comparison vertical search (in particular, for flight and financial services). These transactions have enabled Google not only to entrench its market shares in search and search advertising, but are also part of a broader strategy to acquire dominance over key search verticals and other important segments of online advertising, enabling Google to control online markets up and downstream.

DoubleClick

One of the first mergers of note, which really bolstered Google's market position, was Google's acquisition of DoubleClick in 2008.[38] In April 2007, Google announced its acquisition of DoubleClick for $3.1 billion in cash. DoubleClick develops and provides Internet ad serving services to agencies, marketers and publishers who in turn serve customers. It also sells management and reporting

[37]http://en.wikipedia.org/wiki/List_of_acquisitions_by_Google
[38]Case No COMP/M.4731 – *Google/ DoubleClick*, 11 March 2008

technology worldwide to website publishers, advertisers and advertising agencies, in addition to ancillary services.[39]

Both the US Federal Trade Commission (FTC) and the European Commission (The Commission) undertook a detailed review of the merger. The Commission's market investigation defined a number of key markets. First of all the Commission found that there was not one single market for advertising and that a distinction must be made between online and offline advertising.

In the *market for online advertising*, the Commission observed that text ads could be search or non-search based whereas display ads were almost exclusively non-search ads. In light of this distinction, the Commission considered, but left open, whether or not the market could be further subdivided into *search and non-search advertising.* In this context, it was noted that from an advertiser's perspective search and non-search ads have different effects and serve different purposes; search ads are targeted, based on the user's revealed interest, whereas non-search ads are based on a less precise definition, for example, the context of the website. The Commission also found that online advertising and any narrower markets defined on the basis of search and non-search should be divided alongside *national or linguistic borders within the EEA.*

The FTC also took a similar approach to market definition, finding that there could not be a market for "all online advertising" including search advertising, ads sold through intermediaries, and directly sold ad inventory, as advertisers purchased different types of ad inventory for different purposes, and one type did not significantly constrain the pricing of another.[40]

The Commission also considered that there was a *market for online intermediation*, distinguishing between direct sales and intermediated sales by webspace publishers to advertisers. It, however, left open the question of whether this could be further subdivided into *search and non-search advertising*. In terms of geographic market, the definition for intermediation was at least *EEA-wide*. The FTC's decision took the same approach, finding that there was a relevant antitrust *market for ad intermediation*.[41]

The final market which the Commission defined in its *Google/DoubleClick* decision was that of *provision of online display ad serving technology.* Ad serving technology is the tool used once ad space has been sold to ensure that the correct ad actually appears (i.e., is served) onto the publisher website space at the right place at the right time. The Commission found that the market investigation had confirmed a separate market for the provision of ad serving for display ads and that such a market could be further *subdivided between provision of such services to advertisers and to publishers*. The Commission found that in terms of geographic market definition, the provision of online ad serving technology was at least *EEA-wide in scope*.

The deal raised a number of concerns in Europe and the US as regards competition, centring on Google's ability in the future to eliminate competition, as well as touching on privacy issues. At an EU-level concerns related, in particular, to exclusivity terms in certain Google ad contracts as well as fears that DoubleClick possessed a unique collection of information that, when aggregated with Google's customer information, would create a barrier to entry.

After its initial market investigation, the Commission indicated that the proposed merger could raise competition concerns in the markets for intermediation and ad serving in online advertising.

[39]http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/426 and http://www.ftc.gov/opa/2007/12/googledc.shtm
[40]http://www.ftc.gov/os/caselist/0710170/071220statement.pdf
[41]*Ibidem*

It then embarked on a more in depth review, in particular as to whether DoubleClick would have grown over time into an *"effective competitor of Google,"* and as to whether by creating a company with access to all parts of the online ad process – online advertising space, intermediation services and ad-serving technology – the deal could have anti-competitive consequences for rivals and a negative impact on consumers. Following the Commission's in-depth market investigation, the Commission cleared the merger in March 2008, finding that:

- Google and DoubleClick were not at that time exerting major competitive constraints on each other's activities and could, therefore, not be considered as competitors at that time.
- There would be no ability to engage in strategies aimed at marginalising Google's competitors, mainly because of the presence of credible ad serving alternatives to which customers could switch.[42]

The FTC approved the acquisition in a 4-1 vote on similar grounds, finding that in third party ad-serving markets, competition among firms was vigorous, and would likely increase. The FTC also concluded that Google's entry, even if it were to be successful, would not be likely to have a significant impact on competition.[43]

It would seem that although regulators substantiated their reasoning for approving the merger, concerns raised by other market participants were not unfounded, especially given that it is now apparent that Google has indeed embarked on a strategy of marginalising its competitors and that, despite other smaller players in the market, the viable alternatives to Google for consumers and advertisers alike remain limited, and are not likely to meaningfully constrain Google in the future, given the fact that Google walls off important data from competitors.

Yahoo! Inc.

Following Google's purchase of DoubleClick, it then made moves in 2008 to form an advertising agreement with *Yahoo! Inc*, in an attempt to block a Microsoft/Yahoo! marriage. The deal was scrutinised by the antitrust arm of the US Department of Justice (DoJ). The proposed deal would grant Yahoo! the option to use Google to sell ads for placement on Yahoo!'s search results pages and certain third-party syndication partner websites in place of ads sold through Yahoo!'s competing search advertising platform. The results of the DoJ's investigation showed that *Internet search advertising and Internet search syndication* were the relevant antitrust markets and that Google had shares of more than 70 percent in both markets, with Yahoo! being Google's most significant competitor. The DoJ indicated to the parties that it would block the deal if they attempted to implement the arrangement, since it would have significantly reduced Yahoo!'s incentives to invest in areas of its search advertising business.[44]

By contrast, both the DoJ and the Commission approved a licensing agreement between Yahoo! Search Business and Microsoft in 2010.[45] The deal was first announced in July 2009 and the aim of the marriage was to allow Yahoo!'s website to use Microsoft's Bing search engine, the two firms sharing the revenues generated.[46] The part of Yahoo!'s business subject to the transaction was its search business encompassing its Internet search and the online search advertising businesses, including its online search advertising platform, Panama.

[42]http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_4731.
[43]http://www.ftc.gov/opa/2007/12/googledc.shtm
[44]http://www.justice.gov/opa/pr/2008/November/08-at-981.html
[45]Case No COMP/M.5727 – *Microsoft/ Yahoo! Search Business*, 18 February 2010. See also http://www.justice.gov/atr/public/press_releases/2010/255377.htm, 18 February 2010
[46]http://news.bbc.co.uk/2/hi/business/8522606.stm

The Commission, in assessing the relevant markets confirmed some of those markets it had previously defined in its Google/DoubleClick decision, such as online advertising and intermediation. It then went on to consider a number of other markets:

- **Internet Search:** The Commission considered (although left open) a potential market for Internet search. It distinguished vertical Internet search from general Internet search, since the former focuses on specific segments. Unlike general Internet search, vertical search engines use a more focused crawler that indexes only webpages that are relevant to pre-defined topics. The Commission noted that Google is active in both Internet search and vertical search.

- **Mobile Search Advertising:** The Commission also took the opportunity to consider a potential market for Mobile Advertising. Mobile search ads are typically short, text based ads on which mobile searchers can click to get to the advertiser's landing page or to call the advertiser directly from their mobile phone.

- **Distribution Agreements on Entry Points:** The Commission also noted that Internet search engines, such as Google, operate a two-sided platform serving users free of charge and advertisers for remuneration. In order to be successful, the Commission observed, a search engine operator will try to attract as many participants on both sides of the platform as possible. To do this, search engines try to reach customers through various distribution channels on both sides of the platform, through entry points. The Commission considered a potential relevant market for distribution agreements on entry points, but ultimately left the question open.

Both the DoJ and the Commission approved the deal on the grounds that their investigations had shown that market participants did not foresee any negative effects on competition or on their businesses. The Commission's market investigation found that Google was clearly dominant with 2009 shares of between 90-100 percent in most EU national markets for search and search advertising. By contrast, the Commission found that Microsoft and Yahoo! both had market shares below 5-10 percent. In fact, it found that businesses expected the agreement to actually increase competition in Internet search and search advertising, by allowing Microsoft the necessary scale to become a more credible competitor to Google. The DoJ's decision went further than just acknowledging that scale is necessary for a search engine to be competitive, it actually attempted to describe the network effects intrinsic to search and search advertising platforms:

"The search and paid search advertising industry is characterized by an unusual relationship between scale and competitive performance. The transaction will enhance Microsoft's competitive performance because it will have access to a larger set of queries, which should accelerate the automated learning of Microsoft's search and paid search algorithms and enhance Microsoft's ability to serve more relevant search results and paid search listings, particularly with respect to rare or "tail" queries. The increased queries received by the combined operation will further provide Microsoft with a much larger pool of data than it currently has or is likely to obtain without this transaction. This larger data pool may enable more effective testing and thus more rapid innovation of potential new search-related products, changes in the presentation of search results and paid search listings, other changes in the user interface, and changes in the search or paid search algorithms. This enhanced performance, if realized, should exert correspondingly greater competitive pressure in the marketplace."[47]

[47]http://www.justice.gov/atr/public/press_releases/2010/255377.htm

AdMob

Next on Google's acquisition shopping list was *AdMob,* a mobile advertising platform and one of Google's leading competitors. Google announced in November 2009 that it would purchase AdMob for US$ 750 million. The deal faced close scrutiny by the FTC and evidence yielded from the FTC's investigation showed that each of the merging parties viewed the other as its primary competitor in *the mobile ad network market*, and that each firm made business decisions in direct response to the other. The deal was also met with much opposition: it was argued that the deal would reduce competition in the market for mobile phone advertising. Opponents included, among others, consumer groups, who argued that consumers would face higher prices, less innovation and fewer choices as a result of the merger.

Despite all this, the FTC unanimously approved the merger in May 2010 finding that the purchase would not reduce competition in the fledging *market of mobile advertising.* Central to its decision were recent developments in the marketplace during the course of its investigation, in particular Apple's acquisition of Quattro and its subsequent introduction of iAd, which meant, according to the FTC, that there would be a competing mobile ad network.[48] Nevertheless, the FTC did note that it would *"continue to monitor the mobile marketplace to ensure a competitive environment and to protect the interests of consumers."*[49] Unfortunately, despite these promises of oversight, Google has already secured in excess of 95% of the mobile search market. What Google once saw as a threat is now just another Google monopoly.

ITA

After this series of acquisitions in sectors relating to online advertising, Google turned its attention to bolstering its vertical search offerings, despite already being dominant in Internet search. In fact, in its 2009 Annual Report, Google acknowledged vertical search engines, such as Kayak, Monster.com, Amazon and eBay, as a competitive threat.[50]

Google's next most notable conquest was *ITA*, a flight information provider and software company which powers the data used by most travel search sites. In particular, ITA develops and licenses a product called QPX, which is used by many airlines, online travel agents and online travel search sites in order to provide flight search functionality to consumers. QPX is unique in its capabilities and can serve as a type of "mini-search" engine for travel sites.

In July 2010, Google announced its plan to acquire *ITA* for US $700 million, which it intended to use in order to offer an online travel search product, which would search airfares across airlines websites which are known as Online Travel Intermediaries (OTIs), using QPX. The DoJ began a review of the deal, issuing a second request at the end of August 2010. The DoJ's investigation discovered that the likely effect of the transaction would be a substantial lessening of competition. In particular, the DoJ found that because so many OTIs rely on ITA as an input for their services, Google would have the ability and the incentive to close off ITA from competitors, or at least degrade the quality of QPX made available to them; such actions in the upstream *market for pricing and shopping* would have the effect of substantially reducing competition in the downstream market for *comparative flight search.* Competitors and ITA customers complained that the deal would give Google an unfair advantage in providing travel search results.[51]

[48]http://www.ftc.gov/os/closings/100521google-admobstmt.pdf
[49]http://www.ftc.gov/opa/2010/05/ggladmob.shtm
[50]Google's 2009 Annual Report, p. 34
[51]http://www.justice.gov/atr/cases/google.html

In April 2011, the DoJ approved the deal but only subject to a consent decree designed to ensure ongoing access to QPX for current ITA licensees and to enable new entrants or new licensees to obtain QPX software on fair, reasonable and non-discriminatory terms. Under this decree, Google has been required to, among other things:

- License its QPX and ad-ons: Google must honour existing QPX licences; renew existing licences under similar terms and conditions and offer licenses to OTIs on the basis of FRAND principles.
- Continue to upgrade QPX: Google must continue to develop upgrades and enhancements to QPX and devote the same resources to R&D as ITA did.
- Observe firewalls: Google must observe strict firewalls in order to ensure confidentiality of licensee information.
- Arbitration: Google must report complaints made against it.

BeatThatQuote

On 7 March 2011, Google announced that it had acquired *BeatThatQuote,* the UK's fastest growing price comparison site providing personal finance price comparison services, for £37.7 million.[52] As well as ITA, Google was already active in vertical search, offering a number of services including its Google Product Search and its Google Comparison Advertising. The UK Office of Fair Trading (the OFT) undertook a first phase review of this merger and pushed back twice the expected decision date during review. It is understood that a number of concerns were raised by market participants including that the deal would strengthen Google's market power in horizontal search, as well as enhance its ability to restrict or eliminate actual or potential competitors in the field of vertical search, thereby reducing consumer choice and stifling innovation.

On 1 July 2011 the OFT decided not to refer the case to the UK Competition Commission concluding that the merger did not raise a realistic prospect of a substantial lessening of competition in the markets for the *supply of advertising space on consumer finance price comparison sites (PCSs)* and for *the supply of all online advertising space*. The OFT noted, however, that PCSs are two sided products; being "platforms" that intermediate between two distinct and unrelated types of customers – users and advertisers.[53]

For this reason, the OFT assessed the effects of the transaction not only in the two markets cited above but also in the markets for the *supply of consumer finance PCS search services to users* and the *supply of "white label" PCS technical platforms.* Pre-merger, the parties were found to overlap in the supply of consumer finance PCSs, while Google supplied Internet search and BTQ supplied "white label" platforms, enabling it to syndicate its price comparison technology to third parties.

The case raised both horizontal and vertical issues. As regards horizontal issues, the OFT put these to one side early, considering that the merger would not result in a loss of actual competition given the parties' apparently low shares of the supply of advertising space on the consumer finance PCSs in the UK in 2009 (Google having less than 1 percent and BTQ between 0-10 percent). In light of these seemingly low market shares, the OFT concluded that there was no cause for concern over unilateral effects, so long as the market is drawn narrowly.

On the other hand, the OFT received a significant volume of comments from third parties who

[52]http://www.beatthatquote.com/
[53]http://www.oft.gov.uk/shared_oft/mergers_ea02/2011/Google-BeatThatQuote.pdf

were concerned about the vertical aspects of the merger, suggesting that the merged firm would have the ability and incentive to foreclose rivals, especially as Google is a key source of traffic. The OFT concluded that the merged firm may have the ability to pursue such a foreclosure strategy. It came to this conclusion based on the fact that there was evidence to suggest that Google is an important source of traffic for rival consumers (who may not easily switch away) and the fact that Google accounts for a significant share of traffic to consumer finance PCSs. The OFT also pointed towards examples of ranking alterations in Google's search results for PCSs, such as: "the May Day" alteration;[54] unexplained and frequent variations in rankings for keywords forming key sources of traffic (such as "car insurance"); and variations in rankings as a result of Google manually altering the rankings of websites, including the downgrade of BTQ itself in March 2011.

Despite these observations the OFT concluded that although there was the ability to foreclose rivals, the merger did not actually increase the incentive for Google to do so because, according to Google, Google would forego greater upstream profits on lost advertising than it would be gaining on extra PCS sales downstream.

AdMeld

Another recently announced acquisition is that of AdMeld. AdMeld is an online display advertising company which, if the deal goes ahead, will be purchased for $400 million. AdMeld is a New York based company, providing "yield management" technology, enabling web publishers to instantly sell display ads. Display advertising is an area where Google has been gaining market share since its $3.1 billion acquisition of DoubleClick in 2008 (discussed above).[55] There are clear competitive overlaps between the two companies and it is rumoured that Google is looking to offer AdMeld free-of-charge to its customers.[56] The DoJ is now conducting an antitrust review of this acquisition and has made extensive requests for information from AdMeld competitors, various data exchange companies and advertising and demand-side platforms and other ad-tech companies. Given the open-ended nature of these requests, it is expected that the DoJ will ask for more information at a later date and it is possible that a decision will not be taken until next year.

Motorola

Most recently, Google announced on 15 August 2011 its acquisition of the substantial mobile device manufacturer, Motorola Mobility Holdings Inc. for $12.5 billion, expanding its presence in the important mobile search and mobile advertising markets. According to the Associated Press, this acquisition is *"by far Google's biggest acquisition and a sign the online search leader is serious about expanding beyond its core Internet business and setting the agenda in the fast-growing mobile market"*.[57]

It is understood that the parties have filed or are expected to file shortly merger notifications with regulators in the U.S., EU, Canada, China, Israel, Russia, Turkey and Taiwan.[58]

In some ways, this transaction may appear superficially unproblematic as Google is not currently active in manufacturing of smart phone handsets. However, the vertical nature of the merger is complicated by Google's dominance in the markets for search and search advertising. In fact,

[54]An algorithmic change to Googleís rankings in May 2010
[55]http://www.cnbc.com/id/43384229 and http://online.wsj.com/article/SB10001424052702303635604576391972711586988.html
[56]http://www.digiday.com/stories/google-admeld-probe-widens/
[57]http://hosted.ap.org/dynamic/stories/U/US_TEC_GOOGLE_MOTOROLA_MOBILITY?SITE=CAACS&SECTION=HOME&TEMPLATE=DEFAULT
[58]http://www.techworld.com.au/article/400832/google_motorola_file_merger_clearance_many_countries/

many of the concerns raised in relation to this deal resonate those issues addressed by Google's commitments in *ITA*. Four broad concerns are expected to be identified by antitrust regulators across the globe:

- **Preferential treatment of Google's own services:** as already discussed in detail above, Google has a history of promoting its own services over those of its competitors, especially when it comes to its own search rankings. The press has reported similar concerns in relation to mobile; many fear that Google will favour Motorola over competing handset manufacturers when releasing developments to Android, thus degrading the quality of the product provided to Motorola/Google's competitors. In fact, Skyhook's CEO, Tom Morgan, fears that Google *"will favor the handset maker that furthers [Google's] strategic interests …and now they have $12 billion in strategic interests to look out for."*[59] Google has already sought to keep information about new Android devices and new versions of Android secret, by requesting that details on Android in the context of the DoJ lawsuit over AT&T's T-mobile acquisition remain confidential.[60]

- **Condition rival mobile manufacturers' access to Google's platform on terms dictated by Google:** it is also thought that Google will use access to its platform as a means to impose terms on rival mobile manufacturers. For example, in the *Skyhook* case, the complaint is that Google forced device manufacturers to terminate agreements for use of its positioning technology by using an "invented" compatibility issue to disrupt Skyhook's agreements with Motorola and Samsung. A merger between Google and Motorola will give Google an increased incentive to do this again.

- **Exclusivity agreements with handset makers:** as we have seen, Google has a habit of forming exclusive search and search advertising agreements with a number of operators, such as Apple, Vodafone, Orange and Deutsche Telekom. It is likely that Google will continue to use its mobile platform, (strengthened by its acquisition of Motorola and Motorola's extensive patent portfolio), to lock handset makers and ultimately end-users into its search and search advertising space as well as into using its adjacent products, such as mapping and location services. It could easily do this, for example, by making Android updates conditional on such exclusive agreements.

- **Motorola's patents will not be made available on fair, reasonable and non-discriminatory terms:** if the deal is approved, Google will acquire some 17,000 Motorola patents, which will include a core group of patents which are essential innovative technology for the mobile industry, such as location services, antenna design, e-mail, touch screen gestures, application management and 3G wireless technology.[61] Given the importance of these patents for the mobile industry, Google may well fail to honour pre-existing licences granted to its competitors or offer such licences on terms which are not fair, reasonable or non-discriminatory; using such licences to impose exclusivity terms, such as those described above, on handset manufacturers. Antitrust regulators will have the cumbersome task of ascertaining which companies licence Motorola technology, making extensive enquiries into how these licences impact on the relevant markets, as well as questioning to what extent these licensing agreements will give Google leverage on the relevant markets.

All of these concerns listed above are realistic in view of Google's pattern of anti-competitive conduct across the pc Internet and now mobile Internet platforms.

[59]http://www.usatoday.com/tech/news/2011-08-15-google-motorola-antitrust_n.htm
[60]http://electronista.com/articles/11/09/28/google.worries.att.lawsuit.leaks.plans.to.apple/
[61]http://www.mobiledia.com/news/103953.html

We have seen in this section how Google has embarked on a series of acquisitions and agreements at all levels of the online ecosystem. These moves are deeply worrying as they allow Google not only to reinforce its dominance in search and search advertising markets but also enable it to strengthen its control over all sides of the online search platform, while excluding competitors.

5. The Economics of Google's Online Ecosystem

Why Search Matters

In the beginning of the Internet age, the Internet was not thought of as being part of the "real world", but a virtual one, where what we did online would have no effect on our daily lives. Such a notion can no longer be sustained. Business models and social interaction are now changing; we, whether "we" are citizens, consumers or companies, think and behave differently, in terms of business strategy; buying habits; even the way we communicate. Consumers and businesses alike can barely survive virtually or "really" without access to information online.

The importance of the Internet has been demonstrated by recent statistics; as of December 2009, there were 319,895,346 Internet users in the European Union, which represented 65.3 percent of the population – an increase of 238.9 percent from 2000 to 2009.[62] In light of this continuing rapid growth in Europe, we cannot ignore that most businesses and consumers look to Google as the gateway to the Internet. In fact, there is a strong degree of interdependence between businesses and consumers online, as the Internet, and Google in particular, are the vehicles by which consumers identify businesses online and vice-a-versa. In May this year, Google became the first website to reach 1 billion searches, capturing the attention of the majority of the EU's online users.[63]

As described above, there has been growing concern expressed as regards Google's market shares and its practices online which sparked the Commission's formal launch of its investigation into Google's online practices in November 2010. Google's behaviour should be examined as part of an overall strategy to entrench its dominance across all online platforms and foreclose any rivalry in pre-existing and new markets; markets which are all interconnected by virtue of two-sided and multi-sided platforms.

The Google Platform

In its decision approving Microsoft's acquisition of the *Yahoo! Search Business*, the Commission noted that Google operates a two-sided platform serving *"both search users (for "free") and advertisers (for "remuneration")"*. It added that in order to be successful, Google tries to attract as many participants on both sides of the platform as possible.[64] Two-sided markets and two-sided networks are economic platforms with two distinct user groups providing each other with network benefits. Multi-sided markets are platforms with more than two sides. In two- and multi-sided markets firms need to get two or more distinct groups of customers who value each other's participation on board the same platform in order to generate any economic value.

Markets with more than one side can be contrasted to more traditional one-sided markets, where firms provide goods or services to different types of customers which are not interdependent. A

[62]http://www.internetworldstats.com/stats9.htm#eu
[63]http://www.comscoredatamine.com/2011/06/google-reaches-1-billion-global-visitors/google-sites-1-billion_may-2011/
[64]Case No COMP/M.5727 – *Microsoft/ Yahoo! Search Business*, at paragraphs 47 – 48.

simple example of a one-sided market is that of hairdressers/barber shops; such establishments can choose to serve either men or women or both.

By contrast, with two-sided and multi-sided platforms buyers value many sellers and sellers many buyers. Typically, markets which have more than one-side tend to offer goods or services to one side of the market free of charge.

The *Organisation for Economic Co-operation and Development (OECD),* which plays a major role in developing global antitrust policy, has acknowledged that many platforms, especially those in a web-based economy, have more than two sides and that the insights obtained from two-sided platforms apply more generally to multi-sided ones. It is this which is important, since Google's online platform is a multi-sided market where many different kinds of firms operate. At the centre of those markets is currently a single player with extremely high market shares: Google. Commissioner Almunia himself has publicly acknowledged the importance of this, highlighting the need for vigilance in the ICT industry where:

> *"[We] are facing network effects conducive to extremely large market shares – Google is an example"*[65]

Google takes into account the fact that each type of customer it attracts values more of the other type of customers. This interdependence has significant implications for the economic behaviour of businesses online and impacts on how they choose their business partners, in particular Google. For example, Google's dominance of search is central to the design of its advertising business. Multi-sided markets of search and search advertising are part of a value chain delivering content to online users sometimes in return for rewards to the content creators and payment to the providers of the delivery infrastructure. In that chain there are also other suppliers of services such as publishers, providing content, advertising agencies, advertising intermediaries and technology companies. It is crucial that competition be allowed to take place at every level of that value chain.

For this reason, market definition must take into account the link between the multiple customer groups online and the fact that anti-competitive practices will be felt not only in the market where they are carried out, but across a number of markets having cumulative effects.[66]

Google's Scale

To this end, it is important not to overlook the powerful indirect network effects arising out of the Google platform which have enabled it to achieve scale. Two-sided platforms, according to *OECD Policy Round-table on two-sided markets* typically internalise indirect network effects between the customer/user groups.[67] Indirect network effects occur where the consumption of one product or service on a network drives the value of a complementary product or network, which can in turn increase the value of the original product or service.

These indirect effects are by no means a new concept. In the telecommunication industry indirect effects are derived from the network and these relate to price, where mobile customers are offered cheaper prices for calls on the customers own network (on-net) than for calls to other networks (off-net). Subscribers who have a significant number of callers (friends, family, etc.) on the same network will be attracted to these cheaper calls and will be encouraged to subscribe to that network. This will in turn increase switching costs to another network.

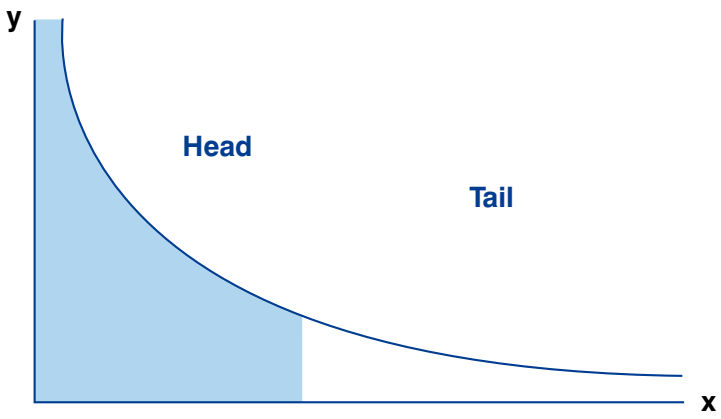
[65]Speech, 8 April 2011 at St Galon
[66]http://www.concurrences.com/article_revue_web.php3?id_article=16302
[67]OECD Policy Round-table on two-sided markets, 2009 available at www.oecd.org/dataoecd/38/61/44445730.pdf

These indirect network effects contrast to the network effects benefiting Google's platform, which are not price-based, but based on user "experience effects".[68] Google uses this experience effect to lock in users of the platform. Google derives indirect effects, for example, from its high volume of search queries made by users, which allows it to collect data about each user's habits and tastes, enhancing its advertising model, and improve its search rankings more generally. Search engines learn, not only about consumer tastes but also how to correct misspellings; the more queries that are made, the greater the number of spelling mistakes which affords the search engine the opportunity to correct these and to learn from these mistakes.

These improved search results in turn boost Google's complementary advertising business; more advertisers are attracted to the platform because of the high volume of users attracted by the relevant search rankings. This is a "positive feedback loop" which makes the Google platform more attractive to both advertisers and users, making both less likely to switch. Google's manipulation of search results helps to reinforce this loop; by ranking its own services higher than others, Google almost guarantees that some businesses may never make it onto a users' radar. This is because users rarely click through onto lower ranking sites.[69] Indeed, it is widely acknowledged that the top four or five results generate 80 percent of interest (measured in clicks).

These indirect effects have enabled Google to gain scale: something which the Commission has acknowledged search engines need to be competitive.[70] In the *Microsoft/ Yahoo! Search Business case*, the Commission's market investigation revealed that *"Google enjoys a large competitive advantage to other search engines and is perceived as a "must have" for users"*.[71] In fact, it is this competitive advantage of scale that has become a barrier to entry, since without ability to build scale, competitors will not emerge to challenge Google's dominance.

Google's scale also allows it to satisfy demand at both the head and tail of search queries; something which competitors just cannot offer. Behind this lies the "80-20 Rule", i.e., the rule that 80 percent of effects come from 20 percent of causes (also known as the Pareto principle). In the search market, this means that a relatively small number of search terms account for the bulk of the traffic, leaving a large proportion of search terms which feature less frequently and are therefore more difficult to satisfy. Given that Google controls the largest online platform (and disposes of vast amounts of data) it is not only able to answer most search queries which are directed to popular subjects – shopping, travel, medical information, etc., but also those more obscure queries, ("tail" queries in reference to the "tailing off" portion of a graph).



[68]http://www.nytimes.com/2008/07/07/technology/07iht-07google.14282611.html
[69]See testimony of Frank Pasquale, http://judiciary.house.gov/hearings/pdf/Pasquale080715.pdf
[70]Case No COMP/M.5727 – *Microsoft/ Yahoo! Search Business*, at paragraph 153
[71]*Ibidem* at paragraph 219.

Research has shown that everyone makes an obscure tail query from time to time and that satisfying demand at the "tail" end increases consumption at the "head" because customers who get satisfactory outcome to their tail queries are more likely to stay with that search engine. These "tail queries" are the key to consumer search engine selection and again drive traffic, which in turn drives advertising revenue.

With access to large revenues accrued from advertising, combined with a considerable user base, Google has been able to experiment with new features and rankings, adjusting its algorithm and expanding into other markets, in turn attracting more and more users to its platforms. It is also able to win more syndication contracts as a result of its high query volume, collecting additional funds and to expand its reach to third party websites, leaving very little of the market left for competing search engines.

In short, Google's "feedback loop" has become a vicious circle for competitors, who are trying to play catch up but are unable to gain scale due to Google's exclusionary practices. The fewer users competitors have, the fewer advertisers they can attract and resulting in significantly lower revenues. This situation is even more aggravated coupled with Google's manipulation of search results, given that consumers will rarely look past the first page of search results, meaning that online companies, like Foundem, One News Page, 1plusV, and many more will never be afforded the opportunity to reach consumers and in turn generate ad revenues.

In light of this, Google's often repeated claim that competition is "just one click away" is patently false – as far as advertisers and publishers are concerned there is no alternative to Google. When it comes to users one should not be distracted by what they notionally could do but should instead recognise that more than 90% of users clearly do not recognise the existence of competition to Google.

6. Restoring Effective Competition Online

We have described in this paper a number of anti-competitive practices carried out by Google in various online markets over what is, by now, a relatively long period of time. These practices have had the effect of excluding competitors from all sides of online platforms, at the same time enabling Google to build massive and insurmountable scale advantages. The key question now is not why or in what way Google has damaged the competitive process, but how exactly effective competition can be restored online.

Power to impose remedies

Competition regulators can impose "remedies" or accept "undertakings" to correct the competitive process when it has been distorted. The Commission has powers to require a firm after the finding of an antitrust infringement to bring the infringement effectively to an end. In bringing the infringement to an end, the Commission may:

> *"for this purpose… impose on them any **behavioural** or **structural** remedies which are **proportionate** to the infringement committed and necessary to bring the infringement **effectively** to an end".*[72]

[72]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

Effective & Proportionate

The first two key points to draw from this provision are that a remedy must ***effectively*** bring the infringement to an end and that it must be ***proportionate*** to the infringement committed. This leads to the question of how far a remedy can go. In assessing remedies to Google's anti-competitive practices, remedies should not limit themselves to bringing these practices to an end, but should aim to eliminate or neutralise the effects of such practices, i.e., tackle those anti-competitive effects of the behaviour that still persist by ordering the competitive consequences of the infringement to be undone.[73] In assessing whether a remedy is proportionate to the infringement, where there is a choice between several appropriate measures, recourse must be had to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued.[74]

We can already draw on situations where Google has agreed to binding undertakings in the context of antitrust proceedings before the French and Italian Competition Authorities and the DoJ (in ITA). These cases provide some good thoughts on how remedies may be able to address Google's anti-competitive conduct.

The *Navx* case was one of the first occasions for the French Competition Authority to intervene, and this fact, to some extent explains its rather conservative approach. In particular, the undertakings agreed in the Navx case were designed in a way which to some extent curtailed Google's freedom. Nevertheless, the French Competition Authority could have gone further to address the competitive advantage that Google had gained from its exclusionary practices, in particular relating to Google's scale. The competition concerns in Navx may have been more effectively addressed if the commitments had been wider in scope and longer in duration. For example, Navx, Pages Jaunes and e-Kanopi had argued in the context of the market test that the commitments should not be limited to advertisers in the sector relating to traffic control, but should be much broader, applying to all AdWords accounts, whatever the activity.[75] The French Competition Authority concluded that such a measure would go beyond addressing the competition concerns in the case at hand. However, with the benefit of hindsight, such a measure may well have been appropriate given that Google has since continued to prevent or at least restrict competitors' ability in a number of markets from generating advertising revenues. In deciding in this way, the French Competition Authority took a relatively narrow view of Google's conduct and did not consider how it had impacted across the online platform.

The Navx commitments left open the grounds on which Google can decide when it can make changes to its AdWord policy without prior warning. Under the terms of the commitments, Google need not notify in advance changes to its AdWords policy nor of the fact that a company has violated its AdWord policy in the case of "immediate and serious risk" to advertisers, users or Google itself. This arguably places the burden on Google to show that its actions were not anti-competitive and that it was simply responding to an immediate and serious risk.

A final observation as regards the Navx commitments is that they are relatively short in duration in comparison to the long-lasting competitive effects on the market; beginning in January 2011 and due to expire in December 2013. With growing concerns as regards Google's retaliation against complainants, upon expiration of these commitments, Google could well resort back to its old practices.

[73]See Case C-119/97P *Ufex v Commission* [1999] E.C.R. I-1341 and *Remedies in European Antitust Law*, Antitrust Law Journal, Vol 56, page 43 – 63

[74]Case T-260/94, *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and Case T-65/98, *Van den Bergh Foods v Commission* [2003] ECR II – 4653, paragraph 201

[75]See Decision no. 10-D-30 of 28 October 2010, *op cit*

By contrast to the French Competition Authority, the DoJ, at the time of the *ITA* acquisition was well versed on the inner-workings of the online platform, having already considered a number of mergers in search advertising. This might explain its approach in its settlement agreement with Google.

This settlement agreement contrasts to the Navx undertakings, in that it at least seeks to guarantee effective competition going forward. The requirement to license data vital to offering comparative flight search services helped address concerns that the merger would substantially lessen competition, as it meant that Google would not be able to wall off competitors from ITA. This provided a guarantee that such services would be able to power their websites to compete against any airfare website Google may introduce.[76] The commitment was also much longer in duration than the Navx undertakings and will expire in five years.

Behavioural or Structural Remedies?

As noted above, the Commission has the power to impose structural or behavioural remedies. The commitments in the Navx and ITA cases are examples of behavioural remedies.

Broadly speaking, behavioural remedies seek to redress specific conduct whereas structural remedies are aimed at changing the incentives of the dominant firm in the market.[77] Other examples of behavioural remedies include putting an end to contracts or contract terms; non-discrimination obligations; requirements to supply, etc. Disgorgement of profits illicitly earned could also be an antitrust remedy where it was thought that those profits enable the firm in question to continue to distort competition.

One interesting and possibly useful comparison to the antitrust issues under discussion here may lie in the world of computerised reservations systems (CRS) for air travel. Developed in the 1950s and rolled out to travel agents in the 1970s, the potential for CRS to distort competition was widely recognised. The European Commission adopted a number of Decisions[78] dealing with discrimination on these electronic platforms and refusals to grant access. In the Sabre case, the Commission considered that a dominant transport company was under an obligation of neutrality, whilst allowing it to pursue economic efficiencies that required it to study and put into effect all reasonable measures required to guarantee such neutrality.

These cases were part of the impetus which led to both antitrust legislation and to a formal regulatory code of conduct for CRS as part of the Community's air transport policy. The antitrust legislation[79] specifically cites the risks of discrimination in relation to price, service, data security and display prioritisation:

> *"The cooperation should not allow the parent carriers to create undue advantages for themselves and thereby distort competition. It is therefore necessary to ensure that no discrimination exists between parent carriers and participating carriers with regard in particular to access and neutrality of display. The block exemption should be subject to conditions which will ensure that all air carriers can participate in the systems on*

[76]http://www.justice.gov/atr/public/press_releases/2011/269589.htm
[77]*Remedies in European Antitrust Law*, Antitrust Law Journal, Vol 56, at page 47
[78]See Case IV/32.318 – *London European v. Sabena* (1988), and Case IV/33.544 – *British Midland v. Aer Lingus* (1992) as well as Commission Press Release IP/00/835 *"Commission acts to prevent discrimination between airline computer reservation systems"* (2000)
[79]*Commission Regulation(EEC) No. 2672/88 of July 26 1988, on the application of Article 81(3) of the Treaty to certain categories of agreements between undertakings related to computer reservation systems for air transport services,* OJ 1988 L 239/13, at recital 5

a non-discriminatory basis as regards access, display, information loading and fees. Moreover, in order to maintain competition in an oligopolistic market subscribers must be able to switch from one system to another at short notice and without penalty, and system vendors and air carriers must not act in ways which would restrict competition between systems."

The purpose of the regulatory code[80] was to resolve the problems raised by the CRSs in terms of distorting competition, but the introduction to which also addressed the interests of passengers, defining the problem in these terms:

"improper practice in terms of denied access to systems, or discrimination in the area of supply, access to the data display system, or the unfair conditions imposed on participants or subscribers may represent a serious loss for air carriers, travel agencies, and ultimately for the consumer".

The Code laid down the principles requiring that CRS displays must be clear, impartial and non-discriminatory, particularly as regards the order of presentation. It also included a ban on transferring data of a personal nature on passengers to third parties not involved in the transaction.

Structural remedies, on the other hand, usually involve an obligation to dismantle or separate control over infrastructure so that a dominant position cannot enable an undertaking from gaining an unfair competitive advantage, whether that be downstream or in adjacent markets. As a rule, structural remedies can only really be imposed where either there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome than a structural remedy.[81] Changes to the structure of an undertaking are proportionate where there is a substantial risk of a lasting or repeated infringement that derives from its structure.[82]

Structural remedies were used in the case of *Raso* to deal with the conflicting dual role of a port company active in port handling operations. The company was afforded by the port authority the exclusive right to supply necessary temporary labour to competitors. The Commission found that this dual role gave the company a monopoly over the supply of temporary labour, enabling it to charge its competitors excessive prices and supply them with less efficient workers. This was described by the Commission as a conflict of interest, the Commission finding that:

"it was not necessary to wait until the undertakings actually commit such abuses before action can be taken against them. It is sufficient for them to be legally placed in a position in which they are induced to commit abuses if they have an interest in doing so".[83]

A more recent example of where the Commission accepted structural remedies was in the case of *RWE*.[84] In this case RWE agreed to divest of its Western German high pressure gas transmission network which the Commission found would ensure that RWE would have no control over the gas transmission network and could no longer engage in anti-competitive practices, relating to network access, which included favouring its own supply.

[80]*Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems* (as subsequently amended by amended by Regulation 3089/93)
[81]Regulation 1/2003, Article 7
[82]Regulation 1/2003, recital 12
[83]Commission Decision of 21 October 1997 on the provisions of Italian ports legislation relating to employment *("Raso")* (97/744/EC)
[84]Case COMP/ 39.402 – *RWE Gas Foreclosure*, Commission Decision, 18 March 2009

Addressing the effects of Google's past anti-competitive behaviour

The question now remains as to how competition regulators can put in motion measures with the aim of neutralising the harm Google has inflicted to the online ecosystem in an effective and proportionate way. As we have seen above, it is clear that a mere cease and desist order will just not do; the Commission has itself acknowledged that such an order would not prevent an infringer, such as Google, from reaping the benefits of past violations, especially in network industries.[85]

In analysing the most effective and appropriate measures to remedying the anti-competitive effects of Google's conduct, it is necessary to consider that Google's conduct has not only harmed markets where the conduct took place but damaged the entire online platform. Broadly speaking, all remedies should aim to address Google's unlawfully obtained scale and to promote innovation and ultimately consumer choice, while actually encouraging Google itself to innovate and compete on the merits.

Much evidence has been presented that Google manipulates its natural and paid results in a way which excludes its rivals from top slots in search rankings, depriving them of traffic and in turn advertising revenues. Any remedy should reflect the idea that Google should not be allowed to structure its display of natural or paid search for retaliatory or exclusionary purposes. A remedy in this context should prevent Google from taking into account the following inappropriate factors in relation to search rankings: whether or not the website or service in question is offered by Google, a firm that is a subsidiary or a business unit of Google, or one of Google's business partners; whether the firm offers or promotes competing products to those of Google; or whether the firm has brought a complaint against Google. Similarly, Google should face an absolute ban from retaliation against any product, service, website or firm.

In particular, we have seen in this paper that Google uses its Universal Search mechanism to place its products in the top rankings, increasing its traffic. In order to address such manipulation, remedies should promote a fair and neutral ranking of the most relevant results in natural search, giving all companies that rank as the "best answer to a query" a chance at occupying the top spot at some point. Such a remedy would need to be backed by an independent mechanism for speedy redress, which might conceivably be in the form of arbitration as in the *ITA* case.

Google has also conducted itself in a way which is considerably opaque across online platforms. Remedies should in some way require Google to become more transparent and open generally – in particular, as regards the way in which it organises its search results, its AdWord policy, its explanation of reductions in quality score, AdSense revenue calculation and algorithmic updates.

As discussed in more detail above, Google's conduct has also had the effect of walling off its content and services from competitors, including competing platforms. Google has prevented the use of tools allowing a single ad campaign to be run across multiple advertising platforms (such as an integrated campaign utilising both Google and Yahoo! data) and restricted competitors from crawling key third-party content under its control, such as digitised copies of books and video, rendering competing services less effective. Any remedy seeking to address these issues should go further than the settlement agreement in ITA and must help improve competing search and search advertising offerings, increase competition, encourage innovation and new entrants, in turn enhancing consumer choice and the overall "user experience".

[85] *Remedies in European Antitrust Law*, Antitrust Law Journal, Vol 56, at page 48

Google has also formed agreements with a number of participants, including OEMs, content owners and mobile telecommunications operators, requiring them to support and/or distribute Google's services exclusively. This has prevented competitors from building the necessary scale to compete with Google. Online players who have formed agreements with such exclusivity provisions or containing other anti-competitive clauses could be afforded the opportunity to elect to either unilaterally rescind the agreement or have the clause in the contract rendered unenforceable.

Such a remedy could also deal with the situation where publishers are forced to agree to Google accessing their content in return for not being delisted from its search results. This would allow companies the flexibility to decide for themselves whether they want to continue to solely make use of the Google SERP platform or to shop around, in turn allowing other online platforms and competitors to build scale and improve their services. Nevertheless, a remedy along these lines would have to be carefully monitored to guarantee that Google did not take retaliatory measures against companies which sought to amend their contracts.

Finally, any competitor to Google faces the enormous problem that Google has managed and continues to manage to extract monopoly profits from the online ecosystem. This has given it the ability to outbid almost any actual or potential competitor for key assets, such as scale, technology or customers. If remedies are to be found which address the underlying competitive imbalance and not just regulate monopoly behaviour, it will be essential to find ways to limit the extent to which Google's war chest can be used to entrench its dominant position.

Addressing the Future

In addition to the concerns and issues described above, it is important to analyse and address how the markets in question are likely to change in the near future. Perhaps the most important of these is the development of mobile Internet access.

Forecasts suggest that sales of non-PC Internet-enabled devices will outnumber PCs this year and that tablet sales alone will overtake sales of laptops by 2015. In that same year, annual global smartphone sales are expected to exceed 1 billion. According to another recent study, annual growth in mobile data traffic in the next four to five years will exceed 90 percent. The importance of this segment is demonstrated by the massive price that Google is willing to pay to acquire the Motorola smart phone business.

As the Internet goes mobile, so does search. The volume of search queries and search ad revenues generated on mobile devices has increased massively in the last few years and is expected to skyrocket in the next two to three years. Mobile users value search as much or more than PC users because they often need specific information quickly and are less likely to sift through large amounts of content on a small screen while on the move. Advertisers also value mobile, both because of the amount of time consumers spend with their mobile devices and because mobile users tend to be more inclined than PC users to take immediate, real-world decisions in response to targeted ads.[86]

The explosive growth of mobile search represents a major opportunity because it creates fertile ground for innovation in new applications and services, as well as a huge, still largely untapped source of revenue for companies across the mobile ecosystem. Google, which already holds a monopoly in search and search advertising on PCs, recognised early on that this trend toward

[86]Particularly relating to geolocation.

mobile represents a major threat to its business. As Google came to understand that the massive growth in mobile search could enable rival search engines to at least gain the scale they needed to compete, it engaged in a systematic effort to thwart this competition by locking up major sources of mobile queries and ad revenues. It is important that antitrust regulators learn lessons from Google's practices in PC-based search advertising, to ensure that consumers have access to a competitive mobile platform.

7. Conclusions

ICOMP has described in this paper how Google has used its dominance in search and search advertising to engage in exploitative, exclusionary and discriminatory practices on PC and, increasingly, on Mobile Internet platforms. Complaints about these practices have been made to a large number of competition authorities, which are actively investigating them.

There is a great deal of evidence that these practices have severely harmed competition across a variety of sectors: mapping; location technology; newspapers; books; publishers; news aggregation; search engines; vertical search engines and price comparison, at the expense of online players and ultimately consumers. Many have argued that they amount to a clear violation of Article 102 of the EU Treaty which prohibits abuse of a dominant position, as well as Google's special responsibility (as a dominant undertaking) under EU law not to act in a manner which further harms competition on these important markets.

In addition to these bad acts, Google's aggressive acquisition strategy has sought to leverage off its existing dominance in search and search advertising into newer areas of the online ecosystem, such as mobile Internet.

The scale that Google has derived from its dominance of search and search advertising, as well as from its exclusionary behaviour and acquisition strategy, has led to a situation where it is impossible to compete, leaving no viable alternative to Google.

However, ICOMP does not believe that it is merely a question of regret but one of remedies. What can be done to restore competition in the online marketplace?

Remedies must look both forward and backward. It is not enough for antitrust regulators to put a stop to Google's existing anti-competitive practices (such as unlawful exclusive arrangements and anti-competitive revenue sharing agreements), widespread though they are. In order to create a healthy and competitive marketplace in Europe and further afield, it is imperative that remedies, whether structural or behavioural (or both), address Google's illegally obtained scale across online platforms, mobile and PC based.

The antitrust authorities must also consider ways in which to ensure that Google does not use years of unlawfully obtained riches to distort competition and block market entry.

Whether or not it is necessary to impose measures intended to deter Google from future unlawful behaviour is primarily a question for the antitrust authorities. However, it will become clearer over the next few months whether the complaints, investigations and likely negative decisions chasten Google or whether it will be "business as usual". If the latter proves to be the case, there is no doubt that not only tough measures will be necessary but also ones severe enough to have a deterrent effect.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