



A SECOND LOOK UNDER THE ANTITRUST MICROSCOPE:

An Update on the Commission's Investigations
into Google's Anticompetitive Practices

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1. Key Developments in the Commission's Google Investigation

In October 2011, ICOMP published its white paper *"Google Under the Antitrust Microscope"*, which provided a detailed description of how Google's anticompetitive practices have excluded competitors and exploited users, enabling it to decide which online companies thrive and which companies die, at the expense of innovation, jobs and growth.

Since that publication, there have been a number of significant developments in the European Commission's (the "Commission") investigation into Google's abusive practices. In total, the Commission is now believed to be looking into around twenty formal (and many informal) complaints brought against Google, the newest of which include complaints from several online travel companies.¹

These new complaints have added further weight to ICOMP's concerns and have provided the Commission with significant additional evidence of Google's abuses of dominance.

True to form, Google's position vis-à-vis the growing evidence of its abusive behaviour has been at best condescending: it has on at least two occasions stated in response to new complaints that it continues to work cooperatively with the Commission, *"explaining many aspects"* of its business and that it *"believes there is always room for improvement, and is thus re-working to address any potential concerns."*²

Almunia's Ultimatum

On 21 May 2012, the European Commissioner responsible for Competition Policy (and Commission Vice President), Joaquín Almunia issued Google with what many interpret as a public ultimatum:

"..Google Inc. has repeatedly expressed its willingness to discuss any concerns that the Commission might have without having to engage in adversarial proceedings. This is why I am giving Google an opportunity to offer remedies..."

In making this statement, Commissioner Almunia handed Google the possibility of offering commitments *in lieu* of further infringement proceedings. There is much logic behind Almunia's approach: he is seeking *"a quick resolution...restoring competition swiftly to the benefit of users"* in what he describes as *"fast moving markets"*. Almunia's message seems clear: Google has one last chance to meet the Commission's concerns, or face a long, drawn-out and ultimately painful legal battle.

In his offer to settle, Almunia identified four areas where Google's business practices are considered to be abuses of dominance of Google's dominant position on the markets for search and search advertising:

- Google's preferential treatment of its own vertical search services over those of competing offerings.

¹ Complainants include: German Publishers (VDZ and BDZV), Ciao!, Foundem, eJustice and its parent, 1plusV, Microsoft, Euro-Cities, Hot Maps, Interactive Lab, Elfvoetbal, NNPT.it, VFT, Deal Du Jour, AEDE, Twenga, Expedia, TripAdvisor, Odigeo and Streetmap

² Per Google Spokesman on 31 October, Al Verney, following its Company Statement of 27 October 2011, see <http://www.mlex.com/EU/Content.aspx?ID=186145>. The statement was also purportedly used by Al Verney in February 2011 after the filing of 1plusVs complaint: http://www.pcworld.com/businesscenter/article/220266/google_faces_another_antitrust_complaint_in_europe.html

- Google's unauthorised copying of content belonging to vertical search services and using this content on its own properties.
- Google's *de facto* exclusivity with partner websites requiring them to obtain most or all of their search advertising from Google, foreclosing competing intermediation services.
- Google's restrictions on portability of online search advertising campaigns from its AdWords platform to competing platforms, particularly for software developers.

Almunia's letter, however, does not mean that the Commission will cease to investigate other concerns not falling under these four headings. Almunia was emphatic that the Commission will continue to investigate other issues, including Google's conduct in relation to its mobile platform, Android. This suggests that Almunia is mindful of Google's history of failing to co-operate fully with regulators:³ in the words of the Director of the US Consumer Watchdog, "*Google has a history of stonewalling and foot-dragging*".⁴

Google's next move

It is not clear that Google will heed the Commission's clear warning. Google's initial response to Almunia's statement was that it disagreed with the Commission's conclusions but was happy to discuss any concerns the Commission might have.⁵ Just days later, Eric Schmidt, Google's Chief Executive, issued a statement indicating that Google might not be so willing to enter into meaningful dialogue after all: "*We disagree that we are in violation until they are more precise on what area of the law we are in violation of. Give us the precise data, the precise problem.*"⁶ What is striking about this statement is that it is inconceivable that Google is unaware of the issues: it has been sent the complaints and has met with the Commission's case team on many occasions.

According to press reports, the Commission has given Google until 2 July 2012 to submit its proposed remedies.

³ <http://www.i-comp.org/blog/2012/above-the-law/>

⁴ <http://www.mlex.com/EU/Content.aspx?ID=240673>

⁵ <http://news.yahoo.com/e-u-antitrust-chief-seeks-remedies-google-114723698.html>

⁶ <http://www.ft.com/cms/s/0/90dbcd28-a687-11e1-968b-00144feabdc0.html#axzz1x0NKyak1>

2. Number of Complaints against Google Increases

Since the publication of ICOMP's paper, *Google under the Antitrust Microscope*, many additional complaints have been filed with the Commission. The new complaints fall broadly speaking into the following four categories:

- Google's exclusionary tactics of preferentially placing its own services in natural search rankings above those of competing offerings significantly reduces the latter's ability to compete.
- Google continues to pursue its exclusionary strategy of discriminating against rival services and going as far as to prevent competitors from accessing its search and advertising platforms.
- Google seems to have cross-subsidised its free-of-charge services, such as Google Maps and API, with its revenue-generating platforms, enabling it to cover the expensive costs of data and licensing in a way which competitors cannot, foreclosing them from the market. Google now appears to be seeking to recoup profits after having driven competitors from the market, by charging for some of these services.
- Google's exploitative "scrape or scrap" policy has enabled its unauthorised use of third party content to go almost unchallenged while content owners lose out on revenues.

On 27 October 2011, Google publicly disclosed the identities of a number of the complainants. These included: the Toulouse-based owner of a business-matching site, *Interactive Lab*; the Dutch football website, *Elfvoetbal.nl*; the German listings association, *Verband freier Telefonbuchverleger*; the Italian news blog, *NNPT.it*; French discount website, *Deal du Jour*; and the German mapping site, *Hotmaps*. The Spanish Association of Daily Newspapers, *AEDE*, filed a complaint on 23 December 2011 accusing Google of abusing its dominant position through, among other things, its Google News offering.

Exactly a month later, the French shopping comparison site, *Twenga*, also filed a formal complaint against Google, becoming one of several FairSearch.org members to lodge a complaint. Other FairSearch.org members followed suit and in March and April 2012, the Commission revealed that additional complaints had been received from two online travel sites; the travel review service, *TripAdvisor*, and the online travel service, *Expedia*.

TripAdvisor and Expedia's complaints were backed by other travel industry stakeholders including: the European Technology & Travel Services Association, Lastminute.com and Amadeus. Level.com (a Fairsearch.org member) responsible for representing the interests of travel agents such as Opodo, said that while it had not filed a formal complaint, it had been monitoring Google's conduct and had alerted the Commission to perceived "*irregular behaviour*". In its 25 April 2012 SEC filing, Google revealed that Opodo's owner, *Odigeo*, had also filed a complaint as had the mapping company, *Streetmap*. Shortly before these complaints, the European Consumer Organisation, the BEUC, wrote a letter dated 27 March 2012 to Almunia in which it expressed its serious concerns that "*consumers have suffered harm from Google's dominance by being provided with partial results of their search queries...*"⁷

⁷ Per Brent Thompson, Vice President of Government Affairs, Expedia, 30 March 2012. See also Letter from M Goyens of the BEUC to Joaquin Almunia, dated 27 March 2012

2.1 News Aggregators & Publishers

In *Google under the Antitrust Microscope*, ICOMP described in detail how Google's conduct had harmfully affected news-aggregators, newspaper and publishers. While the conduct complained of varied from case to case, there was one shared theme: Google's unauthorised exploitation of third party content. Such an argument had been raised by the *German Publishers' Associations* (BDZV and VDZ) in their complaint to the German Federal Cartel Office (the FCO) in December 2010 and was also addressed in Google's settlement with the Italian antitrust authorities in the *FIEG* case.⁸

Asociación de Editores de Diarios Españoles (AEDE)

Despite the fact that Google's use of publishers' snippets has been at the forefront of the antitrust debate surrounding Google's abuse of dominance for some time, the Commission only began to look into specific allegations in December 2011, when it announced that the Spanish Association of Daily Publishers, AEDE, had filed a complaint concerning the use by Google of AEDE members' digital content on the Google News service, without prior authorisation and without offering publishers' remuneration.

As with the German Publishers, AEDE complained that the way in which Google operates its Google News service has a substantial negative impact on newspapers' ability to raise revenues through online advertising. For this reason, AEDE asked for its members to receive a fair share of the revenues Google earns from adverts displayed next to "snippets" of their articles. The AEDE went on to criticise Google's "opt-out option" for content rights holders who do not want Google to make use of their content on its Google News website; by opting out, publishers are able to protect their content but not their business, since to opt-out also means to be excluded altogether from Google's search results.

German Publishers – BDZV & VDZ

The German Publisher Associations, BDZV and the VDZ, had complained about Google's unauthorised use of its members' content before the FCO. However, when their complaint was transferred to the Commission in December 2010, their "fair share" concerns remained with the national regulator. In February 2012, shortly after the announcement of the AEDE's antitrust complaint, the German Publishers took the decision to take their "fair share" grievances to the Commission.

Other Publishers

It is understood that other publishers and industry groups have reached out to the Commission in this respect. An association representing Polish publishers is said to have written to Almunia about Google's conduct toward rivals and two other news sites have filed formal complaints with the Commission. The first is the Dutch football site, *Elfvoetbal.nl*, whose concerns appear to centre on the fact that Google directs users to its own football-related properties and the second is a complaint filed by an Italian news discussion forum, *NNTP.it*.

⁸ See pages 7-10 of *Google under the Antitrust Microscope*

2.2 Business Listings & Mapping Services

More and more consumers use the internet to search for businesses and locations. Google Maps is a popular resource among users and according to a YouGov Survey of a sample of 2,019 individuals in the UK, 49% said that they regularly use Google Maps.⁹ This figure is more striking in the US, where 71 % of the 91.7 million online mapping users visited Google Maps in February 2012.¹⁰ Google's application programming interface service, Google Maps API, has also become very popular with online businesses, allowing them to embed Google Maps into their own sites and to pinpoint their businesses on Google's popular mapping service.

It therefore comes as no surprise that competing online mapping and listing services have become an increasing target for Google's anticompetitive conduct. In fact, so much so, that some services, such as the French mapping company Maporama, have been forced out of business as a result of Google's exclusionary conduct.¹¹

Verband freier Telefonbuchverleger

In October 2010, the Verband freier Telefonbuchverleger (VfT), a German association of 20 regional listing firms, filed a complaint with the Commission raising concerns over the discriminatory preferencing of Google's commercial products in its search rankings. VfT publicly stated that it hopes its "offensive" on Google will help bring about the return of the "objective search engine". According to VfT's website, its analysis has shown that when a search is carried out on Google for a business in connection with a place or a postcode, Google almost always prominently places its sites above those of local listings.¹²

Hot Maps

Hot Maps, a German mapping software developer and licensor, filed a complaint against Google with the FCO on 12th October 2010, accusing Google of exploiting its market power in order to unfairly restrict Hot Maps' ability to offer maps and routing services, contrary to the German Act Prohibiting Restrictions on Competition. In particular, Hot Maps argued that by offering Google Maps API free-of-charge to other websites and without advertising, Google engaged in predatory pricing, since it did not finance payment for licence fees nor geographic data through its mapping services. It is worth noting, that Google has since begun charging certain users heavily for this service, once they surpass usage limits (see below).

In addition, Hot Maps also considered that its "findability" in Google's search results had been "inexplicably declining" since, among other things, the launch of Google Maps; something which according to Hot Maps "*clearly shows that Google is favouring its own services*". In this context, Hot Maps pointed towards Universal Search, which, according to Hot Maps, places Google Map images above organic rankings in response to location searches.

The FCO transferred Hot Maps' complaint to the Commission at the end of 2010, together with that of another mapping company, Euro-Cities.¹³ While it remains unclear whether or not the Commission is investigating API-related claims, it is understood that the FCO, at least in the case

⁹ See <http://labs.yougov.co.uk/>

¹⁰ See <http://www.nytimes.com/2012/03/20/technology/many-sites-chart-a-new-course-as-google-expands-fees.html>

¹¹ See Decision of the Paris Tribunal de Commerce, 31 January 2012, Bottin Cartographes, available at http://www.i-comp.org/en_us/resources/resources/download/1340

¹² <http://www.mlex.com/EU/Content.aspx?ID=186150>

¹³ See page 7 of *Google under the Antitrust Microscope Paper*

of Euro-Cities, did not refer those arguments relating to Google Maps' free API to the Commission and subsequently recommended that this issue could be dealt with before the German courts.

Bottin Cartographes

On 31 January 2012 the Paris *Tribunal de Commerce* handed down a judgment in favour of Bottin Cartographes finding that Google had abused its dominant position contrary to the French Commercial Code by pricing its API below cost in the market for online mapping for geolocalisation of sales points on company websites. The Tribunal ruled that Google enjoyed a *de facto monopoly* in France on the search engine market, concluding therefore that Google Map's is dominant:

"This principal can be seamlessly transposed to online mapping, indeed, Google Maps' dominant position being linked to Google's dominance on the search engine market."

The Tribunal then analysed how Google had abused its dominant position. It found that in selling mapping programmes for free, Google had not allowed for the recoupment of the inevitable production costs involved in offering its services, including, for example, product development and distribution, as well as the rights for geographic data. The Tribunal found that Google's conduct led to the elimination of all market competitors and furthermore, considered that this was part of a wider exclusionary strategy. It held that in offering the product for free, Google had the objective of optimising its commercialisation of targeted advertising over time; client companies would rightly consider that Google Maps API would improve their natural search listings on Google because a search on Google's search engine leads to the display of Google Maps.¹⁴ This judgement offered some comfort to players in the online mapping industry and may well have encouraged others in the sector to come forward in early 2012.

Street Map

Streetmap is a UK provider of online maps, enabling users to search for free by postcode, place, name, street name, telephone code, latitude and longitude. Streetmap also offers a variety of paid for location-based services to businesses. From 2002 to 2004, Streetmap saw a 653% increase in its revenue growth and, in 2006, a YouGov survey rated Streetmap.co.uk as the 4th most favourite and trusted online brand.

However, as from Spring 2007, Streetmap witnessed a sharp decline in traffic and turnover, apparently to the benefit of Google. In March 2012, Streetmap brought a formal complaint to the Commission about Google's abuse of dominance in the markets for search and search advertising, and Google's leveraging of this dominant position into the online mapping sector.

It is understood that some of Streetmap's grievances pivot on discrimination concerns. Firstly, like many complainants, Streetmap argued that by systematically placing its own services at the top of its search engine results page, through Universal Search, Google is favouring its own properties, directing traffic to its sites and discriminating against those of competitors. In fact, according to Streetmap, Google Maps was among those sites experiencing the biggest traffic increase post-Universal Search. As part of this argument, Streetmap also complained that while an introduction of a UK postcode into Google Search returned results from Google's own mapping sites, Google failed to list competing sites, such as Streetmap. Secondly, Streetmap raised the issue of partial crawling, i.e., that Google has a lower crawling rate for sites competing with its own. Algorithms

¹⁴<http://www.i-comp.org/blog/2012/bottin-cartographes-the-implications/>

that run Google's website indexation set out the frequency and scale of their crawls according to a website's ranking. However, Streetmap has claimed that despite its high ranking score of 7 out of 10 (only one point less than Yahoo!), by February 2012, Google's search engine had only indexed 5% of its site. At this rate, it would take 20 years for Google to fully index Streetmap's content.

In addition to these discrimination points, Streetmap also raised similar arguments to those put forward by Euro-cities and Hot Maps, accusing Google of offering its mapping services to consumers and business customers below cost. Unlike its competitors, Google Maps provides its mapping service free of charge to most of its users without advertising (at least for now). Streetmap claimed that Google uses the revenues generated by its other businesses to finance map licences and data, cross-subsidising its mapping services with its advertising platform. Google's business model for its API service, which enables businesses to embed Google Maps into their site and vice-a-versa, was also offered for free until recently, when Google publicly recognised that this business model lacked viability:¹⁵

"with the continued growth in adoption of the Maps API we need to secure its long term future by ensuring that even when used by the highest volume for-profit sites, the service remains viable."

Google introduced usage limits and excess usage penalties as from October 2011 for Google Maps API users. Streetmap has described this tactic as being part of "Google's plan", such that once competition has been driven from the market it is able to begin charging for services. This analysis is in line with the opinion of the French Competition Authority: *"It is true that [Google Maps API] is not a paid for service at the moment in France, but it is in certain cities in the United States, which may indicate, therefore, a possible evolution in that direction."*¹⁶

2.3 Advertising Platforms & Price Comparison Sites

Much of Google's anticompetitive conduct has been directed at competing vertical search engines, as these pose a significant threat (sometimes direct, sometimes indirect) to Google's own services. Many of the initial complainants were price comparison sites, including *Ciao!* and *Foundem*.¹⁷ More recently, the net of Google's anticompetitive behaviour in this field has widened to include business matching sites and sites offering discounts.

Interactive Labs

On 3 February 2011, the French company Interactive Lab filed a complaint with the Commission against Google, as regards its failed attempts to use Google AdWords to promote its business matching service, Woxxo. Interactive Labs has accused Google of operating its advertising services in way which is *"non-transparent and misleading"*.¹⁸ The Commission agreed in April 2011 to proceed with a formal investigation into the French company's claims.

¹⁵ <http://googlegeodevelopers.blogspot.com/2011/10/introduction-of-usage-limits-to-maps.html>

¹⁶ See Opinion of the French Competition Authority No 10-A-29, of 14 December 2010, on the competitive operation of online advertising, at paras. 324 *et seq*

¹⁷ See page 10-12 of *Google under the Antitrust Microscope Paper*

¹⁸ <http://www.mlex.com/EU/Content.aspx?ID=186148>

Deal du Jour

Deal du Jour is a French site (dealdujour.pro) acting as an advertising platform for local businesses, offering a similar service to that of Groupon. In the beginning of August 2011, Deal du Jour filed a complaint with the Commission asking that it “*carry out an investigation of Google urgently, since our company with limited capital is being destroyed by Google’s actions*”.¹⁹

It is understood that Deal du Jour’s complaints are threefold. Firstly, Deal du Jour argued that it dropped down Google’s search rankings without any explanation, such that it was effectively deleted from Google’s index. Secondly, Google is accused of having deleted Deal du Jour’s AdSense account on the grounds that it had engaged in “incorrect activity”. The third grievance is said to relate to Google’s alleged deletion of the Deal du Jour affiliate’s, Int. Yellow Pages, AdWords account, on the premise that the account and advertising terms did not meet the quality requirements set out in Google’s user terms & conditions; an approach which Google previously employed against Navx in 2009, impeding that company’s ability to advertise on Google’s AdWords platform.²⁰

It is worthy of note this alleged conduct occurred in July 2011, in the run-up to Google’s purchase of TheDealmap, a site aggregating offers from various daily deal websites.²¹ This reinforces the notion that Google is focusing on players in “target sectors” – that is to say clearing competitors out of the way before launching its own product or services.

Francotel LLC also filed a complaint against Google in January 2010 with the Commission as regards AdWords terms and conditions, although its complaint has not been reported as being part of the investigation.

Twenga

In early 2012, a complaint filed by the French shopping comparison site, Twenga, became another formal complaint to be filed with the Commission. Twenga’s complaint did not limit itself to the usual concerns relating to Google’s preferential treatment of its services, but also brought new aspects of Google’s conduct to the Commission’s attention: Google has discriminatorily applied algorithmic tweaks to competing services, leaving its own untouched.²² According to Twenga’s Chief Executive Officer, Bastien Duclaux, Google “*applied several algorithms last year and very recently in order to penalise these kinds of products in the search results... Twenga lost more than 30 percent of its audience during the course of August*”.²³

2.4 Travel Industry

In early 2012, two FairSearch.org members, Expedia and TripAdvisor, filed complaints with the Commission within five days of each other. Odigeo (the Barcelona-based owner of eDreams, Opodo, GOvoyage and Travellink) has also been identified by Google as a formal complainant.²⁴

¹⁹ <http://www.mlex.com/EU/Content.aspx?ID=164671>

²⁰ <http://uk.reuters.com/article/2011/08/04/eu-google-dealdujour-idUKLDE77313M20110804>. For details of the Navx complaint, see page 13 of *Google Under the Antitrust Microscope*

²¹ <http://dealbook.nytimes.com/2011/08/01/google-acquires-the-dealmap/> Google is also reported to have attempted a takeover of Groupon last year

²² Most notably, the “Panda” update which Google did not apply to its own products and services
<http://www.pcinpact.com/news/68661-twenga-google-concurrence-marche-recherche.htm>

²³ <http://www.businessweek.com/news/2012-01-24/google-faces-eu-antitrust-complaint-from-french-shopping-website.html>

²⁴ In its SEC filing. A copy of the statement is available at <http://www.mlex.com/EU/Content.aspx?ID=233797>

Google's conduct in the travel industry had already attracted much regulatory scrutiny, having been the subject of a US Department of Justice (DoJ) investigation in the context of Google's acquisition of ITA Software Inc.. The complaints are said to have been sparked off by Google's failure to adhere to the commitments it gave to the DoJ in order to gain antitrust approval for its acquisition of ITA. Following the acquisition last year, Google introduced a flight-search service, Google Flights, exploiting ITA's QPX product which is widely used by the travel industry to offer flight search functionality to consumers.²⁵

FairSearch.org – Expedia Inc. & TripAdvisor

On 30 March 2012, Expedia released a statement confirming that it had filed a complaint with the Commission detailing "*specific business and search practices by Google that constitute a violation of EU competition and consumer protection laws*".²⁶ Expedia is an online travel provider active in North America, France, Germany, Italy, and the Netherlands and is the largest of its kind in the UK.

In its complaint, it called on the Commission to take "strong action" to restore a fair and competitive marketplace that respects consumers' rights. The exact nature of its complaints have not been made public, but Expedia's statement during a US Senate Subcommittee hearing last September is a likely indicator of the conduct complained of: Google's exclusion of links to other online travel agencies on Google Flights, contrary to its formal, legally binding commitments in the ITA deal.²⁷

TripAdvisor, the provider of online travel reviews, joined Expedia in complaining to the Commission on 3 April 2012, reportedly complaining of an issue which goes to the heart of many of the complaints: Google's preferential treatment of its own services. Nevertheless, TripAdvisor took its complaint further, raising concerns which had traditionally only been voiced by the publishing community (see Section 2.1 above) – Google's exploitation of third party content. TripAdvisor accused Google of copying its content by "scraping" its reviews and posting them on Google Places, regardless of the fact that the Google/TripAdvisor deal for the licensing of TripAdvisor's content had been cancelled.²⁸ In its defence, Google had argued, (as it has time and again in *Fieg*, the *German Publishers* and *AEDE*), that websites can prevent Google's crawlers from indexing their pages by turning off this functionality using the robots.txt file.²⁹ However, the solution ultimately amounts to a choice between "scrape or scrap", as this option would also exclude TripAdvisor from Google search rankings, a crucial source of visitor traffic.

The complaints filed by TripAdvisor, Expedia and Odigeo have added a new dimension to the Commission's investigation at a critical stage and provide evidence of the extent of Google's anticompetitive conduct and proof of its strategy; using its platform to bulldoze potential competitors out of the way before entering new markets.

²⁵ See page 25 -26 of *Google under the Antitrust Microscope* for a more in-depth analysis of the ITA transaction

²⁶ Per Brent Thompson, Vice President of Government Affairs, Expedia

²⁷ <http://www.businessweek.com/news/2012-03-30/expedia-files-european-union-antitrust-complaint-against-google>

²⁸ <http://www.guardian.co.uk/technology/2012/apr/03/tripadvisor-files-complaint-against-google>

²⁹ <http://www.mlex.com/EU/Content.aspx?ID=227761>

3. Will the Commission's Investigation Go Mobile?

In October 2011, ICOMP published the white paper addressing “*Google's Efforts to Monopolise Key Segments of the Mobile Ecosystem*” in which ICOMP described the key anticompetitive strategies employed by Google in the mobile sector, namely:

- Anticompetitive restrictions on Android: Google has lured mobile carriers and device manufacturers into using its Android operating system (“OS”) on misleading promises of openness and freedom, and then prevented them from using competing services.
- Exploitation of dominance in online advertising, leveraging into mobile search: Google automatically opted its AdWords customers into participating in mobile search advertising, artificially driving up the price for its mobile search ads.
- Denying competitors' access to interoperability information: Google has refused other mobile companies access to interoperability information required to enable users access to key online content, such as YouTube, artificially giving the impression of an inferior user experience.
- Exclusive agreements making Google the default search engine in mobile: Google has signed a number of exclusive agreements with handset manufacturers and mobile carriers, including a search distribution agreement with Apple, locking consumers into using Google Search.

Google's recent acquisition of *Motorola Mobility*,³⁰ given regulatory approval in February, is likely to exacerbate these problems; enabling Google to consolidate its market power and giving it access to a wealth of standard-essential patents to enforce further anticompetitive restrictions in mobile. It would appear that these issues have been expressly excluded from the Commission's invitation to Google to propose remedies, probably because its investigation has not yet been completed:³¹

- The Commission may not yet have reached a conclusion on how to define mobile; for example, in its *Motorola Mobility* decision, the Commission left open the exact market definition for mobile devices and found that it was not necessary to conclude in that case whether Operating Systems for smartphones and tablets belong to the same product market. The Commission is likely to be seeking to understand these markets better before deciding how the markets should be sliced and diced for competition law purposes.
- The Commission has a number of other investigations into competition in mobile markets (standard settings,³² patent trolls; mobile payments; alleged anticompetitive agreements, etc.).
- Complaints relating to Google's conduct in mobile search and search advertising were raised in the later stages of the Commission's investigation.
- The interface between EU antitrust enforcement, IP law and civil litigation renders the Commission's assessment of alleged abusive patent exploitation less straightforward. The Commission has in the past sanctioned abuses of the patent process and in the *Motorola Mobility* decision, the Commission indicated that the mere threat of litigation in relation to standard-essential patents

³⁰Case No COMP/M.6381 – *Google/ Motorola Mobility*, 13 February 2012

³¹“We continue the investigations on other issues, on other complaints we received recently, for instance all those complaints referring to Android”. <http://uk.reuters.com/article/2012/05/21/oukin-uk-eu-google-idUKBRE84K13V20120521>

³²Vodafone, Deutsche Telekom, France Télécom, Telefónica, Vodafone and Telecom Italia and the GSMA were confirmed in March 2012 to have received RFLs in this respect. See <http://www.mlex.com/EU/Content.aspx?ID=221283>

may be enough to significantly impede effective competition in this sector, for example, where a licence has not been offered on fair, reasonable and non-discriminatory (“FRAND”) terms.³³ This approach has been argued by some not to be in keeping with the jurisprudence of certain Member States, for example, Germany and a section of the IP community is of the view that using antitrust rules to deal with patent issues causes uncertainty.³⁴

That said, Almunia has already fired a clear warning that Google’s conduct in relation to patents will not be overlooked:

“The commission has cleared the Google, Motorola transaction largely on the basis that the transfer of Motorola’s patents to Google does not result in competition problems specifically related to the merger. But I can assure you that the commission will take further action if warranted to ensure that the use of standard-essential patents by all players in the sector is fully compliant with EU competition law and with the [fair licensing] commitments given to standard-setting organisations.”³⁵

Therefore, although Almunia’s ultimatum to propose remedies did not address Google’s behaviour on mobile markets, it is clear that the issue is unlikely to escape the attention of antitrust authorities.

4. Conclusion

This paper contains a description of the recent developments in the Commission’s investigation into Google, including an update on the continuing flow of complaints as regards Google’s persistent exploitative, exclusionary and discriminatory practices. It has become obvious that Google has increasingly used these practices to target potential competitors in sectors where it plans to begin offering its own services, often following an acquisition, clearing the path to success for its own offerings.

The Commission has offered Google a chance to come clean, in the hope of obtaining a rapid solution to its preliminary conclusions that Google harms competition in the online market place, to the detriment of businesses and consumers. If Google fails to offer suitable remedies that are comprehensive, effective and verifiable, the Commission must act fast to prevent further damage; a lot is at stake for European businesses, innovation and the European consumer.

³³ See paragraph 107, *ibid*. In fact, a recent judgement of the European General Court on 1 July 2010 effectively upheld the Commission’s fining of *Astra Zeneca* for abuse of the patent process. See Case T-321/05, summary available here.

³⁴ <http://www.mlex.com/EU/Content.aspx?ID=225878>

³⁵ <http://www.mlex.com/EU/Content.aspx?ID=214153>

