Chapter 2
The Power of Google: First Mover Advantage or Abuse of a Dominant Position?

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Contents

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2.1 Introduction

On November 30, 2010, the European Commission announced the opening of formal antitrust investigations into acts performed by Google Inc. Google allegedly violates Article 102 TFEU[1] (prohibition on the abuse of a dominant position) by engaging in anti-competitive conduct.

The start of formal investigations by the European Commission underlines the image change that the ubiquitous search engine has undergone since its introduction. When Google was first introduced years ago, it was welcomed as a pioneer. As a general search engine displaying an almost blank starting page without advertisements and using an innovative indexing system to deliver highly accurate search results, it has brought many benefits to consumers.[2] By 2011, with an estimated market share of over 90% in the online search market in various European countries,[3] it is under the scrutiny of several European competition authorities as well as being criticized for—among other things—lack of transparency regarding its use of sensitive data.[4] Although the opening of antitrust investigations as such does not mean that Google will be held to have violated Article 102 TFEU, the investigation by the European Commission confirms Google's new reputation as one of the 'bad guys': companies with overwhelming market power that may exploit consumers and competitors and whose conduct should therefore be closely monitored.

Is Google therefore a victim of its own success? It would definitively not be the first company[5] to come within reach of European Competition law as a result of its rapid expansion. But as a first time Article 102 TFEU investigation into a search engine, the examination of Google's practices will involve complex issues related to the specific characteristics of search engines and the market(s) they operate on. In this respect, Google's position as a so-called first mover on this market will need to be addressed by the European Commission, and will have to be taken into account when assessing Google's market power. This market power largely follows from the fact that, as a search engine, Google was a first of a kind, due to its innovative indexing technology 'Page Rank'. Condemning Google for abuse of a dominant position therefore boils down to punishing a pioneer company for

[1] Treaty on the Functioning of the European Union.

[2] See, *inter alia*, Rosenberg 1998.

[3] Search engine market shares around the world, Q4 2010, available at http://blog.greenlightsearch.com/greenlights_search_blog/2010/01/how-search-engine-market-shares-look-around-the-world-featuring-bing-yahoo-and-baidu-and-others.html (last accessed February 18, 2011).

[4] See, *inter alia*, *2007 Consultation Report of Privacy International*, available at http://www.privacyinternational.org/issues/internet/interimrankings.pdf (last accessed January 8, 2011), in which Google is ranked 'hostile to privacy'.

[5] For example French Wanadoo Interactive, which was the subject of antitrust proceedings due to its rapidly increasing market share in the market for high speed internet in France, *infra*.

finding a gap in the market, one may argue. Whether this is true or false, should the investigations lead to actual proceedings, it will be highly interesting to see whether the Commission will address Google's first mover status and the special characteristics of search engine markets, or if it will stick to its traditional assessment criteria for Article 102 TFEU cases.

This chapter will discuss whether the 'power of Google' amounts to a dominant position within the meaning of European competition law, and if so, whether Google may have abused such dominant position. In this respect, this chapter will examine what an Article 102 TFEU assessment of Google would entail, and will speculate on the outcome of possible 102 proceedings initiated against Google by the European Commission. To this end, it will first set out the legal framework of Article 102 TFEU and explain this framework in short (2.2). Second, it will discuss the complaints that were filed against Google and that gave rise to the investigations by the European Commission, as well as several other (pending) antitrust investigations into Google's market power (2.3). Under (2.4) it will be examined which relevant market(s) should be defined and whether Google would hold a dominant position in such market. Finally, it will be assessed whether Google's conduct should be considered abusive (2.5).

2.2 Article 102 TFEU

Article 102 TFEU (formerly Article 82 of the EC Treaty) contains a prohibition on the abuse of a dominant position. Together with the cartel prohibition (Article 101 TFEU) and the rules on State Aid (Article 107 TFEU) it embodies the core of the EU competition rules. The European Commission in its function as the European Competition Authority enforces Article 102 TFEU. Decisions by the European Commission may be appealed to the General Court and the Court of Justice. The European Commission may impose structural measures upon a company that has violated Article 102 TFEU in order to restore competition, as well as a fine.

2.2.1 Dominance

The prohibition on abuse only applies to the conduct of undertakings with a dominant position. Hence, the assessment of dominance is an essential requirement for its application. In order to determine whether an undertaking is dominant within the meaning of Article 102 TFEU, first a relevant market has to be defined, because dominance as such does not exist. The concept only has meaning in relation to an actual market. Google, for example, does not have a dominant position on the banana market, but it may very well be dominant on the market for search engines.

2.2.1.1 Relevant Market

Article 102 TFEU itself does not contain any rules on market definition. However, in 1997 the European Commission issued a notice on this subject, setting out the factors and circumstances it considers decisive.[6] These guidelines are still the main reference model for market definition, both for the European Commission itself and for national competition authorities.[7] The most important factor in market definition is demand substitution: which products (or services) does the consumer consider substitutable? Together, these products constitute the relevant product market, which is the starting point for the assessment of dominance.

The relevant market also has a geographic dimension. The relevant geographic market comprises the area in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas.[8] This area is assessed by measuring demand substitutability as well.

A dominant position within the meaning of Article 102 TFEU has been defined by the European Court of Justice as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.[9] Such position of economic strength may appear from various factors such as high market shares, barriers to entry and economies of scale. According to its 2009 Guidance document[10] in relation to the assessment of exclusionary practices, the European Commission will in particular take into account the following:

- constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors),
- constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry),

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[6] *Commission notice on the definition of the relevant market for the purposes of Community competition law*, Official Journal C 372, 9.12.1997, pp 5–13.

[7] *DG Competition Discussion Paper on the application of article 82 of the Treaty to exclusionary abuses,* available at http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf, para 12.

[8] *Commission notice on the definition of the relevant market for the purposes of Community competition law*, para 8.

[9] See Case 27/76, "*United Brands Company and United Brands Continentaal v Commission*" [1978] ECR 207, para 65; Case 85/76, "*Hoffmann-La Roche & Co. v Commission*" [1979] ECR 461, para 38.

[10] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Official Journal C 45/02, 24.02.2009, pp. 7–20.

- constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).[11]

Although the European Commission's focus on market share has diminished in the last decade,[12] it still seems the main focal point for the assessment of dominance.[13] The existence of barriers to entry however has become more and more important as a factor in establishing dominance. If it is highly difficult for other undertakings to enter the relevant market, the allegedly dominant undertaking enjoys a safe position in which it may increase prices or otherwise act at its own will, without being held back by any competitive constraints. However, the European Commission adheres to a rather broadly defined concept of barriers to entry. In the aforementioned Guidance document, it clarifies that barriers to entry may also 'take the form (…) of important technologies or an established distribution and sales network. They may also include costs and other impediments, for instance resulting from network effects, faced by customers in switching to a new supplier.'[14]

This definition of barriers to entry may be criticized for including factors that can be a direct result of the undertaking's own investments and efforts. If an undertaking has invested much in the development of a new technology, or has made considerable expenses in order to enter the market itself, why should competitors not be required to do the same? Network effects, moreover, occur in many information technology-related markets (including—to some extent—in the market for search engines, as will be discussed later on) and may benefit consumers. By qualifying these factors as barriers to entry, the European Commission arguably lowers the threshold for dominance.

Barriers to entry play an important role in the assessment of Google's position on the relevant market(s), as will be discussed later on in this chapter.

2.2.1.2 Dominance in New Economy Markets

'New economy markets' is a phrase generally used to indicate markets within the knowledge economy, where fast succession of technological changes and product innovation play a key role. Characteristics of such markets are: products that have a short life circle and are technically complex, the occurrence of standardization

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[11] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, para 12.

[12] Mrs. Kroes, at that time EU Commissioner for Competition, stated in 2005: '(…) high market shares are not–on their own–sufficient to conclude that a dominant position exists. (…) A pure market share focus risks failing to take proper account of the degree to which competitors can constrain the behavior of the allegedly dominant company'. Speech delivered on September 23, 2005 in New York at the Fordham Corporate Law Institute.

[13] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* par 13 and the case law mentioned therein.

[14] Idem, para 17.

and a large need for product compatibility and interoperability.[15] It is argued by both lawyers and economists that market definition and the assessment of market power in such markets should be dealt with differently.[16]

In many new economy markets competition no longer revolves around price, but around innovation. Rather than taking place on the market, the competition is for the market. This is called *dynamic* competition (as opposed to *static* competition: competition on price). Consequently, in this type of competition the winner takes all: the most successful competitor shall dominate the whole market. This process is often called 'tipping'. This dominant position is nevertheless fragile, because if another competitor innovates successfully it may in turn take over the whole market.

Focus on product substitutability and market share will often fail to acknowledge these dynamics of new economy markets. High market shares do not properly reflect the competitive constraints that the 'winner' of the market in question is under. Also, products in the new economy are often technologically complex and hence their characteristics differ to a high extent, as a result of which consumers will perceive certain products as non substitutable, even though they may be substitutable on the basis of their prices.[17] As a consequence, an assessment of product substitutability will make the market seem narrower than it actually is.

When traditional methods for market definition are applied to markets in the new economy, this may therefore lead to the conclusion that an undertaking is dominant, whereas in reality the undertaking involved may be under severe competitive constraints. The European Commission however adheres to demand substitution and market share when it comes to market definition and establishing dominance. Several authors have criticized this focus on 'traditional' methods and price competition.[18]

As the market(s) that Google operates on should be qualified as new economy markets, the European Commission will need to take this into account when assessing Google's market position.

2.2.2 Abuse

Having a dominant position as such is not prohibited by Article 102 TFEU. However, the dominant undertaking has a 'special responsibility' toward the competitive process.[19] This means that a dominant undertaking is not allowed to abuse its position by adopting conduct that may be considered abusive.

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[15] Rahnasto 2003, para 1.08–1.13; Temple Lang 1996.

[16] Ahlborn et al. 2001; Teece & Coleman 1998.

[17] Ahlborn et al. 2006, para 5.1.

[18] Ahlborn, et al. 2006; Veljanovski 2001; Bishop and Lexecon 2001.

[19] Case 322/81, "*Nederlandsche Banden Industrie Michelin (Michelin I) v Commission*" [1983] ECR 3461, para 57.

Article 102 TFEU lists several practices that are considered abusive:

(a) imposing unfair purchase or selling prices, or unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This list is nonexhaustive; practices not listed may also be considered abusive.

Generally speaking, abusive conduct can be divided into two categories: exploitative conduct (such as imposing unfair prices or trading conditions) and exclusionary conduct (such as contractual tying or refusal to deal), which is aimed at excluding competitors from the market. Over the last years, the European Commission has focused its enforcement on the last category. According to the European Commission, exclusionary conduct may completely or partially deny profitable expansion in or access to a market to actual or potential competitors and often serves as a basis for subsequent exploitation of consumers.[20]

The conduct that Google has been accused of most likely falls into the category of exclusionary abuse. The paragraph below will discuss the complaints recently issued to the European Commission, and give an overview of both pending and completed antitrust investigations into Google's market power in various jurisdictions.

2.3 Antitrust Investigations into Google's Market Power

2.3.1 United States

In the US, Google has been the subject of several antitrust investigations in relation to alleged abuse of market power. Much publicity has been given to the examination of the Department of Justice with respect to the recently rejected Google Books settlement.[21] Although the Google Books settlement would have had implications for the European market as well, its effects on competition would have differed from the effects in the US due to the fact that the settlement allowed for the availability of

[20] Speech at Fordham Corporate Law Institute by Mrs. Kroes, *supra*; *DG Competition Discussion Paper on the application of article 82 of the Treaty to exclusionary abuses*, para 1.

[21] *Statement of Interest by the U.S. Dept. of Justice Regarding the Proposed Settlement, Authors Guild, Inc. v. Google, Inc.*, Case No. 05 CV 8136 (DC) (S.D.N.Y. Feb. 4, 2010), available at http://thepublicindex.org/docs/amended_settlement/usa.pdf (last accessed January 21, 2011). Other matters involve "*Kinderstart.com LLC v. Google"* (No. 5:06-cv-02057-JF (N.D. Cal. July 13, 2006)), and the merger between Google and Doubleclick (which was approved by both the FTC and the European Commission; see *infra* for the decision of the latter).

full book content in the US, UK, Canada and Australia only.[22] This in itself did not mean that the settlement was outside the grasp of the European Commission, since European competition law covers all conduct that is capable of affecting trade between Member States,[23] however the implications of the settlement for the competitive process would probably have been less far-reaching than in the US. As the settlement has recently been rejected[24] and the Google Book Settlement as such is dealt with in a different chapter of this book, this chapter shall not include an assessment of the Google Books settlement under European competition law.

Recently, it became known that the Federal Trade Commission ('FTC') has launched an investigation into Google's practices as well.[25] The FTC has not (yet) given any insight into the focus of its investigations, however, reportedly it is looking into similar behavior as the practices that are under the scrutiny of the European Commission.[26] These will be discussed below.

2.3.2 *Article 102 TFEU Complaints with the European Commission*

The complaints that have been filed against Google with the European Commission were initiated by three companies: Foundem,[27] a UK price comparison website, Ciao,[28] a German price comparison website (and Microsoft subsidiary) and eJustice,[29] a French search engine directed at legal search requests. All three complainants offer so-called vertical search services: search engines aimed at dealing with search requests for specific content rather than dealing with general search requests. Vertical search engines can be highly interesting for advertisers because of the opportunities for targeting a specific group of customers. For example, a travel agency would prefer to advertise on Expedia (a vertical search engine for travel related services) rather than advertise on a search engine such as Google, where it is less sure that its advertisement will reach consumers looking for travel services.

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[22] *Amended Settlement Agreement*, http://www.googlebooksettlement.com/r/view_settlement_agreement (last accessed January 21, 2011), para 1.19.

[23] Article 101 TFEU and article 102 TFEU both require that the agreement or conduct *may* affect inter-State Trade. See also *European Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, Official Journal C 101/07, 27.4.2004, pp 81–96.

[24] *Opinion of Federal Judge Chin of March 22, 2011*, http://thepublicindex.org/docs/amended_settlement/opinion.pdf (last accessed August 31, 2011).

[25] Google Confirms F.T.C. Antitrust Inquiry, New York Times June 24, 2011, http://bits.blogs.nytimes.com/2011/06/24/google-confirms-f-t-c-antitrust-inquiry/ (last accessed August 31, 2011).

[26] Google confirms US antitrust probe, http://www.theregister.co.uk/2011/06/26/google_acknowledges_ftc_review/ (last accessed August 31, 2011).

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

[28] http://www.ciao.de/

[29] http://www.ejustice.fr/

The complainants have complained to the European Commission that Google downgrades their web pages in its search results, thereby placing its own competing services at a more preferential position. As advertisers will most likely prefer to advertise on search engines with a higher ranking in search results, a consequence of downgrading competitors' web pages will be that they are less attractive to advertisers. As a result, this practice eventually leads to the exclusion of competitors offering vertical search services—thus claim the three complainants.

The complaints about downgrading relate to *unpaid* Google search results: search results that are also referred to as 'natural' or 'organic'. Unpaid search results may be distinguished from *paid* results or 'sponsored links': search results generated as a direct result of advertisers' payments. Apart from their complaint about downgrading web pages in unpaid search results, the above-mentioned companies have also accused Google of influencing paid search results: they claim that Google lowers the 'quality score' of their services. The quality score plays an important role in determining the price to be paid for advertising under Google's advertising service Adwords. It rates an advertiser's advertisement, webpage and/or keyword[30] in terms of relevance, and influences the 'CPC' or 'cost-per-click': the price that an advertiser has to pay when a user clicks on its advertisement. The higher the quality score, the lower the CPC and vice versa.

Apart from these complaints relating to paid and unpaid search results, the European Commission made clear in its announcement of November 30, 2010 that it will also look into allegations that Google imposes exclusivity obligations on advertising partners. Such obligations would involve a prohibition for advertising partners to place advertisements by competitors of Google on their websites. Further, it will investigate alleged restrictions on the portability of online advertising campaign data to competing online advertising platforms.[31] From the documentation made available by the European Commission it is unclear whether these allegations also stem from the aforementioned three companies.

In December 2010 it was reported that the European Commission has added complaints with the German competition authority ('*Bundeskartellamt*') by a mapping company, Euro-Cities,[32] and two German associations for newspaper publishers and magazine publishers (B.D.Z.V.[33] and V.D.Z[34]) to its investigations.[35]

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[30] The reference word or phrase that triggers the display of an advertisement in Google. Advertisers register keywords of their choice with Google AdWords.

[31] Press statement IP/10/1624 by the European Commission, 30 November 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624&format=HTML&aged=0&language=EN&guiLanguage=en (last accessed January 16, 2011).

[32] http://www.euro-cities-ag.de/

[33] http://www.bdzv.de/home-engl.html

[34] http://www.vdz.de/

[35] See Google antitrust inquiry in Europe becomes broader, New York Times December 17, 2010, http://www.nytimes.com/2010/12/18/technology/18google.html (last accessed January 16, 2011); German news media challenge Google, Der Spiegel January 18, 2010, http://www.spiegel.de/international/business/0,1518,672580,00.html (last accessed February 18, 2011).

Eurocities claims that Google has integrated Google Maps on other websites for free, thereby depriving Eurocities of its chances to make money by selling its own maps. The complaints by the publishers' associations relate to downgrading search results, just as with Foundem, Ciao and eJustice. In this respect, the publishers' associations have asked for divulgation of the Google search algorithm. A further complaint of the publishers' associations concerns Google's practices in relation to the display of content. According to the publishers, Google earns a lot of money by displaying advertisements in close proximity to hyperlinks leading to newspaper and magazine articles. In this way, they argue, Google benefits from the efforts made by the publishers without paying them any remuneration.

The European Commission will thus investigate the following practices that Google is allegedly involved in:

- downgrading competitors' web pages in its unpaid ('organic') search results;
- manipulating paid search results by influencing the quality score of competitors' services;
- imposing anti-competitive contractual restrictions on its advertising partners by prohibiting them to show advertisements of Google's competitors as well as by restricting the portability of their advertising campaigns to competing platforms;
- offering its own products for free, thereby putting its competitors out of business;
- using third party content to make money through advertisements, without paying any remuneration.

In spring 2011 it further became known that Google's competitor Microsoft has also submitted complaints with respect to Google's behavior to the European Commission. According to Microsoft, these complaints relate to alleged restrictions with respect to the access to and interoperability with You Tube, Google's alleged attempts to monopolize search results from "orphan books" and possibly anti-competitive contractual restrictions for advertisers and website owners.[36] At the time of writing of this chapter, the European Commission has not confirmed whether it has added these complaints to its investigation. If so, the investigation will become much broader and should be even more interesting than it already is. Especially the complaint in relation to lack of interoperability, which noticeably seems quite similar to the practice Microsoft itself was condemned for by the General Court in 2007, could be a challenge for the European Commission, as this complaint could involve forced access to Google's intellectual property.

Before examining whether Google indeed would be held dominant and if so, whether the above-mentioned practices would be considered abusive under EU law, we will first discuss the recent investigations into Google's market power by the French and Italian competition authorities.

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[36] Adding our Voice to Concerns about Search in Europe, http://blogs.technet.com/b/microsoft_on_the_issues/archive/2011/03/30/adding-our-voice-to-concerns-about-search-in-europe.aspx (last accessed August 31, 2011).

2.3.3 Investigations by European National Competition Authorities

2.3.3.1 Autorité de la Concurrence *(French Competition Authority)*

In December 2010, the *Autorité de la Concurrence* concluded an investigation into the French online advertising sector. The investigation was triggered by a request of the Minister for Economy, Finance and Employment (*ministre de l'Economie, des Finances et de l'Emploi*) in accordance with Article L.462-1 of the French Code of Commercial Law (*Code de Commerce*).[37] This article provides for a consultation of the *Autorité* by parliamentary institutions. These are no 'real' antitrust proceedings as the *Autorité* does not issue an official decision directed at a specific company, but merely delivers an opinion.

The *Autorité* reached the conclusion that Google has a dominant position on the advertising market linked to search engines. According to the *Autorité*, search-related advertising represents a specific market that is not substitutable with other forms of communication.[38] In this respect, the *Autorité* considered it of crucial importance that the online advertising market allows advertisers to fine-tune the targeting of certain groups of consumers. Thus, advertisers are able to present consumers with an offer tailored to their needs, based on the consumer's search activity.[39] Google, which was heard by the *Autorité* as part of a large-scale consultation with entities in the online advertising sector, had argued that there is no separate market for online advertising, but rather a market for advertising in general, be it online or offline. Its main argument to support this view was that both online and offline advertising allow for cross-selling: many advertisers target several platforms (internet, mobile platforms, regular press) as part of the same campaign. However, the *Autorité* decided that this could also mean that online and offline advertising should in fact be regarded as *complementary*, and hence are to be dealt with as separate markets.[40]

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[37] Article L462-1 reads: 'The Council on Competition may be consulted by the parliamentary committees with regard to bills and any issues relating to competition. It shall give its opinion on any competition issue at the request of the government. It may also give its opinion on the same issues at the request of the territorial authorities, professional associations and trade unions, approved consumer organisations, chambers of agriculture, chambers of trade or chambers of trade and industry, with regard to the interests for which these are responsible.'

[38] Press release of the *Autorité de la Concurrence* of 14 December 2010, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=368&id_article=1514 (last accessed January 22, 2011).

[39] Press release of the *Autorité de la Concurrence* of 14 December 2010; *Opinion of the Autorité de la Concurrence on competition in the online search market*, available in English at http://www.autoritedelaconcurrence.fr/doc/10a29_en.pdf (last accessed August 31, 2011).

[40] *Opinion of the Autorité de la Concurrence on competition in the online search market*, pp 24–27.

With respect to the position of Google on the online advertising market related to search engines, the *Autorité* concluded that it holds a position of dominance. The *Autorité* based its conclusion on several observations:

- Google's high market share on the aforementioned market in France (over 90%) and the fact that it has held such market share for several years now;
- Google's high profits in comparison with its competitors' profits;
- the fact that Google can allow itself to largely ignore the dissatisfaction of its customers (the advertisers that it has a contractual relationship with);
- the existence of barriers to entry.[41]

The *Autorité* clarifies that Google's dominant position as such is not prohibited, as it stems from 'a great deal of innovation, supported by significant and continuous investments'.[42] However, it also identifies behavior by Google that may be deemed abusive, as both exclusionary and exploitative prohibited conduct. Several practices are highlighted in this respect:

- the artificial raising of barriers to entry through exclusionary (AdSense) contracts and by putting up technical obstacles (particularly making it harder for other search engines to index YouTube, Google's video service) (exclusionary);
- using leverage power: by manipulating competitors' quality scores, by favoring 'Google Maps' over competitors' mapping services when displaying geographic search results and by participating in AdWords biddings with its own services (exclusionary);
- lack of transparency and possible discrimination in relation to the AdWords mechanism[43] (exploitative);
- lack of transparency with regard to the calculation of revenues with regard to its AdSense services (exploitative).[44]

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[41] *Opinion of the Autorité de la Concurrence on competition in the online search market*, p 48.

[42] Press release of the *Autorité de la Concurrence* of 14 December 2010. It has to be added that even if the Autorité would not have perceived Google's position the result of significant innovation, Google's position as such could not have been prohibited. French competition law (just as European competition law) does not prohibit a dominant position *per se*, only the abuse of such position.

[43] In June 2010, the *Autorité de la Concurrence* had already imposed interim measures on Google Inc. and Google Ireland as a result of such lack of transparency (*European Competition Network brief 05-2010*, available at http://ec.europa.eu/competition/ecn/brief/05_2010/fr_google.pdf (last accessed January 23, 2011). This decision was prompted by a complaint by Navx, a company selling databases for GPS navigation, indicating the localization of mobile and fixed speed traps. Navx's AdWords account had suddenly been suspended by Google because Google decided to change its policy for advertisers selling devices aimed at evading speed cameras. Google was instructed to restore Navx's account and improve transparency on its policy.

[44] *Opinion of the Autorité de la Concurrence on competition in the online search market*, pp 53–62.

As indicated above, the opinion of the *Autorité de la Concurrence* is not an official decision and the practices identified should be investigated in the context of a specific complaint. However, the *Autorité's* investigation was quite extensive, and despite the fact that it relates to French competition law, it will most probably be read with close attention by the European Commission in the course of its own investigations.

2.3.3.2 Autorità Garante della Concorrenza e del Mercato *(Italian Competition Authority)*

Finally, a short note on pending antitrust investigations into Google's market power by the Italian competition authority. The Italian competition authority (*Autorità Garante della Concorrenza e del Mercato* or 'AGCM') had opened an investigation in August 2009, looking into alleged tying between Google search and Google News. The Italian association of Newspaper and Periodical publishers had complained that publishers lacked control over their publications being used in Google News. Publishers were nevertheless forced not to extract their publications therefrom, as these would then also be excluded from Google search itself. To address the AGCM's concerns, Google proposed to introduce a new dedicated search functionality for Google News, so that publishers can exclude their content from Google News without the risk of excluding them from Google search.[45]

The AGCM also had another concern: the contract conditions imposed by Google in the framework of the AdSense program. It added these to its investigation, thus widening its scope. In this respect, Google proposed to increase transparency in the revenue sharing formula relating to AdSense and modifications thereto.[46]

In January 2011, it became known that the AGCM has accepted Google's commitments and has abandoned the case.[47]

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[45] *European Competition Network brief 03-2010*, available at http://ec.europa.eu/competition/ecn/brief/03_2010/it_google.pdf (last accessed January 23, 2011).

[46] Idem.

[47] Press release of the AGCM of January 17, 2011, available at http://www.agcm.it/stampa/news/5194-a420-as787-antitrust-accetta-impegni-di-google-e-chiede-al-parlamento-di-adeguare-le-norme-sul-diritto-dautore.html (last accessed January 23, 2011). See also, the related news item at http://www.bloomberg.com/news/2011-01-17/italy-antitrust-accepts-google-commitments-for-web-publishers.html (last accessed January 23, 2011). The AGCM stated that it also submitted a report to the Italian government, recommending that Italian copyright laws be reformed in order to deal with the complex issues of the online dissemination of copyrighted works.

2.4 Google's Power

2.4.1 Initial Observations

Above, I have set out the contours of Article 102 TFEU and have given a brief overview of antitrust investigations into Google's market power. Now, I shall discuss whether Google's power would indeed amount to a dominant position within the meaning of Article 102 TFEU. As mentioned, this involves an assessment of the relevant product- and geographical markets.

With respect to the assessment of Google's dominance in relation to Article 102 TFEU, several observations may be made:

- The companies that have submitted complaints against Google with the European Commission do not compete with Google on the market for search engines itself, but on related markets;
- With respect to the Google/DoubleClick merger, in 2008 the European Commission has already defined several relevant markets in relation to Google[48];
- The market(s) Google operates on must be characterized as new economy market(s), where Google can be considered a 'first mover'.

These observations should be taken into account when assessing Google's dominance.

2.4.2 Google and the Relevant Market

What relevant market(s) should be distinguished in relation to the complaints that are now before the European Commission with regard to Google's alleged dominance? Below, we will examine several options for the definition of both the relevant product and the relevant geographical market.

2.4.2.1 Commission Decision in the Google/DoubleClick Merger

As indicated above, the European Commission has identified relevant product and geographical markets in relation to the Google/DoubleClick merger. Although in principle the relevant market has to be defined in each particular case separately and market definition with respect to merger control may differ from market

[48] *Commission Decision of 11.03.2008, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, case No COMP/M.4731–Google/DoubleClick*, available at http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf (last accessed January 29, 2011).

definition in relation to possible abuse of dominance,[49] the Commission's market definition in relation to this merger could give some useful indications.

In its Google/DoubleClick merger decision, the European Commission identified several relevant markets. Just as with the investigation by the French competition Authority, Google/DoubleClick had argued that there is one market for both online and offline advertising. The Commission did not agree with this: offline and online advertising were perceived as separate markets by most of the Commission's respondents, and—it was argued—online advertising is much more capable of reaching a targeted audience. Also, the Commission stated, the measurement of the effectiveness of online advertising can be much more precise.[50] Thus, there is a separate market for online advertising. According to the Commission, it could be that the market for online advertising has to be further distinguished into separate markets for search- and non-search-related advertising,[51] but it did not reach a conclusion on this point.[52]

Further, the Commission identified a separate market for intermediation in advertising services, as it considers that the direct sale of advertising space ('inventory') is often not an option for smaller content publishers.[53] Third, it identified a separate market for the provision of ad serving technology (DoubleClick's core business),[54] which—according to the Commission—may be further subdivided into markets for ad serving technology for text advertisements and for display advertisements.[55] Within these subdivided markets, the Commission suggested that there might even be a further subdivision into the provision of the services to advertisers and to publishers.[56]

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[49] For example, the SSNIP ('Small but Significant Increase in Price') test for product substitutability may provide better results within the context of merger control. The reason for this is that with mergers, generally the situation in which a dominant undertaking has elevated prices to such extent that every product will—unjustifiably—be considered a substitute (the so-called *Cellophane Fallacy*) will not occur as often as it does in relation to dominance.

[50] *Commission Decision of 11.03.2008, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, case No COMP/M.4731–Google/DoubleClick*, para 45.

[51] 'Search related' advertising concerns advertisements that appear next to the results of search queries by internet users, such as the 'sponsored links' appearing after entering a search request in Google. 'Non-search related' advertising concerns advertisements that can appear on any webpage and are not triggered by search requests (such as banners).

[52] *Commission Decision of 11.03.2008, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, case No COMP/M.4731–Google/DoubleClick*, para 48–56.

[53] Idem, para 57–73.

[54] Ad Serving technology is technology used to ensure correct placing of the advertisements, monitor their financial performance and manage the content publisher's inventory.

[55] *Commission Decision of 11.03.2008, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, case No COMP/M.4731–Google/DoubleClick*, para 74-81.

[56] Idem, para 79–81.

With regard to the geographical market, the Commission ruled that this market consisted of—at least—the European Economic Area, except with regard to the market for online advertising. This market was deemed to be divided alongside national or linguistic borders.[57]

Does this market definition by the European Commission provide any leads for the definition of relevant market(s) with respect to the current complaints?

2.4.2.2 Product Market Definition

The Commission decision regarding Google/DoubleClick concerned the merger of two undertakings active in the field of online advertising—Google itself as a platform providing online advertising space and DoubleClick as a seller of ad serving services. Therefore, it is not a surprise that the relevant markets defined by the Commission all concern markets encompassing or related to online advertising.

However, not all of the companies complaining to the European Commission about Google's alleged dominance are also in this field. While eJustice, Ciao and Foundem all offer vertical search services and may therefore be considered to compete with Google on the market for providing online advertising space, the German publishers' association and Eurocities are content providers. As the investigation into Google would concern a market definition with regard to possible dominance, in principle the activities of the complainants are not decisive, however when choosing a starting point for market definition they are not entirely irrelevant either. For example, if the Commission would have to decide on the alleged dominance of a company producing and selling bananas, it would probably be quite pointless to test whether shoes constitute a substitute product. The question is therefore where to start when defining the relevant market in relation to the current complaints.

In this respect, it has to be taken into account that Google is much more than only a platform for online advertising space. Apart from its primary activity as a search engine, it also offers software (-applications) such as Gmail, Google Talk, Google Chrome and Google Maps, it exploits content (YouTube) and it offers services such as AdSense and Google Product search. One could therefore imagine that the Commission would define several markets.

It is likely that there are two 'main' markets that can be identified in relation to Google: the market for providing internet search results and the market for online advertising. These markets will be interrelated, as companies that offer search engines generally use a business model in which the search result services are financed by selling advertisements. As mentioned above, with respect to Google/DoubleClick merger the Commission suggested that this market could be (sub)-divided into a market for search-related advertising and for non-search-related advertising, because from a content publisher's perspective search-related

[57] Idem, para 82–91.

advertising and non-search-related advertising are not substitutable. The reason for this, it argued, is that search-related advertisements are generally shown on a different website and thus—so may be concluded—do not generate any income for the content publisher.[58] This assumption, however, is based on a rather narrow interpretation of the concept of search-related advertising, whereby (apart from search engines themselves) only embedded search engine boxes are connected with search-related advertising. However, in practice many content publishers offer search services that provide results for search queries within their own website.[59] Therefore, search-related advertising may be profitable for content publishers as well. The distinction between a market for search and non-search-related advertising should therefore in my opinion be abandoned.

With respect to the market for search results however, it could be argued that a separate market for the provision of vertical search services is to be distinguished. Although the search results that are generated through a vertical search service may also be found through a general search engine, it is likely that there is a specific consumer demand for vertical search engines. For example, Dutch internet users looking for houses for sale would rather use the vertical search engine 'Funda', than a general search engine, since such a search engine may not allow the user to fine-tune its search with regard to the price, location, etcetera. As the General Court has held with respect to *Microsoft*, the existence of a separate consumer demand may be decisive in respect to the existence of a separate market.[60] It could thus be argued that there is a separate market for vertical search engines.

In sum, with regard to the current antitrust investigation into Google, the following relevant product markets may be defined: the market for online advertising services, the market for internet search results and the market for vertical search results.

2.4.2.3 Geographical Market Definition

The definition of the geographical market will not be as straightforward as it may seem. Despite the world-wide accessibility of the internet, users' preferences are often nationally (or at least linguistically) oriented. Nevertheless, with respect to the market for search results I would argue that it is a world-wide market, as the conditions for competition are similar in each country (with the exception, perhaps, of countries where internet access and companies' online activities are restricted). However, the markets for vertical search engines and online advertising

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[58] *Commission Decision of 11.03.2008, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, case No COMP/M.4731–Google/DoubleClick*, para 54.

[59] See, e.g., the Times' website (http://www.thetimes.co.uk/tto/news/).

[60] Case T-201/04, "*Microsoft v EC Commission*" [2007] ECR II-3601, para 917.

services identified above seem to be much more nationally oriented, as the conditions for competition (such as advertising prices) are likely to vary much more with respect to these markets. For these markets, I would think that the European Commission's decision in the Google/Double Click merger could be followed and that these markets should be defined along linguistic/national borders.[61]

2.4.3 Google and Dominance

Would the European Commission assess that Google is dominant in relation to the above-mentioned markets?

2.4.3.1 Competitive Restraints

As discussed earlier, when assessing Google's position, the European Commission will have to take into account the fact that market share may not be a useful indication for dominance with respect to the markets Google operates on. These markets qualify as new economy markets, where competition is all about innovation, and dominant positions may be highly transitory. Also, even though Google holds a large market share on the market for search results, this may be different in respect to the markets for online advertising services and vertical search engines.

A better way to measure Google's position on the identified markets, would be to analyze the competitive restraints Google is under. Does potential entry of Google's competitors to the market pose a serious threat to Google's position? The answer to this question is not a definitive 'no', and could even be a 'yes'. A few examples: Bing, Microsoft's search engine, has rapidly reached a market share of 12% in the US since its introduction in 2009.[62] Microsoft and Yahoo have started a 'search alliance', thereby cooperating in order to attack Google's position on the search engine and online advertising markets.[63] Companies that have market power in different but related markets, such as the market for internet browsers,

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[61] *Commission Decision of 11.03.2008, declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, case No COMP/M.4731–Google/DoubleClick*, para 82–91.

[62] ComScore reports of November 2010, available at http://www.comscore.com/Press_Events/Press_Releases/2010/12/comScore_Releases_November_2010_U.S._Search_Engine_Rankings www.comscore (last accessed February 12, 2011). According to these numbers, Bing's market share in the US would even be almost 30%, if one would also count the market share of Yahoo's search engine (which uses Bing's algorithms as a result of the above-mentioned 'search alliance' between Microsoft and Yahoo). In Europe however, Bing's (and Yahoo's) market share is allegedly still small.

[63] http://www.searchalliance.com/home (last accessed February 18, 2011).

may use their position in those markets to enter the search engine market. The obvious example here is Microsoft's Bing, but one can imagine what could happen if Apple was to introduce a new general search engine.

Given these developments, it is not so self-evident that Google is under no competitive threat at all. As Google itself smartly remarked in its press statement after the European Commission announced that it would commence antitrust investigations: '(…) competition is only one click away'.[64] This may however not be too far from the truth.

Moreover: network effects, that characterize many new economy markets, play a less important role in the markets that Google is active on. For an internet user, the value of a search engine does not increase when more people start using it, as opposed to—for example—an operating system or word processor. On the other hand, network effects do occur with respect to Google's paying customers: the advertisers. However, these network effects are slightly different from 'ordinary' network effects: to the advertisers the value of the search engine does not increase when more advertisers start using it, but when more internet users start using it. In this respect, the search engine and related online advertising market resemble markets that need to have an 'installed base' before being able to function properly, such as markets for video games, where companies first have to attract a sufficient amount of console users before their can persuade game developers to build games for a certain platform. These markets are often identified as 'two sided industries'.[65] This characterization applies—to some extent—to the relationship between the market for online advertising services and the market for search results: before being able to attract sufficient advertisers, a search engine company has to have an installed base of customers using the search engine. However, it is important to note that—as opposed to, for example, the market for video games—this interdependence is not protected by a proprietary technology: both users and advertisers may switch to a different search engine without being restrained by proprietary lock-in effects. The fact that they have not done so (yet), could be the result of Google's first mover advantage rather than an indication of the existence of barriers to entry. In this respect, I disagree with the opinion of the Autorité de la Concurrence, where it states that high fixed costs for developing and testing new algorithms constitute a barrier to entry.[66]

It is argued that the specific characteristics of the market(s) that Google operates on should be taken into account when assessing its position, and here the absence of proprietary lock-in effects in these markets could indicate that barriers to entry may not be that high. This would mean that Google is under competitive constraint, even though it may have a high market share on the markets identified.

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[64] Our thoughts on the Commission review, available at http://googlepublicpolicy.blogspot.com/2010/11/our-thoughts-on-european-commission.html (last accessed February 12, 2011).

[65] Jones and Sufrin 2011, p 79.

[66] *Opinion of the Autorité de la Concurrence on competition in the online search market*, *supra,* p 46.

The European Commission should arguably take this into account in its investigation.

2.4.3.2 Assessment by the European Commission

In the past, the European Commission has shown that it is not always susceptible to arguments relating to the special characteristics of new economy markets. In the *France Télécom* case, the Commission largely ignored the company's argument that its high market share on the—then emerging—market for high speed internet access was not representative, ruling that its increasing high market shares over a two-year period was a clear indication of dominance.[67] With respect to the *Microsoft* case, the Commission noted that it would not be hesitant in applying (traditional) antitrust analysis to 'hi-tech' markets, and that it even considered some aspects of such markets (such as network effects) as an especially strong indication of dominance.[68]

Also, the Commission has held undertakings to be dominant because they were an 'unavoidable trading partner'. As mentioned, the European Court of Justice has identified the criterion 'unavoidable trading partner' as the essential test for dominance,[69] but the Commission has deemed undertakings to be an 'unavoidable trading partner' merely because they became the most important trader in the field, not because competitors and consumers did not have any alternatives. Such has happened, for example, in the case of *Intel*, where the Commission ruled that for Intel's customers, a switch to a different supplier was 'unrealistic'.[70] Such assessment might be applied by the Commission to Google as well: despite the fact that customers and consumers are able to switch to a different search engine, it may rule that Google is still an 'unavoidable trading partner', merely by its current status in the market.

Considering the above, there is a fair chance that the European Commission will focus on Google's high market shares and the fact that it has become the most important player in the market when assessing Google's position in the market. However, it should also take into account the characteristics of the markets involved and perform an analysis of the competitive constraints that Google is

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[67] Commission Decision of 16 july 2003 relating to a proceeding under Article 82 of the EC Treaty. (COMP/38.233 - Wanadoo Interactive), http://ec.europa.eu/competition/antitrust/cases/dec_docs/38233/38233_87_1.pdf (last accessed February 12, 2011), para 211–222.

[68] Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 *Microsoft*), http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf (last accessed February 12, 2011), para 470.

[69] Case 85/76, "*Hoffmann-La Roche & Co. v Commission*" [1979] ECR 461, *supra*.

[70] Commission Decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990 - Intel), http://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_11.pdf (last accessed February 12, 2011).

under, to see if this high market share is really a clear indication of dominance. This may be less self-evident than it seems.

2.5 Google's Abuse

As demonstrated above, it is argued that it is less sure that Google holds a dominant position within the meaning of Article 102 TFEU than it may initially appear. Let us assume, however, that the European Commission is to consider Google as being dominant in the relevant markets: will it then consider its behavior to be abusive?

2.5.1 Practices to be investigated

The following practices by Google that will be investigated by the European Commission have been identified previously in this Chapter:

1. downgrading competitors' web pages in unpaid ('organic') search results;
2. manipulating paid search results by influencing the quality score of competitors' services;
3. imposing anti-competitive contractual restrictions on advertising partners by prohibiting them to show advertisements of Google's competitors as well as by restricting the portability of their advertising campaigns to competing platforms;
4. offering products for free, thereby putting competitors out of business;
5. using third-party content to make money through advertisements, without paying a remuneration.

Below, we will address these practices and discuss whether they would constitute an abuse under Article 102 TFEU.

2.5.1.1 Downgrading Web Pages; Manipulating Search Results

The practices mentioned above under 1. and 2. are discussed simultaneously, as they both concern behavior where the dominant undertaking favors its own products or services on an ancillary market over its competitors products and services.

Both with respect to the first-mentioned practice, the downgrading of competitors' web pages in unpaid search results and the second mentioned practice, the manipulation of paid search results, it is quite likely that the Commission will consider this to be abusive—provided, however, that the complainants and the European Commission succeed in proving that Google actually and deliberately indeed downgrades their web pages. This could pose some problems, as Google

itself denies this and claims that the complainants' websites do not obtain high search rankings because they copy most of their data from other websites.[71] 'We built Google for users, not for websites. (…) Not every website can come out on top' it stated in its response to the announcement by the European Commission of November 30, 2010.[72] In this respect, the European Commission may ask for disclosure of Google's algorithm (for the purpose of proceedings only).

If it is demonstrated that Google intervenes in its search results in order to give its own websites (such as Google Product, a vertical search engine that complainant Foundem has specifically protested about[73]) a higher ranking, this is likely to be considered abusive. The practice could be compared to a shop owner favoring its own products by giving them a much better display in the shop, even though there is a higher demand for its competitor's products. Whereas one may argue that this is normal competitive behavior, since the shop owner is the one investing in the shop and should therefore be able to favor its own products, the European Court of Justice's case law points in a different direction. In its leading judgment on this matter, *Commercial Solvents*,[74] the ECJ ruled that a dominant undertaking that refuses to supply a competitor in a derivative market because it wishes to enter this market itself, abuses its dominance. This situation is not entirely similar to the practice Google is allegedly involved in, because Google has not refused to display the complainant's websites altogether. However, it shows that behavior of a dominant undertaking which is aimed at excluding competitors from an ancillary market, because it wants to enter such market itself, is generally considered to abusive under Article 102 TFEU. Also, it is recalled that the *Autorité de la Concurrence* has identified exactly the same practices by Google as likely to be abusive.[75]

Further, there is a possibility that the European Commission would consider the above-mentioned practices by Google as abusive tying or bundling. In this respect, the Commission could consider that the supply of Google's search engine services and the supply of its products on the derivative market (the Google websites competing with the complainant's websites) are in fact tied together, so that consumers have less choice and competitors will be excluded from the market for the tied product. In its 2009 Guidance paper on exclusionary abuses, the Commission has identified the following requirements for abusive tying:

- the undertaking is dominant in the tying product market, and:
- the tying product and the tied products are two distinctive products, and:

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[71] EU launches Google investigation after complaints, http://www.reuters.com/article/2010/11/30/us-eu-google-probe-idUSTRE6AT1L220101130 (last accessed February 18, 2011).

[72] See Google, Our thoughts on the Commission review, *supra*.

[73] Foundem has explained the backgrounds of its complaint to the European Commission on its website http://www.searchneutrality.org/, thereby comparing the search results for its own price comparison website with the results for Google Product.

[74] Cases 6/73 and 7/73, "*ICI and Commercial Solvents v Commission*" [1974] ECR 223.

[75] *Opinion of the Autorité de la Concurrence on competition in the online search market*, *supra*.

- the tying practice is likely to lead to anti-competitive foreclosure.[76]

These conditions could be deemed fulfilled with respect to the practices Google allegedly is involved in. However, in its *Microsoft* decision, the General Court identified a fourth requirement for abusive tying, namely that the dominant undertaking does not give consumers a choice to obtain the tying product without the tied product.[77] This requirement would be a particular impediment for a finding of abusive tying with respect to Google's alleged behavior, as consumers typically are under no obligation to use the Google search engine if they do not use Google's other products (and vice versa). However, the Commission could decide to 'incorporate' this condition of (lack of) consumer choice into the requirement of foreclosure: if in the end all competitors are removed from the market, consumers will have no choices left.[78] Nevertheless, the argument for abusive tying in relation to the above-mentioned practices seems less strong than the argument for foreclosure on the basis of the *Commercial Solvents* case law.

In sum, it is argued that—provided that Google will be held dominant and it is demonstrated that the alleged practices actually occur—both the downgrading of competitor's web pages in unpaid search results and the manipulation of paid search results will be deemed abusive.

2.5.1.2 Imposing Anti-competitive Contractual Restrictions on Advertising Partners

With respect to the allegations that Google has imposed exclusivity obligations on its contracting partners in the online advertising market, it is not unlikely that this behavior will be considered abusive as well. In the past, the European Court of Justice has severely condemned exclusivity obligations imposed on customers in derivative markets.[79]

The prohibition not to advertise for competitors of the dominant undertaking, as Google allegedly has imposed on its customers, has been specifically addressed in one of the ECJ's leading cases, *United Brands*.[80] In this case it was ruled that United Brands' refusal to supply a customer who had taken part in an advertising campaign for one of United Brands' biggest competitors was abusive. However, this concerned an absolute refusal to supply as a punishment for advertising for a

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[76] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, para 50.

[77] Case 201/04, "*Microsoft v Commission"* [2007] ECR II-3601, para 864 and 962.

[78] Jones and Sufrin 2011, p 478.

[79] See, e.g., Case C-310/93P, *BPB*, and Case T-65/89, "*BPB Industries and British Gypsum v. Commission"* [1993] ECR II-389.

[80] Case 27/76, "*United Brands Company and United Brands Continentaal v Commission*" [1978] ECR 207.

competitor and not merely a contractual obligation. Moreover, the ECJ's ruling has been criticized on this point.[81]

Whether any exclusivity obligations imposed by Google will be deemed abusive arguably depends on the exact nature of these obligations. Exclusive (purchasing) contracts, obliging the customer to buy only the dominant undertaking's product or services, are generally considered abusive, as well as loyalty contracts, promising the customer priority deals or lower prices if it purchases exclusively with the dominant undertaking.[82] Restricting its customer's possibility to take its business to other companies offering online advertising services is likely to be deemed abusive if Google is considered to be an unavoidable trading partner.[83] However, with respect to a mere prohibition to advertise for competitors it may be argued that even a dominant company should be allowed to defend its commercial interests in this way. It is fully understandable that it could be quite destructive to a company's commercial policy if its customers engage in advertising for the company's competitors.

Therefore, it is hard to predict what will be the outcome of the assessment of Google's allegedly imposed exclusivity obligations without being familiar with the content of the contracts concerned. However, if such contracts would oblige the customer to purchase all its online advertising services with Google and would prohibit such customer to change to another supplier, it is not unlikely that this will be considered abusive.

2.5.1.3 Integrating Third Party Products on Other Websites for Free

The complaint issued by Eurocities relates to so-called predatory behavior: the dominant undertaking lowers its prices for a certain product to such an extent, that competitors are unable to compete and are driven off the market. Whether certain behavior should be considered predatory and therefore anti-competitive is often difficult to assess. The reason for this is not only that predatory pricing may benefit consumers in the short term (they receive the product at lower price or even—as is the case with Google Maps—for free), but also that there is a thin line between temporarily lowering prices as part of a normal business strategy and real predatory behavior.[84]

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[81] Jones and Sufrin 2011, p 484, as well as the there cited article by P. Jebsen and R. Stevens 'Assumptions, goals, and dominant undertakings: the regulation of competition under the article 86 of the European Union', (64) Antitrust L.J. 1996, pp 510–511.

[82] Cases 40/73, "*SuikerUnie v. Commission",* [1975] ECR 1663, Case 85/76, "*Hoffmann-La Roche & Co. v Commission"* [1979] ECR 461, Case 322/81, "*Nederlandsche Banden Industrie Michelin (Michelin I) v Commission"* [1983] ECR 3461.

[83] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, para 36.

[84] Jones and Sufrin 2011, pp 392–393.

The European Commission and the ECJ have developed a test for predatory pricing in the case of "*AKZO*",[85] which—in short—entails that if the company charges prices below average costs, these are presumed to be predatory, and that if prices are above average cost but below total costs, the prices are considered predatory if they are proved to be part of a plan to eliminate competitors. This test is however much disputed, as it may be difficult to assess whether costs are fixed or variable and also because there may be rational business reasons for pricing beneath average costs. In its Guidance paper, the European Commission states the following with regard to predation: '(…) the Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm'.[86]

Would offering Google Maps for free amount to predatory pricing? The price Google charges is obviously below average costs as the product is offered for free, and one may argue that for this reason this practice thus falls within the test for predation as developed by the Commission and the ECJ. However this argument fails to take into account the fact that this is Google's business model. Google offers products for free, and makes money by selling advertisements related to these products. Google Search functions in the exact same way.

Moreover, an important requirement for the finding of predatory behavior is the existence of barriers to entry. Without barriers to entry, the eliminated competitors will immediately return to the market once the undertaking concerned raises prices. As mentioned above, it may be argued that in Google's case barriers to entry are not so high. This would plead against a finding of predatory behavior.

Finally, it is often argued that predatory pricing is a normal business strategy in new economy markets, as companies often lower their prices in order to win the competition race for the market. This reasoning could be applied to Google as well.

Considering the above, there are quite a few arguments against considering Google's behavior in relation to Google Maps abusive within the meaning of Article 102 TFEU. However, the European Commission has shown in the past that it is reluctant to take into account the 'new economy market' argument[87] and may still consider Google's behavior as a 'sacrifice' and therefore abusive.

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[85] Case C-62/86, "*AKZO Chemie B.V. v Commission*" [1991] ECR I-3359.

[86] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, para 63. See also *supra*, Sect. 2.4.3.2.

[87] Commission Decision regarding "*France Télécom*", *supra*.

2.5.2 Using Third Party Content to Make Money by Placing Advertisements, Without Paying a Remuneration

Finally, the complaint made by the German publisher's associations that relates to the use of content in order to generate advertising revenue, without paying remuneration. The exact nature of this complaint has not yet been disclosed, but according to several media the complaint revolves around Google's display of 'snippets' of third party content in Google News.[88] If so, this complaint relates to the practice that was also investigated by the Italian Competition Authority.[89]

Google News displays hyperlinks to news messages from different content websites, together with the first two or three lines of the message concerned. If the internet user clicks the hyperlink, it is guided to the corresponding page on the news source's website. The publishers allegedly are concerned about the fact that Google earns money by offering this service, whereas the content it revolves around is actually theirs.

I would argue that this complaint is more related to unfair competition (as opposed to unlawful competition within the meaning of the TFEU) or infringement of intellectual property rights rather than possible abuse of a dominant position. If Google is allowed to display the 'snippets' under the relevant intellectual property laws, the lack of remuneration to the publishers will arguably not be considered as abusive behavior. If the content is in the public domain, everyone is free to use such content without the obligation to remunerate the rights-holder for its use, and if there is no obligation to remunerate for the use of the content, then it is hard to imagine why there would be an obligation to share advertising revenue, even for a dominant company. Moreover, the service that Google offers by presenting an overview of news content, may bring benefits to consumers. To generate advertising revenue for this without remunerating the content owners should therefore be considered as competition on the merits (unless it infringes any intellectual property rights).[90]

Assuming that the complaint indeed relates to the above-mentioned use of snippets by Google News, I would therefore argue that this is unlikely to be considered abusive behavior within the meaning of Article 102 TFEU.

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[88] See An Antitrust Complaint for Google in Germany, New York Times January 18, 2010, http://www.nytimes.com/2010/01/19/technology/19antitrust.html (last accessed February 18, 2011); German news media challenge Google, Der Spiegel January 18, 2010.

[89] *Supra,* Sect. 2.3.3.2

[90] *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, para 1.

2.6 Conclusions

In this chapter it was examined whether the power of Google amounts to a dominant position within Article 102 TFEU and if so, whether Google will be held to have abused such position.

It is obvious that Google has a high market share on the search engine market, as well as on the market for online advertising. However this alone should not be decisive in the assessment of Google's alleged dominance. Google is a first mover in a new economy market, where high market shares are common and often do not properly reflect a company's competitive position vis-à-vis its competitors. The search engine market's characteristics are moreover different from many other new economy markets, as network effects and consumer lock-in situations are less present. This could indicate that barriers to entry are not so high, which would mean that Google is at least under some competitive constraints. Google's dominance may therefore be less self-evident than it seems.

If Google is held dominant, however, it is likely that at least some of the practices it has been accused of are considered abusive under Article 102 TFEU. The case law of the European Court of Justice and the European Commission shows that if a dominant undertaking uses its dominance in one market to eliminate competition in a related market it violates Article 102 TFEU. Practices whereby Google is proved to use its leverage on the search engine market to distort competition in related markets, such as influencing search results in order to favor its own services, are therefore likely to be considered abusive.

However, if Article 102 TFEU proceedings against Google actually take off, it is argued that—for the reasons mentioned above—the European Commission should first investigate closely whether Google may be under competitive constraints, and whether its behavior is not merely a reflection of severe competition on related markets. Because otherwise the European Commission would indeed punish a pioneer company that has made life easier, more efficient and arguably more fun for many consumers.

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