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The Commission's „Next Big Thing“?

On April 15, 2015 the European Commission sent Google its statement of objections (SO) in the Google Search case.¹ On the same day, it opened investigations against Google with regard to Android.² The question of whether the contractual framework of Android licensing violates competition law has been covered in another article (it does not).³ This article is aimed at assessing the Commission's competitive analysis and comparing the Google search case to other EU decisions, in particular to the European Commission's decisions in the Microsoft cases. This is not an easy task because neither the SO nor Google's response of August 27, 2015 have yet been published in full. The following remarks, therefore, only reflect preliminary thoughts about the sparse information that has been revealed to the public in the Commission's press releases and Google's blogs. Based upon this information, the Commission does not seem to have a particularly strong case against Google.

I. The Commission's Statement of Objections

Interestingly, the Commission does not cover the whole range of search-related complaints and markets. It rather

focuses its SO on Google's allegedly favourable treatment of Google Shopping compared to other comparison shopping services – possibly with the idea that depending on the outcome of this case, the Commission might apply the same principles to other types of search results like restaurants or hotels. This focus on shopping echoes the origins of the case because product search/shopping was one of the areas of investigation as early as 2009.⁴ The Commission outlined its

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1 See Comm., http://europa.eu/rapid/press-release_IP-15-4780_en.htm and http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm.

2 See Comm., http://europa.eu/rapid/press-release_MEMO-15-4782_en.htm and http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm.

3 See Körber, NZKart 2014, at pages 378 et seq. (in German) and Körber, Let's Talk About Android – Observations on Competition in the Field of Mobile Operating Systems, <http://ssrn.com/abstract=2462393>.

4 See Foundem, http://www.foundem.co.uk/Foundem_Google_Timeline.pdf, at page 9.

competitive concerns in a memo that was published on April 15, 2015 as follows:

“The Commission is concerned that users do not necessarily see the most relevant results in response to queries – to the detriment of consumers and rival comparison shopping services, as well as stifling innovation. Google has a dominant position in providing general online search services throughout the EEA, with market shares above 90 % in most EEA countries. Since 2002, Google has also been active in providing comparison shopping services, which allow consumers to search for products on online shopping websites and compare prices between different vendors. The first product it offered, “Froogle”, was replaced by “Google Product Search”, which in turn was replaced by its current product “Google Shopping”. The Statement of Objections outlines that the markets for general search and comparison shopping are two separate markets. In the latter market, Google faces competition from a number of alternative providers. [...]

The Statement of Objections alleges that Google treats and has treated more favourably, in its general search results pages, Google's own comparison shopping service “Google Shopping” and its predecessor service “Google Product Search” compared to rival comparison shopping services.

Google's conduct may therefore artificially divert traffic from rival comparison shopping services and hinder their ability to compete, to the detriment of consumers, as well as stifling innovation.

More specifically, the preliminary conclusions are:

- *Google systematically positions and prominently displays its comparison shopping service in its general search results pages, irrespective of its merits. This conduct started in 2008.*
- *Google does not apply to its own comparison shopping service the system of penalties, which it applies to other comparison shopping services on the basis of defined parameters, and which can lead to the lowering of the rank in which they appear in Google's general search results pages.*
- *Froogle, Google's first comparison shopping service, did not benefit from any favourable treatment, and performed poorly.*
- *As a result of Google's systematic favouring of its subsequent comparison shopping services “Google Product Search” and “Google Shopping”, both experienced higher rates of growth, to the detriment of rival comparison shopping services.*
- *Google's conduct has a negative impact on consumers and innovation. It means that users do not necessarily see the most relevant comparison shopping results in response to their queries, and that incentives to innovate from rivals are lowered as they know that however good their product, they will not benefit from the same prominence as Google's product.*

The Statement of Objections takes the preliminary view that in order to remedy the conduct, Google should treat its own comparison shopping service and those of rivals in the same way. This would not interfere with either the algorithms Google applies or how it designs its search results pages. It would, however, mean that when Google shows comparison shopping services in response to a user's query, the most relevant service or services would be selected to appear in Google's search results pages.”⁵

II. The Factual Background of the Commission's Objections

Before we can assess if Google did something wrong, it is necessary to cast some light on the factual background of the Commission's objections. As the Commission has outlined, before Google introduced “Google Shopping”, which is at the center of the Commission's complaints, Google presented results in a service called “Google Product Search”, and prior to that, “Froogle”. While the mere relabeling is irrelevant with regard to the substantial issues at hand, these name changes have been accompanied by changes in the functioning as well as the economic basis of the services. These aspects, in contrast, are of great importance for the competitive analysis.

Froogle was launched as a standalone web page in 2002. Initially, Froogle results were not shown on the Google Search web page,⁶ but soon they also appeared in the organic (ad free) search results list.⁷ In 2007, Google renamed Froogle “Google Product Search”.⁸ The new service was one of Google's innovative “Universal” search services.⁹ By introducing Universal search, Google made it possible for consumers to find more in-depth information in the organic search list (e.g. a map) instead of a mere hyperlink to the desired information (e.g. a link to a map service website). Likewise, if users looked for a certain product (e.g. when searching for “buy smartphone”), special search results including prices, pictures and additional information were presented in a Product Universal box that was originally placed at the top of the organic (general) search results list, if directly relevant for the query, and that later appeared on different places within the first search results page depending on its relevance with regard to the search enquiry. The results in this box continued to be “organic search results”. There was no paid inclusion. If users clicked on a product picture or link within the box, they were either routed to a vendor's webpage¹⁰ or to a product search webpage.

In May 2012, Google not only renamed “Google Product Search” to “Google Shopping”, but also completely changed the underlying business model. Google Shopping has never been part of the organic search results list. It has always been an ad service. If users search for a product (“buy smartphone”), the Google Shopping box is displayed on the Google Search page above the general search results list in the advertising section of the page. It is not a part of the organic search list. To make this clear and because vendors can pay for inclusion of their “Product Listing Ads” in this box, the box is labeled as “Sponsored”. This signals to the users that the results in this box are not “organic” search results. Hence, the general search algorithms that determine the rank within the organic search results list do not apply. The Google Shopping results more closely resemble AdWords results, and have the same function. If users click on a link or picture within the Google Shopping box, they are redirected to the vendor's web page (and not to the Google Shopping

5 Comm., http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm (partial bold print by the Commission).

6 See <http://searchenginewatch.com/sew/news/2067723/online-shopping-googles-froogle>.

7 See <http://googlesystem.blogspot.com/2006/07/google-onebox-results.html>.

8 See <http://googleblog.blogspot.com/2007/04/back-to-basics.html>.

9 See <http://googleblog.blogspot.co.uk/2007/05/universal-search-best-answer-is-still.html>.

10 In this case, Google did *not* receive remuneration from the vendor. The link was free of charge like any other organic search result.

page¹¹), and Google receives a pay-per-click remuneration from the vendor (identical to clicks on AdWord ads).¹²

In short: If it is true that the Commission's analysis does not clearly differentiate between Google Product Search (from 2008 to April 2012) and Google Shopping (since May 2012), as Commission's press release suggests, the competitive assessment would be profoundly flawed, because these two services are based on completely different business models and may have entirely different effects. While Google Product Search was a free Google *Search* service, Google Shopping is (and has always been) a paid-for Google *Ad* service.

III. The Commission's Competitive Assessment

1. Market Definition

In its memo, the Commission underlines that “Google has a dominant position in providing general online search services throughout the EEA, with market shares above 90 % in most EEA countries”.¹³ This indicates that the Commission focusses on the horizontal search market (or rather the horizontal search side of the, at least, two-sided market that is relevant in this case¹⁴). Moreover, considering that search is a free service, the 90 % share must be based on usage and not on turnover. Such a market definition remains questionable, even if other sides of the market (i.e. advertising) are taken into consideration. There are several possible criticisms.

First, a market definition that only focusses on horizontal search would ignore how users search, and what users regard as substitutes – which is the key to a proper market definition. Google Search actually offers a combination of horizontal (general) and vertical (specialized) search services, and both fields overlap with each other and with competing services. The only economically sensible way to look at the market is to see what consumers regard as a substitute „per query“ (or per query category). For shopping queries, most users would regard Idealo, etc. as substitutes. For travel questions, they regard TripAdvisor, Hotels.com, HRS, etc. as substitutes. So there is no such thing as a “general search market”. There is a mosaic or conglomerate of markets for specific categories of search results, and some suppliers specialize only in one, whereas other suppliers play in more than one of these markets. As the German Monopolies Commission put it in its Special Report 68 (2015) “Competition policy: The challenge of digital markets”:

*“[S]pecialised search engines can partially substitute the search results of general search engines. Whereas general search engines are typically used for many searches, other specific search inquiries including some commercially relevant inquiries are often made through specialised search engines, including inquiries concerning products, hotels and restaurants. As a result, the market definition depends on individual circumstances”.*¹⁵

Second, whatever the market definition, it is important to include all suppliers who can meet the consumers' needs in that market. When analyzing the effect on competition, it would be too narrow only to include the impact on “aggregation-only” product search engines: For instance, if users search for a book (or another product) many of them will turn to Amazon¹⁶ or eBay, and others to Google. While it is true that eBay or Amazon Marketplace differ from mere “aggregation-only” services like Google Shopping, because users can actually buy products on these platforms, the “direct buy feature” seems to be rather an “additional function”. It reduces the user's transaction costs and thereby

creates consumer efficiencies. This makes them *more*, not *less* competitive with Google or “aggregation-only” services. Precisely because users find this convenient, Google is testing a mobile direct-shopping feature for Google Shopping in the US.¹⁷ The core function “find and compare products that would fulfill the user's needs” stays the same regardless of whether the product search is performed using an “aggregation-only service” like (up to now) Google Shopping or on a “direct-buy platform” like Amazon or eBay. According to the European Commission's Notice of 1997, market definition is “*a tool to identify and define the boundaries of competition between firms. ... The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face*”.¹⁸

Excluding the competitive pressure generated by vertical search engines and/or platforms like Amazon or eBay from the definition of “general search markets” creates a misleading impression of the actual market conditions and is not in line with this rationale.

2. Dominance

It is unlikely that the Commission solely relies on the “above 90 %” horizontal search market share argument when it comes to assessing the question of Google's dominant position, even though the public memo only mentions this aspect. It stands clear that a proper analysis cannot be so limited. Two short general remarks illustrate this:

First, in a multi-sided market like the one at hand,¹⁹ dominance on *one* side of the market does not suffice. This is especially true, if the market shares are based on usage rather than turnover. Dominance or, at least, a certain degree of market power on *all* sides of the market is necessary. The advertising side is particularly important in this respect because Google receives its remuneration on this side of the market while the search side is free of charge.

Second, even though high market shares usually are a useful first indicator of dominance, this may not be the case in innovation-driven markets of the digital economy in which innovation rather than price is the most important competitive factor. The German Monopolies Commission pointed out:

*“Combining more than 90 percent of search inquiries regularly, the largest share of horizontal inquiries in Germany is answered by Google. However, it would be premature to associate this high user share with corresponding market power; it is necessary to take all sides of the platform and their interdependencies into account.”*²⁰

11 There is, however, a general link to the Google Shopping page at the top of the box.

12 Compare <https://support.google.com/adwords/answer/2454022>.

13 See Comm., http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm.

14 Google is a platform that, at least, connects users searching for answers (“search market”) and with advertisers who pay money for search related ads (“advertising market”).

15 German Monopolies Commission, Special Report 68 (2015): “Competition policy: The challenge of digital markets”, http://www.monopolkommission.de/images/PDF/SG/SG68/S68_summary.pdf, at para. S27.

16 A study by Forrester Research suggests that more people start their product searches on Amazon than on Google, see <http://searchengine-watch.com/sew/study/219674/amazon-passes-google-as-top-destination-for-shopping-research-report>.

17 See <http://www.valuewalk.com/2015/07/google-tests-mobile-direct-buy-shopping-feature/>.

18 Comm., OJ 1997 C 372/5 (9.12.1997), at para. 2.

19 See footnote 14 above.

20 German Monopolies Commission, Special Report 68 (2015): “Competition policy: The challenge of digital markets”, http://www.monopolkommission.de/images/PDF/SG/SG68/S68_summary.pdf, at para. S27.

If Google introduced prices on the free search side of the market, or lowered quality there, it would suffer loss of revenue on the paid advertising side of the market.

Third, in its Guidance with regard to the enforcement of Article 102 TFEU, the Commission defines dominance 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”.²¹

While the requirement of “power to behave independently of the competitors” in traditional markets primarily refers to price-setting, its main focus in the innovation-driven digital economy must be on innovation. So dominance could only be found if Google could afford not to innovate and still keep its usage shares. Yet, in the digital economy, innovative enterprises quickly conquer high market shares, but they may lose these shares just as quickly when an innovative competitor introduces an even better product. The significance of high market (usage) shares is very limited in such a dynamic environment.²² It can simply mean that the undertaking continues innovating at a faster pace than its rivals.²³ A particularly careful case-by-case analysis is necessary.

For example, on the one hand, the Commission's *Microsoft* tying cases of 2004 and 2009 were characterized by persistently high market shares for a paid product (Windows) of above 90 %, strong network effects as well as other barriers to entry, which effectively sheltered Microsoft from competition. The Commission stated in 2009 that the

“overall utility that a consumer derives from a client PC operating system [...] depends on the applications he can use on it and that he expects to be able to use on it in the future. Independent Software Vendors write applications for the client PC operating system that are most popular among users. In other words, the more popular an operating system is, the more applications will be written for it and the more applications are written for an operating system, the more popular it will be among users”.²⁴

The Commission furthermore held that the degree of ubiquity that Windows had attained resulted in the availability of nearly all commercial applications for Windows and often only for Windows.²⁵ Users were often “locked in” to Windows because they had invested in the Windows license as well as in Windows-specific software and hardware, and they were used to work with this software and hardware. Therefore, huge switching costs prevented them from migrating to other operating systems.²⁶ Finally, in the 2009 *Microsoft* Internet Explorer case, the Commission underscored that Microsoft had made its Internet Explorer part of Windows by embedding it into the operating itself, thereby giving neither OEMs nor users a choice of whether to preinstall it or not. According to the Commission, it was quite troublesome to download and install a second browser at this point of time. This case echoed the similar case investigated in the US first by the FTC and then the DOJ.

At that time, Microsoft did not even permit OEMs to preinstall competing browsers, thereby actively foreclosing competitors from the essential Windows platform. At the end of the so-called “browser war”, the former market leader Netscape was eliminated. Since there was no significant competitor left, Microsoft then ceased improving Internet Explorer 6.0 for many years, thereby slowing down innovation not only on the market for web browsers, but on the internet as

a whole.²⁷ All of this was to the detriment of the consumers. Microsoft was able to act this way because it was not subject to any noticeable competitive constraints for an extended period of time, i. e. because it was dominant.²⁸

On the other hand, in its 2011 *Microsoft/Skype* merger decision, the Commission considered equally high market shares of 90 % on the market for consumer communications services to be unproblematic where the market affected was dynamic, and consumers could (and would) easily switch suppliers, particularly because the services that were offered in these markets were free and there were no (or low) switching costs.²⁹

The *Google* case resembles the *Microsoft/Skype* case rather than the *Microsoft* tying cases. Google, on the one hand, has enjoyed high usage shares in search markets and other markets since 2007 (even though these market shares might not be conclusive), and there are presumably high costs for establishing a new search engine.

Search, on the other hand, is free of charge, there are hardly any network effects, and there are little to no switching costs for the consumers. There might be indirect network effects such as the improvement of the search results based on the collected search data, but these are subject to the law of diminishing returns.³⁰ Direct network effects do not exist because a search service – unlike an operating system or a consumer communications service – does not get more attractive for user with an increasing number of other users. A search service gets more attractive only if it is better than others.

Moreover, although Google has a strong brand name and a good reputation (which it both earned by innovating), there is little loyalty with regard to online services as is shown by the rapid decline of services such as MySpace, which was overtaken by Facebook (despite more significant network

21 See Comm., Guidance, OJ 2009 C 45/7 (24.2.2009), at para. 10.

22 See also Körber, (2015) 36 E. C. L. R., at 239, at page 241.

23 See also German Monopolies Commission, Special Report 68 (2015), http://www.monopolkommission.de/images/PDF/SG/s68_full-text_eng.pdf, at para. 197: “Large market shares may be the result of well-functioning competition, and are unproblematic as long as the latitude of a search engine which has large market shares is sufficiently restricted by other factors and market entry remains possible as a matter of principle. It is therefore to be discussed below what factors may influence market concentration on the search engine market, and the degree to which market power is favoured or limited”.

24 Comm., 16.12.2009, Case COMP/C-3/39.530 – *Microsoft (Internet Explorer)*, at para. 26.

25 Comm., 16.12.2009, Case COMP/C-3/39.530 – *Microsoft (Internet Explorer)*, at paras. 27 and 56; Comm., 24.3.2004, Case COMP/C-3/37.792 – *Microsoft (Interoperability and Media Player)*, at para. 452.

26 Comm., 24.3.2004, Case COMP/C-3/37.792 – *Microsoft (Interoperability and Media Player)*, at para. 463 quoting internal Microsoft memos: “It is this switching cost that has given customers the patience to stick with Windows through all our mistakes, our buggy drivers, our high TCO, our lack of a sexy vision at times, and many other difficulties. [...] Customers constantly evaluate other desktop platforms, [but] it would be so much work to move over that they hope we just improve Windows rather than force them to move”.

27 Webmasters had to code their websites to work with Microsoft's substandard Internet Explorer because of its ubiquity, and were not able to make use of more advanced functionality that other browsers offered, as this would have meant that the webpage “broke” when rendered by the Internet Explorer.

28 See Comm., 16.12.2009, Case COMP/C-3/39.530 – *Microsoft (Internet Explorer)*, at paras. 54 et seq.

29 Comm., 7.10.2011, Case M.6281 – *Microsoft/Skype*, at paras. 108 et seq.

30 Indeed, Bing (especially in the US where its usage share is about 30 %), but also DuckDuckGo have achieved enough search volume such that additional query volume will add little or nothing to search quality. And, more importantly, specialized search engines need only consider category-specific information and thus reach this point much earlier.

effects in this field), or Altavista and Yahoo!³¹ which were overtaken by Google.

The users can easily switch or multi-home. And they would do so, if Google would manipulate its search results, start charging a fee for search, or stop innovating. There are other search engines such as Bing, Yahoo! or DuckDuckGo to which even unexperienced users can easily migrate (for a single search or for good) at any time with a simple mouse click and without cost. Because there are alternative search engines, Google cannot stop innovating without losing advertising revenue and market shares like Microsoft did after it had won the “browser war”. This is especially important because the search-related markets (like the consumer communications market in the *Microsoft/Skype* case) are innovation driven markets. As we have seen, in these markets, innovation and not the price (which often is zero) is the key factor of competitive success. Insofar, Google's “ability to behave independently of its competitors” (which is by definition required to conclude that an undertaking is dominant under EU competition law³²) seems to be quite limited in the *Google* case, while Microsoft in the *Microsoft* cases of 2004 and 2009 was not subject to such competitive constraints and therefore clearly dominant.

3. Abusive Behaviour

Competitive analysis in innovation-driven markets is a most complex task. This not only applies to market definition and assessment of dominance, but also to the question of whether the behavior of a presumably dominant undertaking is an expression of competition on the merits or an abuse. Rules that were established with regard to the traditional economy do not necessarily fit the digital economy. It is, therefore, hard to imagine any situation in which a “simple solution” in form of a “per se-rule” can be applied to an innovation-driven market, or in which a certain behavior can be deemed anti-competitive “by object” or “by nature”.³³

The same applies here. The question of whether Google's treatment of its own services and the competing services violates Art. 102 TFEU must therefore be answered on the basis of a careful case-by-case economic analysis that takes the special circumstances of the digital economy into account. US antitrust law would call this a “rule of reason” approach.

Furthermore, the complex competitive analysis with regard to the alleged abusive behavior in the *Google* shopping case must distinguish between Google Product Search and Google Shopping because these services are based on completely different business models, even though the latter was functionally the former's predecessor. While Google Product Search was part of Google's organic search services which are free of charge for users, Google Shopping has always been part of Google's commercial ad services. Google has made this clear by marking the Google Shopping box as “Sponsored” and by putting it above the organic search results list, which – like the separate placement of AdWords ads – is not only objectively justified, but *necessary* to avoid consumer confusion (and, hence, is not an expression of “favouring” Google Shopping or of an abuse in the first place). Marking and placement make it easy to identify the Shopping results as ads even for inexperienced users.

Finally, the Commission must clearly distinguish the object of the alleged anticompetitive behavior because it makes a great difference if access is required to Google's Search *web page* (which includes the organic search results list as well as

ads), to Google's ad free organic *search list*, or to specialized Google *ad services* like Google Shopping.

According to its public memo, the Commission observed that “*Google systematically positions and prominently displays its comparison shopping service in its general search results pages, irrespective of its merits. This conduct started in 2008*”.³⁴ The Commission furthermore claims that “[a]s a result of Google's systematic favouring of its subsequent comparison shopping services “Google Product Search” and “Google Shopping”, both experienced higher rates of growth, to the detriment of rival comparison shopping services. Google's conduct has a negative impact on consumers and innovation”.³⁵ This quote indicates that the Commission treats Google Product Search and Google Shopping in the same way. As stated above, this would be clearly erroneous because Google Shopping (in contrast to Google Product Search) is not a *search service*, but an *ad service*. As such Google Shopping appears on the search results *page* (like AdWords), but it is obviously not a part of the organic search results *list*.

Moreover, while links to the competing comparison shopping services (like Foundem) are still part of the organic search results *list* and, therefore, positioned within this list (free of charge) according to the results of the general search algorithms, these search algorithms do, by definition, not apply to ad services like AdWords or Google Shopping. A different treatment of different services obviously does not constitute discrimination in the meaning of Article 102 lit. c TFEU which only prohibits “*applying dissimilar conditions to equivalent transactions*”.

Moreover, while Art. 102 lit. c TFEU forbids dissimilar treatment of two competing third party services without objective justification, it does not mandate to treat third party services the same as the services of the dominant undertaking or its subsidiaries. The German Supreme Court (BGH) has repeatedly and explicitly underscored that it is not an abuse – even for a dominant company – to treat its own divisions or subsidiaries more favorably than its competitors. The reasoning behind these judgments is that a group of undertakings must be treated by competition law as a “single economic unit”, i. e. as “one undertaking”. Third-party competitors need not be treated the same³⁶ because, as

31 See Fortune article from that time: http://archive.fortune.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm: “*This much is clear: Yahoo! has won the search-engine wars and is poised for much bigger things*”.

32 See Comm., Guidance, OJ 2009 C 45/7 (24.2.2009), at para. 10.

33 See also the recent ECJ, 11.9.2014, C-67/13P – *Groupement des cartes bancaires (CB)*, at paras. 53 et seq. where the ECJ cautions the application of “by object” categories to new types of behaviour. While that case concerned Article 101 TFEU, the same principle applies to “by nature” abuses under Article 102 TFEU.

34 Comm., http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm.

35 Comm., http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm.

36 BGH, 24.10.2011, Case KZR 7/10, GRUR 2012, 84, at para. 31 – *Telefon- und Branchenverzeichnisse: “Die Kl. kann sich unter dem Aspekt der Ungleichbehandlung nicht darauf berufen, dass die Bekl. sie nicht mehr beliefert, wohl aber die PVN. Die PVN bildet als Konzernunternehmen der Bauer Media Group mit der Bekl. eine wirtschaftliche Einheit. Sie kann deshalb gegenüber der Kl. nicht als gleichartiges Unternehmen angesehen werden”* = “*The plaintiff cannot with regard to the aspect of dissimilar treatment rely on the ground that the defendant has ceased to supply her, but not PVN. PVN is an undertaking of the Bauer Media Group and forms a single economic unit with the defendant. She therefore cannot be considered as an undertaking of the same kind („gleichartiges Unternehmen“) in relation to the plaintiff*” (unofficial translation); see also, inter alia, BGH BGH, 24.9.2002, Case KZR 4/01, GRUR 2003, 167, at page 168 = WuW/E DE-R 1003, at page 1004 – *Kommunaler Schilderprägebetrieb*; BGH, 31.1.2012, Case KZR 65/10, NJW 2012, 2110, at para. 15 = WuW/E BGH 2360, 2365 – *Freundschaftswerbung*.

a general rule, “no one is required to sponsor third-party competition at his own expense”.³⁷ The concept of the “single economic unit” is also acknowledged by the European Court of Justice.³⁸

A universal equal “treatment rule” can be found in regulatory law (e.g. with regard to access to electrical power grids), but it applies in competition law only in “exceptional circumstances”, i. e. if a dominant undertaking controls access to an “essential facility” or a natural monopoly.³⁹ As discussed below, Google Search does not fulfill this requirement, and – as far as the publicly available information goes – neither the Commission nor any of the complainants argue that it does. Therefore, it seems highly questionable to argue that a different treatment of Product Universals like the former Google Product Search and links to competing shopping portals would constitute a breach of Article 102 TFEU as the Commission seems to do. It is even more surprising that the complainants seem to argue that they should be able to include their results in Google Shopping (i.e. in the Google ad space) for free. Under EU law, even an essential facility is entitled to a reasonable monetary compensation for access to its facility.

Even if one were to accept a general “equal treatment rule”, dissimilar treatment could only be found if Product Universals like the former Google Product Search and links to competing shopping portals were of equivalent relevance to users. This, however, is not the case because Product Universals by definition offer additional information (pictures, prices etc.). They are product innovations that offer the consumers a clear advantage compared to simple “blue links” (and, hence, no “innovation-abuse”).⁴⁰ For this reason, the FTC concluded that the introduction of Universal Search as well as additional changes made to Google’s search algorithms – even those that may have had the effect of harming individual competitors – could be plausibly justified as innovations that improved Google’s product and the experience of its users. If Google’s rivals lost business because of product improvements this would, according to the FTC, be nothing but a common byproduct of “competition on the merits” and of the competitive process that competition law encourages.⁴¹

The following remarks focus on Google Shopping because Google discontinued Google Product Search in May 2012. As we have seen, the competitive question with regard to Google Shopping is obviously *not* whether competition is impaired by applying the general search algorithms in a different way to Google Shopping and competing comparison shopping services. The general search algorithms do not apply to Google Shopping at all because it is an ad service. The relevant questions rather are (i) whether it constitutes an abuse within in the meaning of Art. 102 TFEU that Google places its ad services at the top of the results page and above the organic search results list without offering the same opportunity to competing comparison shopping services, or (ii) whether it constitutes an abuse that Google does not grant competing comparison shopping services access to the Google Shopping service.

With regard to the first question, it seems perfectly normal and justified for Google to show its own ads on the search result page, at the top or on the side, because that is how Google makes money. There is no obligation to show rivals’ ads, and certainly not if the rivals are unwilling to pay for them.

With regard to the second question, former Commissioner *Almunia* underscored in an open letter on May 13, 2014:

“I expressed serious concerns about several of Google’s business practices. One of them is Google’s prominent display, within its normal search results, of its own specialised (or „vertical“) search services without informing users of this favourable treatment. Indeed, such a practice could unduly divert Internet traffic to Google’s services to the detriment of services offered by its competitors, which could be just as relevant, or even more relevant, to the user” ... Approving these proposals would indeed introduce three main changes. First, users would be clearly informed of which links are promoted by Google and are not the result of its normal search engine. Second, there would be a clear separation between Google’s specialised services and the normal search results on its page. Third, whenever it promotes its own services, Google would also have to present the specialised services of three competitors in a way that is clearly visible to users. These rival links would also be displayed in a comparable visual format.”⁴²

The first two aspects have been addressed by marking the Google Shopping box as “Sponsored” and putting it at the top of the search page outside the search results list. A remedy for the third issue was proposed by Google by way of its third commitments in 2014. Google had offered to include links to three competing services, selected through an objective method and comparable to the way in which Google displayed its own services.⁴³ But this remedy was ultimately rejected by the Commission after heavy lobbying by Google’s opponents and political pressure.

Regardless of (failed) past attempts to reach a commitment decision, the question remains open if EU competition law does require Google to share access to its new ad service Google Shopping with rival comparison shopping services like Foundem at all. The correct answer to this question is “no”. As a general rule, competition law aims at protecting competition, not competitors. As we have seen, even dominant undertakings are under no obligation to help their competitors to compete by granting them access to their resources or by sharing their innovations. To impose such an obligation on an undertaking would also affect the undertaking’s basic rights with respect to its freedom of contract and property.⁴⁴

Therefore, as explained above, according to settled case law of the ECJ, competition law imposes an obligation to grant access to a dominant undertaking’s facilities only in “exceptional circumstance”. The presence of “exceptional circumstances” is (according to the ECJ since *Magill*) subject to four requirements which (according to the decision in *IMS Health*) must be cumulatively satisfied: (i) access to the facility must be indispensable for access to the downstream market, (ii) the refusal to grant access must exclude any effective competition in this market, (iii) the refusal to grant

37 For example, BGH, 11.11.2008, Case KVR 17/08, NJW 2009, 1753, at para. 24 – *Bau und Hobby*: „Niemand ist verpflichtet, zu seinen Lasten fremden Wettbewerb zu fördern“; BGH, 12.11.1991, Case KZR 2/90, NJW 1992, 1827, 1828 – *Aktionsbeiträge*.

38 See, for example, ECJ, 24.10.1996, Case C-73/95 P, ECR 1996, I-5482, at paras. 50 et seq. – *Viho* (with regard to Article 101 TFEU); ECJ, 10.9.2009, Case C-97/08 P, ECR 2009 I-8237 – *Akzo Nobel* (with regard to liability for fines).

39 See sources in Fn. 48 below.

40 With regard to this distinction see *Körber*, *JIPLAP* 2014,517, at pages 518 et seq.

41 See <http://www.ftc.gov/opa/2013/01/google.shtm>.

42 *Almunia*, <http://www.faz.net/aktuell/feuilleton/debatten/the-digital-debate/joaquin-almunia-we-discipline-google-12937515.html>.

43 See http://europa.eu/rapid/press-release_IP-14-116_en.htm; *Almunia*, http://europa.eu/rapid/press-release_SPEECH-14-615_en.htm.

44 See e.g. Article 16 and 17 CFR, OJ 2000, C 364/1.

access must harm consumers, for instance if it hampers innovation or prevents the appearance of a “new product” in this market, and (iv) the refusal to grant access must not be objectively justified.⁴⁵

The “indispensability” requirement refers to the essentiality of the facility for access to the downstream market. This requirement will be satisfied only if the facility can neither be duplicated nor substituted. According to the ECJ’s decision in *Bronner*, the relevant factor in this respect is not the specific party requesting access, but the question of whether a competitor which is as efficient the owner would be able, either alone or in cooperation with others, to produce the input essential to the access and whether there is no (including any less favourable) alternative access.⁴⁶ In its 2007 *Microsoft* decision, the GC emphasized that the assumption of an indispensable licensing is not subject to the requirement that competitors would be eliminated from the market right away without licensing. The GC held it to be sufficient if the customers expected the products of the other manufacturers to achieve a degree of interoperability comparable to that of the products of the owner in order to be able to survive in the market (“must be able to interoperate [...] on an equal footing”).⁴⁷ In the 2004 *Microsoft* case, access to the interoperability protocols was, according to the GC, indispensable for the competitors in order to compete with Microsoft. These protocols were an “essential facility” because there were no substitutes for this information and because Microsoft Windows was used by more than 90 % of the users who were locked in to Windows. Therefore, according to the GC’s ruling, the competitors needed access to these features of the Windows standard in order to exist.

Whether the same applies to the *Google* case, seems highly questionable. If we assume, *quod non*, that Google was dominant and that the relevant downstream market is the market for internet-based comparison shopping services, then the relevant platform or “essential facility” is not the Google Search web page, but the internet.

In this context, popular media often claim that those who do not appear on one of Google’s first organic search pages are virtually “invisible” on the internet. If that were true, then Google’s search engine could be deemed an “essential facility” to which suppliers of competing comparison shopping services need access if they want to sell their services on the internet – and to which they could thus force (paid for) access under the competition laws.⁴⁸

However, this is not the case. *First*, there are other search engines such as Bing, Yahoo! or DuckDuckGo, as well as specialized search engines to which users can easily switch. *Second*, websites of other undertakings can be visited directly without any cost or burden. Undertakings that have built up strong brand names such as “Amazon”, “Booking.com” or “Idealo” are easily found on the internet without the help of a(nother) search engine. Well-known brands get most of their traffic by direct user access and not through Google. *Third*, even if it were *harder* to locate comparison shopping services that do not appear on at least *one* major search engine, Google’s search engine does not control access to the internet merely because it is used particularly often. Competition law is not designed to sanction success in competition or to help less successful competitors.

Moreover, according to the European Court of Justice’s *Bronner* decision a service may be an “essential facility” only if refusal of access to it would “*be likely to eliminate all competition in the [downstream ...] market on the part of*

the person requesting the service”, which is not the case if *this market can be accessed by other means “even though they may be less advantageous”*.⁴⁹ Search engine links are clearly not the only way to advertise internet services. For example, vertical travel search engines such as “Expedia”, “Booking.com” or “HRS” also advertise extensively (and successfully) on TV and in other “offline media”. Comparison shopping services are free to do the same or, for example, to advertise on Google’s web page using AdWords.

In sum, Google clearly is not an “essential facility”.⁵⁰ Hence, Google is under no obligation to grant competitors access to Google Shopping or to the Google Search web page *at all* based upon application of Article 102 TFEU by way of the “essential facilities doctrine”.

Before this background, it seems to be quite bold to claim that a “diversion of traffic” constitutes an abuse in the meaning of Article 102 TFEU even in the absence of an essential facilities situation as the Commission seems to argue in its SO.⁵¹ While, according to the Commission, Microsoft actively *foreclosed* competitors from the essential Windows platform in the 2004 and 2009 *Microsoft* cases, Google did nothing to foreclose its competitors from the internet (which is the relevant platform in the *Google* case) or from competition on the downstream market. Rather, the Commission seems to accuse Google of *not sharing* the traffic that Google has generated by the quality of its search engine and other innovative services with its less successful competitors. At the minimum, such a novel theory of harm would require a meticulous scrutiny based upon very solid economic evidence. The Commission would have to show that “exceptional circumstances” exist which equal those of an essential facilities situation, and that Google’s “refusal to share” harms competition and consumers, and not only Google’s competitors. This seems rather unlikely. In its response to the SO, Google claims that the Commission falls short of these requirements and does not even back up its claim or provide a clear legal theory to connect it with the proposed remedies.⁵²

A fortiori, there is no basis for an obligation to equal treatment of competing comparison shopping services with regard to access to Google’s search web page or with regard to access to the Google Shopping service. The latter would seem particularly odd because Google Shopping is a service to consumers (on the search side) and to vendors (on the advertising side) and not to comparison shopping services. The vendors are treated equally, and the consumers expect that a click on a Google Shopping link leads them to a vendor and not to another comparison shopping services (which probably offers different results). The latter would be

45 ECJ 6.4.1995, Joined Cases 241 and 242/91, ECR 1995, I-743 para. 48 et seqq. – *Magill (RTE and ITP)*; ECJ 26.11.1998, Joined Cases C-7/97, ECR 1998, I-7791, at paras. 39 et seq. – *Bronner*; ECJ 29.4.2004, Joined Cases C-418/01, ECR 2004, I-5039, at paras. 34 et seq. – *IMS Health GmbH*. The “new product” requirement has up to now only been applied in cases which involved access to an intellectual property right.

46 ECJ 26.11.1998, Case C-7/97, ECR 1998, I-7791, at paras. 44, 43, 46 – *Bronner*.

47 GC 17.9.2007, Case T-201/04, ECR 2007, p. II-3601, at paras. 374 and 435 – *Microsoft*.

48 See e. g. ECJ, 26.11.1998, Case C-7/97, Rec. 1998, I-7791 – *Bronner*.

49 ECJ, 26.11.1998, Case C-7/97, Rec. 1998, I-7791 – *Bronner*, at paras. 41 et seq.

50 See also *Körber*, (2015) 36 E. C. L. R., 239, at page 241.

51 See <http://googlepolicyeurope.blogspot.de/2015/08/improving-quality-isnt-anti-competitive.html>.

52 See <http://googlepolicyeurope.blogspot.de/2015/08/improving-quality-isnt-anti-competitive.html> (August 27, 2015).

good for the competitors, but rather confusing and, at the minimum, inconvenient for the users.

In this respect, the Commission's allegation “that users do not necessarily see the most relevant comparison shopping results in response to their queries”⁵³ makes little sense, since users who use Google Search cannot (and do not) expect to find the “objectively” best results of all (more than 300) shopping comparison services on the internet. Rather Google users expect to see the best results according to Google's search algorithms, like Foundem users expect to see the best results according to Foundem's search algorithms. Each comparison shopping service uses its own indexes and algorithms. Therefore, the results (must) differ. This is an expression of *competition* among these services, and not of an abuse. Google Search is not “the internet”, and apart from that, there simply is no such thing as an “objectively correct search result”.⁵⁴

Moreover, Google may be able to crawl competing websites for search results, but it has no access to the competitor's indexes or algorithms. Hence, Google cannot evaluate the quality of the competitor's results. And even if Google could evaluate the competing services or their results, this would not help because Google would still have to decide, based upon its own algorithms, which results it considers to be the most relevant. If Google's own algorithms would not find their own results to be the most relevant, these algorithms would be flawed.

In short: As there is no such thing as an objectively “most relevant comparison shopping result”, it is simply impossible for Google to present such results to the users.

4. Remedies

Based upon what the press releases of the Commission thus far revealed, the Commission does not seem to have a strong case against Google. Yet, even if, we would assume that the Commission was right and that it could prove an abuse, the Commission's (quite vague) suggestions with regard to the necessary remedies do not seem appropriate. The Commission requests that

*“Google should treat its own comparison shopping service and those of rivals in the same way. This would not interfere with either the algorithms Google applies or how it designs its search results pages. It would, however, mean that when Google shows comparison shopping services in response to a user's query, the most relevant service or services would be selected to appear in Google's search results pages”.*⁵⁵

While the Commission ultimately leaves it to Google how to achieve “equal treatment”, it is hard to see how such a remedy would not interfere with both the algorithm that Google applies, or how it designs the search result page. It requires Google to extend the general algorithm to ads and to specialized search results (the relevance of which is determined by different signals). That surely makes changes to the algorithms unavoidable and stands in stark contrast to the position that former Commissioner *Almunia* expressed in an open letter on May 13, 2014:

“We cannot tell Google how it should organise its page. Requiring that Google has to treat its own specialised services in the exact same way as the services of its competitors would mean that, depending on the results of the algorithm, Google's own services might not appear on its own page. This would certainly be an unprecedented constraint imposed on a company by an antitrust authority. Our role is not to prevent

*Google from innovating and trying to meet users' needs by developing and offering new services. This would not be in the users' best interest. Our role is to ensure that Google does not prevent competitors from doing the same”.*⁵⁶

With regard to Google Product Search, the remedies proposed by the Commission lead to nothing, because this service was discontinued by Google in May 2012. With regard to Google Shopping these remedies do not seem appropriate either, *first*, because (other than the Google Product Search box) the Google Shopping box never was part of the organic search results list. It is an ad service comparable to AdWords. Thus, there can be no “equal treatment” with regard to the *organic search results list*.

Second, the links in the Google Shopping box lead to vendors, not to comparison shopping services. Hence, there is no basis for “equal treatment” with regard to the Google Shopping box either; in fact, commitments by Google to show links to three selected competing services within the Google Shopping box were rejected by the Commission.

Third, an “equal treatment” requirement with regard to the Google Search web page would, in effect, mean that Google has to advertise competing services on its web page even though Google Search is not essential facility, and in spite of the fact that not even owners of essential facilities have to share their facility without just compensation.

If we disregard these objections, an “equal treatment” requirement could be fulfilled in four ways, none of which seems acceptable:

- *Remedy 1:* Each of the (supposedly more than 300) competing comparison shopping services gets a similar box that must (like the Google Shopping box) be placed above the organic search results list. Regardless of the question of ranking, this would mean that users would have to click through 30 pages of pure advertising before they reach the first organic search results. This is obviously not acceptable.
- *Remedy 2:* The Google Shopping box and selected results of other comparison shopping services are presented above the organic search results list. This remedy repeats the Google commitments that were rejected by the Commission (apart from the placement of the competitor's links in their own boxes), and raises questions about the mechanism of the selection of results, for which the underlying currently existing algorithms would need to be changed. The question of payment of that rival to Google for valuable page “real estate” (which is dedicated to ads) would also need to be resolved.
- *Remedy 3:* Only the single best comparison shopping service is presented above the organic search results list. This remedy is not viable, *first*, because it is impossible to determine which service offers “the objectively best results” when each service uses different criteria, different suppliers disagree on which results are the best, and, last but not least, different users have different preferences as well. *Second*, as former Commissioner *Almunia* underscored in his open letter, it would clearly be unacceptable for Google to only show results of competitors and not of

53 Comm., http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm.

54 See also Körber, (2015) 36 E. C. L. R., 239, at pages 242 et seq. with regard to internet search in general.

55 Comm., http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm (partial bold print removed by the author).

56 *Almunia*, <http://www.faz.net/aktuell/feuilleton/debatten/the-digital-debate/joaquin-almunia-we-discipline-google-12937515.html>.

its own service. Moreover, like with regard to remedy 2, the question of adequate compensation remains.

- *Remedy 4*: Google completely removes Google Shopping from the European Google Search web pages. Considering the course of the commitment negotiations, this remedy seems to be the only realistic outcome if the Commission could prove an abuse.

Remedy 4, like the others, would obviously not be in the best interest of the European consumers because it would not only deprive them of Google Shopping. They would potentially lose access to other search innovations that Google has introduced in the past years. If Google would be subject to a general “equal treatment” remedy (as if Google Search was an essential facility), a Sword of Damocles, including the risk of high fines, would hang over all product innovation on Google’s side, in particular above all Universals and ads similar to Google Shopping.

While the SO only covers Google Shopping, the Commission’s investigation against Google is also aimed at other

specialized services which are beneficial to users (i.e. that an address query leads to results with a map or that a query for a flight presents results of available flights for that city pair). The Commission has already announced that it will extend its theory of harm to other services.⁵⁷

In the end, Google might be forced to revert its European search pages to displaying just naked “blue links” like before 2007 in order to avoid being effectively punished for out-competing European undertakings. This would not only be harmful to innovation and to the consumers, but, as former Commissioner *Almunia* put it, it would also “*certainly be an unprecedented constraint imposed on a company by an antitrust authority*”⁵⁸ – and not the Commission’s “next big thing”. ■

⁵⁷ See <http://www.wsj.com/articles/eu-deepens-antitrust-investigation-into-googles-practices-1440178863>.

⁵⁸ *Almunia*, <http://www.faz.net/aktuell/feuilleton/debatten/the-digital-debate/joaquin-almunia-we-discipline-google-12937515.html>.
