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The Challenges involved with the Application of Article 102 TFEU to the New Economy And the implications for the Google case

Joyce Verhaert, LL.M, KU Leuven
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ABSTRACT

On both sides of the Atlantic, the European Commission as well as the US Federal Trade Commission, have been investigating various business practices of Google. In addition, Google has also drawn the attention of several National Competition Authorities across Europe. This is the first time that Article 102 of the Treaty on the Functioning of the European Union (TFEU) has been applied to a search engine. As a result, the examination involves intricate issues related to specific characteristics of markets within the New Economy in which search engines operate. The investigation into Google’s behaviour has raised the question whether established competition law principles and instruments are fit to address the challenges posed by the specific characteristics of the New Economy on competition analyses. The aim of this contribution is to research the challenges that emerge when conducting antitrust analyses involving the market for search engines as part of the New Economy and the implications for the competition case against Google. Recommendations will be made as to how the dynamic considerations should be taken into account when assessing Google’s position.

1 Joyce Verhaert, LL.M., is currently working as legal researcher at the Interdisciplinary Center for Law and ICT (ICRI), KU Leuven.
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I. INTRODUCTION

On both sides of the Atlantic, the European Commission as well as the US Federal Trade Commission, have been investigating various business practices of Google. In addition, Google has also drawn the attention of several National Competition Authorities across Europe. This is the first time that Article 102 of the Treaty on the Functioning of the European Union (TFEU) has been applied to a search engine. As a result, the examination involves intricate issues related to specific characteristics of markets within the New Economy in which search engines operate.

The investigation into Google’s behaviour has raised the question whether established competition law principles and instruments are fit to address the challenges posed by the specific characteristics of the New Economy on competition analyses.

The aim of this contribution is to research the challenges that emerge when conducting antitrust analyses involving the market for search engines as part of the New Economy and the implications for the competition case against Google. Recommendations will be made as to how the dynamic considerations should be taken into account when assessing Google’s position.

II. THE GOOGLE CASE: A STATE OF AFFAIRS

A. EUROPEAN COMMISSION

After the filing of complaints by seventeen undertakings, among which Microsoft and Oracle, the European Commission announced in November 2010 that it was investigating whether Google had, in breach of EU competition law, abused a dominant market position in online search.2

In its preliminary assessment of 13 March 2013, the Commission has outlined four competition concerns about Google’s business practices in search in Europe. From these four concerns, the Commission has deducted four business practises which may violate Article 102 TFEU: (1) the favourable treatment, within Google’s horizontal Web search results, of links to Google’s own vertical Web search services as compared to links to competing vertical Web search services; (2) the use by Google, without consent, of original content from third party websites in its own vertical Web search services; (3) agreements that de jure or de facto oblige websites owned by third parties (referred to in the industry as ‘publishers’) to obtain all or most of their online search advertisement requirements from Google; (4) contractual restrictions on the management and transferability of online search advertising campaigns across search advertising platforms.3

Although the first and second packages were found insufficiently effectively dealing with the competition concerns raised by Google’s behaviour, Commissioner Almunia announced last February (rather sudden) to accept Google’s third

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2 Angela Daly, Recent issues for competition law on the Internet: Google’s Search and Advertising, the Apple App Store, and the AOL Huffington Post Merger. Presented at the 5th Competition Law and Economics European Network (CLEEN) Workshop, European University Institute, 9-10 May 2011.

3 Ibid.
package of remedies and that he would be proposing to the Commission to adopt a decision settling the case against Google without a formal finding of an infringement or the imposition of fines. In its proposal, Google guarantees that whenever it promotes its own specialised search services on its web page, the services of three rivals, selected through an objective method, will also be displayed in a way that is clearly visible to users and comparable to the way in which Google displays its own services. Although facing mounting pressure to reconsider aspects of its settlement with Google\textsuperscript{4}, the Commission is now preparing the formal process for rejecting the complaints and making a final decision on whether to make Google's proposal legally binding.

This settlement does, however, not necessarily mean the end of the Google-case in the European Union. The complainants could challenge the Commission’s decision and appeal to the General Court of Justice which has the power to overrule the decision of the Commission.\textsuperscript{5} Although commitment decisions are rarely challenged, the chance in this case is greater than normal. German online mapping services Euro-Cities already expressed its dissatisfaction with the Commission’s decision and announced that it would take its grievance to the courts.\textsuperscript{6}

The European agreement does, however, go a great deal further than a similar settlement Google reached with the Federal Trade Commission, which sought only minor concessions from the company.

B. FEDERAL TRADE COMMISSION

In addition to Europe, Google has also been the subject of several antitrust investigations in relation to alleged abuse of market power in the United States. The company confirmed in June 2010 that it was under investigation by the Federal Trade Commission.\textsuperscript{7} The top Democrat and top Republican on the Subcommittee encouraged the FTC to focus the investigation on search bias.\textsuperscript{8} Next to unfairly promoting its own competing vertical properties, competitors suggested that Google is free-riding off their content when the search engine points users to newspapers and to other sites willingly indexed by Google, that it is deceiving users about its search-engine results, and that Google is apparently engaging in

\textsuperscript{4} Other members of the European Commission, including Viviane Reding, Michel Barnier and Günther Oettinger, presumably complained in closed-door meetings that Almunia announced the Google settlement without fully consulting them beforehand. As a result, the competition chief, now needs to appear before a European Parliament committee to explain the commission’s deal with the search giant.

\textsuperscript{5} This has also happened in the case against Thomson Reuters. After the Commission settled with Thomson Reuters following an investigation launched in 2009 over the firm’s lack of rewriting codes, resulting in customers potentially being locked-in to working with the company, Morningstar released a statement on 13 February 2014 announcing its request to the EU General Court, asking it to “reconsider its decision to exclude real-time data feed providers – such as Morningstar – from the scope of the remedy.”

\textsuperscript{6} Foo Yun Chee, “Google avoids fine with EU antitrust deal”, Reuters (5 February 2014) available at http://www.reuters.com/article/2014/02/05/us-eu-google-idUSBREA140NO20140205 [Accessed March 10, 2014].


exclusionary exclusive deals and acquisitions by outbidding the similarly deep-pocketed Microsoft. In order to address this alleged behaviour, they proposed almost two dozen remedies.⁹

The FTC conducted an extensive investigation into search bias and in particular evaluated Google’s introduction of Universal Search in order to determine whether Google used that product to reduce or eliminate a nascent competitive threat. The FTC, however, 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.¹⁰

In January 2013, the Federal Trade Commission voted, as a result, to close the twenty months lasting investigation in return for an unprecedented voluntary agreement to cut restrictions it places on advertisers’ ability to transfer data from ad campaigns to competing platforms, and to curtail Google’s unauthorized use of content from sites like Yelp and TripAdvisor in its own specialized search pages.¹¹ The investigation was closed, finding that the evidence did not support a claim that Google’s prominent display of its own content on its general search page was undertaken without legitimate justification: “While not everything Google did was beneficial, on balance we did not believe that the evidence supported a FTC challenge to this aspect of Google’s business under American law.”¹²

The FTC, however, does accept Google’s binding commitment to stop the most problematic business practices relating to its search and search advertising business. Google has committed to stop misappropriating – or “scraping” – the content of its rivals for use in its own specialized search results. Google will also drop contractual restrictions that impaired the ability of small businesses to advertise on competing search advertising platforms.¹³

III. THE MARKET FOR SEARCH ENGINES AS PART OF THE NEW ECONOMY

The New Economy encompasses high-tech industries and describes a diverse array of markets in which new information, communication and other technolo-

¹³ Ibid.
gies have produced significant changes in recent decades. It generally refers to the manufacturing of computer software, Internet-based business and communications services and equipment designed to support the first two. Although there does not seem to be one definition or description of the New Economy, in literature there is general agreement on its distinguishing characteristics.

A. THE MARKET FOR SEARCH ENGINES

As the Internet grew exponentially, the need for users arose for an easy way of finding the information that they needed. Search engines are also referred to as the virtual gatekeepers of cyberspace as they filter the abundance of information on the World Wide Web and determine the access to this information as they function as a tool to navigate and help users locate publicly available content on the Internet. As described by Grimmelman, the essence of a search engine is the combination of information about content with user queries to provide recommendations to users who can then find the content. Undoubtedly, search engines are part of the New Economy.

The market for search engines has witnessed rapid growth during the last few decades, from nil in the nineties to a multi-billion dollar business today. Search engines and search engine–based portals are some of the most visited web pages in the market. According to Telang, search engines are the most important promotional method used by e-commerce sites. They represent the most common way web pages are come across by users. Users spend a lot of time finding relevant information through search engines.

Also on the supply side, this market went through a lot of changes. The market has witnessed the entry of different search engines with both lower-quality and higher-quality engines. At present, there are many engines active on the market, despite the presence of a few well-established ones such as Google and Yahoo!.

These general or horizontal search engines must be distinguished from vertical or specialised search engines, which focus on a specific segment of online content. Contrary to general search engines, specialised search engines focus on niche markets, for instance travel. These specialised search engines are on the rise as they were designed to deliver very particular searcher needs. In 2011 ten times as many product searches were being executed on Amazon and eBay, both vertical sites, compared to Google, a horizontal search engine. While the use of general

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18 Ibid.
19 Ibid.
search engines declined 3% in 2012 in the United States, vertical searches went up 8% and as of January 2012 in the US, more than 35% of all searches occurred on non-search engines, signalling an increase in search activity on vertical, e-commerce and shopping comparison sites.\textsuperscript{22}

Also social networks impose competitive constraints as social media websites, such as Facebook, are becoming an important starting point for accessing the web. Over the past two years search navigation has appeared to shift to social media. Social media has not only changed the way consumers communicate on the Internet, but also impacted content discovery and navigation.\textsuperscript{23} Facebook provides a search service powered by Bing, which enhances the threat that both Bing and Facebook represent to Google. Moreover, Facebook has introduced at the beginning of 2013 the so-called graph search function.\textsuperscript{24} Also, consumers look increasingly for offers, for instance on Facebook and buy from Facebook merchant pages.\textsuperscript{25}

B. CHARACTERISTICS

Markets within the New Economy – and therefore also the market for search engines – differ considerably from traditional ones. They are firstly characterised by very high rates of rapid technological progress, both in terms of creating new products and platforms, and in terms of significantly reducing production costs.\textsuperscript{26} As a result of this rapid innovation, high tech industries often have more dynamic effects than other industries, meaning that they can reduce costs by refining existing products, processes and capabilities.\textsuperscript{27} Search engines operate within this innovative economy. As a result, a certain level of innovation is required to be able to enter the market. Also, search engines need to constantly invest to keep improving their technology in order to survive.\textsuperscript{28}

Secondly, New Economy markets are inclined to have high fixed or sunk costs and low marginal costs of production, because developing a new and innovative product requires large investment. Once these initial investments have been made, the incremental costs of reproducing are relatively low, sometimes even negligi-


\textsuperscript{24} Which makes it possible to search for example for “What new music should I listen to?”, “Where’s the best sushi place in town?” and “How do I learn to play the piano?”


\textsuperscript{26} Aysem Diker Vanberg, From Archie to Google - Search engine providers and emergent challenges in relation to EU competition law, European Journal for Law and Technology 3(1) (2012), p. 4.

\textsuperscript{27} Ibid.

\textsuperscript{28} OECD Competition Committee, Competition Policy and Policy and Knowledge-Based Capital (2013).
Companies that deal with high fixed costs often need to price significantly above marginal costs in order to earn a competitive return in the long run. As a result, a central pricing strategy for these companies will be price discrimination. In addition, in order for dynamic competition to exist in high tech industries there is a need for a rational expectation of significant market power for a reasonable period of time. Also, New Economy markets tend to be highly concentrated as a result of the high costs that are involved with market entry.

New Economy industries are then characterised by network effects, also called network externalities or demand-side economies of scale. Direct network effects arise where users of a product interact with each other, for example a social network: a larger number of users increases its utility. Indirect network effects arise where high usage rates for one product increases the attractiveness of that network for another group, which in turn results in indirect benefits for users of the original product. The classical example is that of a fax machine. Network effects are generally considered beneficial, although there is some dispute over whether and under what conditions they might also raise exclusionary concerns for network effects have important implications for market structure: they tend to reinforce the position of market leaders and may therefore contribute to a company becoming dominant. Network effects also play a role in the market on which Google is active as additional users of its search engine increases the value of its advertising platform. This also implies that Google operates a two-sided platform.

Markets in the New Economy often include two- or multi-sided platforms which can be distinguished from more traditional one-sided markets, where a company provides goods and services to different types of customers which are not interdependent. Search engines, on the other hand, operate a two-sided platform serving both search users for free and advertisers for remuneration.

Many industries benefit from increasing economies of scale, or increasing returns: the average cost per unit decreases as sales increase. Economies of scale in conjunction with network effects will generally result in a single firm with lowest costs and a large share of the market. In the New Economy, particularly search engines benefit from supply-side economies of scale as their business model tends to rely on volume impact, distributing electronic content and services at low marginal cost and high unit margins.

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31 Ibid.
32 OECD, *The Economic and Social Role of Internet Intermediaries* (2010).
36 Ibid.
37 OECD, *The Economic and Social Role of Internet Intermediaries* (2010).
38 Ibid.
IV. AN INTRODUCTION TO ARTICLE 102 TFEU

Article 102 TFEU, the European counterpart of section 2 of the Sherman Act on which the investigation of the FTC into Google’s behaviour was based, prohibits the abuse of a dominant position by one or more undertakings within the common market. It reads as follows:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

a) directly or indirectly imposing unfair purchase or selling prices or other 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.

The first step when applying Article 102 TFEU is to define the degree of economic power, in other words: dominance. In order to determine whether an undertaking is dominant within the meaning of Article 102 TFEU, a two-stage procedure is involved. Firstly, the relevant market needs to be defined as the concept is only meaningful in relation to an actual market. This assessment is undertaken with regard to the relevant product and geographic markets in relation to which market power may be found to exist. Secondly, the identification of market power itself.

A. DOMINANCE

The treaty does not contain a definition of dominance. As a result, it is left to the Commission – subject to the control of the Court – to determine whether a dominant position exists. In Sirena v. Eda, the European Court of Justice (ECJ) defined dominance as the ability or power to prevent effective competition in an important part of the market, considering the position of producers or distributors of similar products. In Michelin v. Commission, the Court clarified the definition of dominant position: “It exists when an undertaking enjoys a position of economic strength enjoyed by an undertaking which enables it to hinder the

maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers” and “(...) very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.”

A position of economic strength may be the result of several elements such as high market shares, barriers to entry and economies of scale. As a result, dominance is the power to hinder effective competition, which means the power to behave independently in the market.

Since United Brands v. Commission, the Court uses a standard definition for dominance: “Undertakings are in a dominant position when they have the power to behave independently without taking into account any substantial extent, their competitors, purchasers and suppliers. (...) It is not necessary for the undertaking to have total dominance such as would deprive all other market participants of their commercial freedom, as long as it is strong enough in general terms to devise its own strategy as it wishes.”

1. Market Definition

In order to define the relevant market, first the scope of the market needs to be outlined, in order to limit it to a manageable number of products or services and undertakings.

Market definition focuses on consumer needs and identifies product substitutability in case the product concerned become more expensive. The relevant market includes all products with which there is a sufficient degree of substitutability and thus which with the product in question may compete.

The case law of the ECJ points out that market definition is, in essence, a matter of interchangeability. This also follows from the Commission’s Notice.

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45 Court of Justice Case 85/76, Hoffmann-La Roche & Co. AG v. Commission (Vitamins), 13.2.1979 ECR 461, para 41.
49 Ibid.
50 Kwangkug Kim, Competition Law in the New Economy Industries: Is the Current Competition Analysis Adequate to Protect Consumers in the New Economy Industries (2012). Published thesis (M.Phil), University of Manchester.
Goods or services that can be regarded as interchangeable are within the same product market.\(^{54}\) This is addressed by looking at the demand sides as well as the supply sides of the market.\(^{55}\)

The Commission’s Notice explains that the relevant product market is defined as follows: ‘A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.’\(^{56}\)

As stated by the Commission’s Notice, the assessment of demand side substitution entails a determination of the range of products, which are viewed by consumers as substitutes. The Notice introduces the so-called Small but Significant Non-transitory Increase in Price (SSNIP) test or hypothetical monopolist test, whereby it becomes possible to determine whether particular products are within the same market. This test works as follows.\(^{57}\) When applying this test, a hypothetical small (5-10%), permanent change in price is supposed. Then, the likely reactions of consumers to that increase are evaluated:\(^{58}\) are the consumers inclined to switch products or not? Craig and De Búrca take as an example the increase in the price of beef. Will this lead consumers to switch in significant numbers to lamb or pork? Cross-elasticity is high when the increase in the price leads consumers to switch. The existence of high cross-elasticity indicates that the products are part of the same market.\(^{59}\)

Also factors on the supply side may affect the degree of product. This means that even if undertakings are producing different products it may be relatively simple for one undertaking to adapt its machinery to make the goods produced by the rival without incurring significant additional costs or risks in response to small and permanent changes in relative prices. In these circumstances, the two products may be regarded as to be part of the same market.\(^{60}\) Even if, for a customer, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell


\(^{58}\) Commission notice on the definition of the relevant market for the purposes of Community competition law, para 15.


the various qualities immediately and without the significant increases in costs described above.  

In the Commission’s Notice the example of paper is given. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, for instance an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market value and volume.  

In addition to the product market, also the relevant geographic market needs to be defined. The Commission’s Notice defines the relevant geographic market as follows: “The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.”  

According to Craig and De Búrca, the geographic market is defined as the territory in which all traders operate in the same or sufficiently homogenous conditions of competition in relation to the relevant products or services, without it being necessary for those conditions to be perfectly homogenous. As a result, the SSNIP-test can also be applied to the description of the geographic market: if the price of beef in the Netherlands would be permanently raised by a small but significant amount, would consumers switch to suppliers in Belgium? If an undertaking is able to increase its price and keep its customers, “this would mean that the market would be worth monopolizing; prices could be raised profitably, since there would be no competitive restraint.”  

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61 Commission notice on the definition of the relevant market for the purposes of Community competition law, para 20–23.
62 Commission notice on the definition of the relevant market for the purposes of Community competition law, para 22.
63 Commission notice on the definition of the relevant market for the purposes of Community competition law, para 8.
2. **Market Power**

After defining the market, it is necessary to assess whether the undertaking in question is dominant within that sphere. Therefore, measurement of market power is necessary.

Market power refers to the ability of an undertaking to limit output, raise price above marginal cost and deprive consumers of choice and influences innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time. Competition authorities have to show that the firm is likely to be able to defeat the challenges posed by potential competitors in order to prove dominance.

Market definition provides for a framework within which this assessment should be performed. There are three factors that need to be taken into account for this assessment: 1) market shares, 2) barriers to expansion and entry and 3) buyer power. The Discussion Paper on the application of Article 82 (now: Article 102) of the Directorate-General for Competition of the European Commission (DG COMP) states that for dominance to exist the undertaking(s) concerned must not be subject to effective competitive constraints. In other words, it thus must have substantial market power.

3. **Substantial Part of the Common Market**

In order for Article 102 TFEU to apply, the dominant position must be held in a substantial part of the common market. Imagine an undertaking is dominant in only one Member State or in a part of a Member State, can this be considered as a substantial part of the common market? The Suiker Unie-case indicates that the question relating to substitutability is not simply one relating to physical size of the geographical market to the European Union as a whole. The court considered the ratio of the volume of Belgium and South German production of sugar to Community production overall and concluded accordingly that each of those markets could be considered as substantial. According to Whish, it is likely that each

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67 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, para 24.
71 The DG Competition has a dual role in antitrust enforcement: an investigative role and a decision-making role.
72 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, para 22-24.
Member State would be considered to be a substantial part of the common market. Furthermore, in *Suiker Unie* it was established that parts of a Member State can constitute as a substantial part. Neither the Community Courts nor the Commission have laid down any particular percentage of the common market as a whole that is critical in determining what is substantial.75

B. **ABUSE**

Once it has been established that an undertaking has a dominant position in a substantial part of the common market, it is necessary to consider what constitutes an abuse of that position as dominance in itself is not an offence, only the abuse of market power is punishable under Article 102 TFEU.

Abusive behavior must be distinguished from normal competitive strategy. There is no definition available of what is meant by an abuse of a dominant position. In the case of *Hoffman-La Roche v. the Commission*76, the ECJ described abuse as follows: “An objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

Moreover, Article 102 TFEU contains a non-exhaustive list of practices that are considered abusive: (a) directly or indirectly imposing unfair purchase or selling prices or other 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.

As for abusive conduct, a distinction is made between exploitative (directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions)77 and exclusionary abuses (i.e. exclusive dealing agreements, tying, refusal

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to supply, bundling, margin squeeze, price discrimination) which is aimed to foreclose competitors from the market.\textsuperscript{78}

The case law of the ECJ states that while a finding of dominance does not in itself imply any reproach, the undertaking nonetheless has a ‘special responsibility’, irrespective of the cause of that position, not to allow its conduct to impair genuine and undistorted competition on the common market.\textsuperscript{79} The concept of special responsibility was first mentioned in the \textit{Michelin I case}\textsuperscript{80} and later repeated in judgements of the Community Courts and decisions of the Commission on Article 102 TFEU.\textsuperscript{81}

This special responsibility of a dominant firm becomes even greater and the finding of abuse more likely, where the undertaking under investigation is not merely dominant but ‘enjoys a position of dominance approaching a monopoly’.\textsuperscript{82} The concept of super-dominance was first used by Advocate General Fenelly in the case of \textit{Compagnie Maritime Belge}, where members of a liner conference held a 90% market share. The Advocate General argued that a superdominant company has a duty not to preclude competition in the market. The term super-dominance was however not adopted by the Court. Instead the Court reverts back to the language of special responsibility. In \textit{Tetra Pak II}\textsuperscript{84} the Court refers to a position of quasi-monopoly whereas in \textit{Irish Sugar}\textsuperscript{85} the Court of First Instance refers to the extensive dominant position.\textsuperscript{86}

As pointed out by Craig and De Búrca, the consequence of this special responsibility is that an undertaking in a dominant position may be deprived of the right to adopt a course of conduct which is not in itself abusive and which would be unobjectionable if taken by a non-dominant undertaking.\textsuperscript{87} As a result, “while it is accepted that a dominant undertaking can take steps to protect its own interests

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\textsuperscript{78} \textit{Ibid}, p. 200-205.  \\
\end{flushright}
when they are attacked by competitors, it is not allowed to strengthen its dominant position, which will be held to be an abuse.”

V. ARTICLE 102 TFEU APPLIED TO THE NEW ECONOMY

As described earlier, markets within the New Economy differ considerably from traditional ones. These distinct dynamic characteristics of the New Economy pose a set of challenges on competition analyses. Both lawyers and economists agree, as a result, that a new way to approach competition law is required: market definition and the assessment of market power should be dealt with differently in New Economy markets.

Jorde and Teece predicted that “antitrust policy in the 1990’s will be shaped more by concerns about innovation and competitiveness than in any other period in recent history” and worried that “the analytic lenses still commonly employed today in antitrust analysis were more suitable in a world where competition was less global, where innovation was less of a multinational phenomenon, and where time to market was less critical.” According to Ahlborn, one size does not fit all and therefore antitrust analysis should be tailored to the special characteristics of high tech sectors to reflect the dynamic nature of competition and the key role of innovation in dynamically competitive industries.

Diker Vanberg goes a step further by stating that Article 102 TFEU, in its current form, is not well suited for dealing with dynamic industries like search engines. She substantiates this proposition with two arguments. Firstly, despite reform attempts, Article 102 is still not based on economic analysis. Second, in line with Posner he points to the institutional problems due to the characteristics of search. “Due to the innovative and fast paced nature of the search industry there is a need for speedy solutions to competition problems. However, an antitrust case involving high tech industries might take so long that given the fast paced

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88 Ibid.
89 Kwangkug Kim, Competition Law in the New Economy Industries: Is the Current Competition Analysis Adequate to Protect Consumers in the New Economy Industries (2012). Published thesis (M.Phil), University of Manchester.
94 Kwangkug Kim, Competition Law in the New Economy Industries: Is the Current Competition Analysis Adequate to Protect Consumers in the New Economy Industries (2012). Published thesis (M.Phil), University of Manchester.
nature of the industry the decision itself may become irrelevant and ineffectual. By the time Commission and the courts finalise the case, the company in question might lose its dominant position.

Dolmans and Leyden state that new business models made possible by the Internet require the European Commission, National Competition Authorities and courts to refine and adapt well-worn antitrust principles for use in this new context. They also point out that market definition and dominance analysis are complicated by the fact that online services inhabit a particularly dynamic competitive space, and consumers and advertisers can relatively easily switch and multi-home: “Competition is cutthroat. The lines between categories (such as “general search”, “vertical search”, “social networking search”, “product comparison”, etc.) are constantly moving, while at the same time online services continue to compete against their “real-world” equivalents (for example, as the Commission recognized in Microsoft/Yahoo, online search engines may compete against online directories or even offline search formats).

A. MARKET DEFINITION IN NEW ECONOMY MARKETS

Traditional market definition focuses on demand side substitutability. Markets within the New Economy are, however, not ruled by static but dynamic competition as competition in these industries is not dominated by price but innovation. As a result, when traditional methods for market definition are applied – and the two-sidedness of the market is not taken into account – it is ignored that the platform in question operates with two-markets whose prices and profits are linked which may lead to incorrect market definitions in dynamically competitive industries. An assessment of product substitutability will make the market seem narrower than it actually is which could lead to the (incorrect) conclusion that an undertaking is dominant, whereas in reality the undertaking involved may be under severe competitive constraints. The implications of an incorrect finding of dominance cannot be underestimated. The special responsibility imposed on dominant undertakings may result in the prohibition of welfare-enhancing actions if

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they hurt competitors’ profits and it may prevent companies with high market shares but which are under the threat of entry from competing actively on a level playing field with their current and future competitors.\textsuperscript{102} Also, imposing unjustly conditions on undertakings could erode incentives for innovation and stifle technical progress.\textsuperscript{103} The practical implications with respect to market definition of the two-sidedness of markets in the New Economy should therefore be taken into account.\textsuperscript{104}

Standard tools, such as the SSNIP-test, must be adapted to the two-sidedness of markets within the New Economy.\textsuperscript{105} This has also been recognised by the OECD\textsuperscript{106} — referring to Commission cases Google/DoubleClick\textsuperscript{107}, Microsoft/Yahoo! and Deutsche Börse/NY Stock Exchange — and the French National Competition Authority in its Opinion on the competitive operation of online advertising.\textsuperscript{108}

The SSNIP-test tries to identify short term demand substitutability by posing a small but significant price rise, but the high technology markets of the New Economy are characterized by dynamic competition, where the threat to existing products comes from new products. Declaring that a firm has market power if it can sustain a significant but non-transitory price increase therefore neglects the performance dimension of competition.\textsuperscript{109} In addition, it is partially difficult to apply the traditional SSNIP-test because online services are generally made available for free to the end user.\textsuperscript{110,111}

\textsuperscript{102} Ibid, p.27.
\textsuperscript{105} Ibid, p. 18.
\textsuperscript{106} OECD (2012) Round table on market definition.
\textsuperscript{107} This case concerned the merger of Google and DoubleClick, both active in the field of online advertising: Google providing online advertising space and DoubleClick sold ad serving services.
\textsuperscript{108} Autorité de la concurrence Opinion No 10-A-29 of 14 December 2010 on the competitive operation of online advertising, para 108.
\textsuperscript{110} Dolmans and Leyden in this light refer to the decision of the Paris Commercial Court in the case of Bottin Cartographes v. Google, where Google’s offer of some of its Google Maps services was condemned as being predatory, on the ground that they are made available to consumers for free (and therefore by definition at a price below Google’s average variable costs). The Court did not take into account the two-sided nature of Google’s market and did also not analyse whether Google covered its costs through sales of advertising. According to the authors, the analysis calls into question the essence of the advertising-funded business model in multisided markets that has spurred recent innovation in online services, enabling countless new web services to be made available for free to consumers.
Next to the “free product” problem, the unequal pricing pattern makes the standard market definition analysis tools unfit for purpose. In regard of the two-sidedness it is difficult to determine from which number the 5-10% should be derived to examine the effects on the market for the complimentary product, such as search services. It cannot be based on the actual price of zero that applies to Internet searches, as this would result in a price increase of zero.

The European Commission recognizes this difficulty and is of the opinion that great care will have to be exercised in using the SSNIP-test to determine whether or not an incumbent has a dominant position for the purposes of Article 102 TFEU. The Commission does, however, not propose concrete suggestions for dealing with the problem.

B. MARKET POWER IN NEW ECONOMY MARKETS

Market shares play an important role in determining market power. They should, however, not be blindly used as indicators of market power in New Economy markets. This has also been recognised by the European Commission in the Microsoft/Skype merger case which statement was recently confirmed by the Court of Justice of the European Union: “In [...] a dynamic context, high market shares are not necessarily indicative of market power”.

Markets within the New Economy are typically populated by monopolists or oligopolists. Since incumbents are under the permanent threat of entry and are only able to keep their leading position if they continue to innovate high market shares are often not a good benchmark for market power. Focusing on market shares fails to acknowledge the dynamics of markets in the New Economy and equating high market shares with dominance in dynamic industries is therefore particularly problematic.

According to Almeida, one needs to depart from the common practice of assuming that all undertakings act as price takers in an environment of perfect competition. Pleatsikas and Teece emphasize the need to take into account the full competitive environment and the constraints that it places on any alleged antitrust violation or inquiry.

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113 Ibid.
116 Consideration 67.
118 Ibid.
Almeida suggests that antitrust authorities should look forward at innovation implications of business behaviour. Furthermore, “an essential element of market power analysis is an examination of actual and potential innovative threats to leading undertakings, which cannot be a simple exercise in drawing boundaries and computing shares or even looking at traditional barriers to entry, which concern non-innovative entry. It generally involves the exercise of judgment regarding the likelihood of future races for market dominance and the likely nature of those races. There is no guarantee that such races will continue in any industry, but neither does the absence of a visible race at any particular point in time imply that dynamic competition is at an end.” By extension, in his opinion there is no economic sound basis for treating leading undertakings in this context as if they had the kind of a durable market position given the fragility of market leadership positions. He, however, acknowledges that this is not an easy undertaking since the “road map” for identifying and assessing innovation effects is less developed.¹²²

Evans and Schmalensee argue that the analysis of market power in the New Economy should consider the vulnerability of leading undertakings to entry powered by drastic innovation, not just to the entry of undertakings producing equivalent products with known processes.¹²³ This kind of analysis may require a difficult judgment about the likelihood of disruptive innovations in the future, but by simply assuming that such innovations cannot occur ignores history and imparts substantial and obvious bias to market power examinations in important sectors.¹²⁴

According to Messina the dynamism of the New Economy can cancel out dominance as dominance achieved is always temporary. Almeida in this respect: “in the New Economy where undertakings are generally exposed to fierce competition, network effects and immense product innovation whereby their positions change in an unpredictable way and speed”¹²⁵ According to some commentators, therefore, antitrust enforcers need to be aware of the self-corrective nature of dominance in New Economy industries.¹²⁶

VI. HOW TO APPLY ARTICLE 102 TO THE GOOGLE-CASE?

As concluded earlier, the specific characteristics of the market for search engines needs to be taken into account when applying Article 102 TFEU and they also need to lead to an adjustment of the traditional approach to market definition and the assessment of market power. The consequences of these findings for the competition case against Google will be discussed below and answer will be giv-

¹²³ Ibid.
¹²⁵ Rafael Alves de Almeida, Market dominance in the New Economy, Revista DIREITO GV 4 2(2) (2006).
en to the question whether the approach of National Competition Authorities and the European Commission hitherto needs adjustment when considering the specific characteristics of the market in which Google operates. Also, how should Google’s market be defined, is there a role for the SSNIP-test, and how to assess Google’s market power?

A. DEFINING GOOGLE’S RELEVANT PRODUCT MARKET

The challenges posed by the specific characteristics of the market for search engines as part of the New Economy raise the question how competition authorities should go about defining Google’s two-sided market and what relevant product and geographic market(s) should be defined by the European Commission with regard to Google’s alleged dominance.

1. The How

When assessing Google’s position, competition authorities need to take into account the two-sidedness of Google’s market. Google is a matchmaker connecting advertisers and searchers. The advertising revenues financing for a large part the search results that are provided by Google for free. Advertisers want to reach a large audience and monetise their investment in advertising and users value the relevance of search results, which include the organic and sponsored results.\(^{127}\) It is crucial for product market definition to capture this link between the two sides of the market.

Competition authorities have recognised the two-sided nature of the market for search engines, for example in the decision of the European Commission in Google/DoubleClick. The Commission there identified intermediation services as being of a two-sided nature.\(^{128}\) Regrettably, the decision does not mention how the presence and extent of the two-sidedness in the market was identified.

As discussed earlier, the two-sided nature of the market for search engines makes it difficult to apply certain standard tools, such as the SSNIP-test which is traditionally applied to one-sided markets. Relying on the SSNIP-test, without modifying it to the two-sided nature of the market, is therefore problematic. Market definition is particularly difficult in the case of Google as it involves a two-sided market where the product or service on one side of the market is offered free of charge to searchers. It is therefore difficult to determine from which number the 5-10% should be derived to examine the effects on the market for search results. According to Zingales, it cannot be based on the actual price of zero as this would lead to a price increase of zero.\(^{129}\) And as users do not always click on the advertisements offered in response to a given keyword, it is very difficult to assess the effect on the user side of a price rise on the advertising side.\(^{130}\) The cur-


\(^{128}\) Ibid.


\(^{130}\) Ibid.
rent conception of the SSNIP-test is therefore not consistent with markets where services are offered for free.\textsuperscript{131}

The European Commission’s Notice on the definition of the relevant market for the purposes of Community competition law explains that “a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.”\textsuperscript{132} In the case of Google, the definition of its relevant product market, taking into account the peculiarities of its two-sided market, should consist of an analyses of the substitutability of the products of both sides, namely search results and advertising space. This can be substantiated by the fact that delivering search results and providing for advertising space, can in this case be considered as “fundamentally different products, meeting different needs and therefore belonging in separate relevant markets”.\textsuperscript{133}

Therefore, first it needs to be determined whether Google’s advertisers would be inclined to change platform and if yes, to which ones. Next, it needs to be examined whether users would switch to another platform and if yes, to which alternatives precisely. Also, it needs to be assessed how the behaviour of advertisers and users relate to one another.\textsuperscript{134}

Normally, the SSNIP-test would be used to assess how advertisers would respond to an increase in price of the advertising space. However, the SSNIP-test, in its current form at least, is not fit to define Google’s two-sided market. Instead, in order to assess the advertisers elasticity of demand surveys and interviews could be conducted. This method has already been applied by the European Commission in competition analyses in other markets to determine whether products are demand substitutes.\textsuperscript{135} Advertisers should be asked if they would continue to make use of Google if the number of searchers would decrease by 5-10% while at the same time the prices for advertising would remain the same. The survey could be expanded and more parameters could be included. In the end, the results of the interviews and surveys will enable measuring the constraints that advertisers may exert on Google.\textsuperscript{136}

As for the searcher or user side of Google’s two-sided market, a change in quality that may be seen as negative as a price increase must be identified. Although quality is subjective, relevance and price are factors that play a role in the users’ online experience and can therefore be used for the purposes of this test. As

\begin{itemize}
\item[134] Ibid.
\item[135] In this regard Bania refers to Commission decisions Ryanair/Aer Lingus, Case COMP/M. 4439 [2007] OJ C 10/6 and KLM/Martinair, Case COMP/M. 5141 [2009] C 514.
\item[136] Konstantana Bania, Abuse of Dominance in Online Search: Google as the New Content Gatekeeper (2013).
\end{itemize}
for relevance, more relevant search results save users time. The question that should be asked is what the effect would be of a small but significant decrease in the relevance of search results while the relevance of search results of other search engines remains the same. The second factor is Google’s pricing policy. Would users be willing to pay a fee in order to access Google’s search results? In this case, the effects of a small but significant increase in price of Google’s search engines would be measured while the relevance of Google’s, and also that of other search engines, would remain the same and also the other search engines would remain available for free. 137

There are, however, two shortcomings to this approach. First, searchers do not know whether they get the most relevant search results. Second, when the test is limited to an analysis of the reaction of users to the quality decrease of the search results provided by Google, the link between the two sides of the platform is ignored. Therefore, in order to measure demand-side substitutability, a conjoint analysis which includes variables such as the relevance of search results, number of ads per search results page and price the users would be willing to pay to access Google’s search results needs to be conducted. 138

From what has been discussed, it is clear that the way in which the SSNIP-test has traditionally been applied needs adjusting to the particularities of the services provided by search engines, such as Google. The approach described is suggested for defining Google’s relevant product market as it takes into account the obstacles resulting from the characteristics of the two-sided market.

2. The What

As set out above, crucial for product market definition is to capture the link between the two sides of the market: advertising and search. Therefore both the market for Internet search as well as the advertising market need to be considered when assessing Google’s market position.

a. Internet Search

The first market on which Google is active, is the one where users type in queries to obtain relevant results.

During the investigation of the European Commission into the Microsoft/Yahoo! merger 139, the question was raised as to whether a separate market for Internet search could be defined. Unfortunately, the Commission has in its first phase market investigation not assessed whether Internet search constitutes a separate market. As the transaction at hand did not raise serious doubts in the EEA under any alternative market definition, the question whether Internet search constitutes a separate market was left open. 140

137 Ibid.
138 Ibid.
139 In this merger case the Commission needed to decide whether the acquisition of control of the online search and search advertising businesses of Yahoo! by Microsoft could impede effective competition in the common market.
Although this definition of the market has been conducted in light of a merger case and market definition with respect to merger control may differ from market definition in relation to the alleged abuse of a dominant position, the Commission’s decision still contains useful considerations. This also applies to the Commission’s decision in Google/DoubleClick that will be addressed.

As a side note, when focusing only on advertising, while acknowledging that the notified operation had an impact on both Internet search and search advertising throughout the European Union, and abstained from analysing the online search market, the Commission failed to take into account the link between advertisers and users.\(^{141}\)

Also Zingales has raised the question whether Internet search can be a market in itself. He answered this question by referring to the Deliège\(^{142}\) decision of the European Court of Justice. The case concerned Deliège, a high-level but amateur Belgian judoka, who argued that she had fallen into disfavour with the Belgian sports federations and claimed that they had prevented her from taking part in tournaments to damage her career and to prevent her from participating in the Atlanta Olympic Games. For instance, she was not selected by her national federation for an international tournament, participation in which was necessary for her to be selected by that federation for the Olympic Games. The federation had limited the number of participants in that tournament. The Court in this case gave answer to the question whether a service can be considered an “economic activity”, when it is not paid for by those for whom it is performed: “In that connection, it must be stated that sporting activities and, in particular, a high-ranking athlete’s participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 59 of the Treaty (...). For example, an organiser of such a competition may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors. Moreover, the athletes provide their sponsors with publicity the basis for which is the sporting activity itself.”\(^{143}\)

What can be deducted from this decision is that a service, even if it is not paid for by those for whom it is performed, can be considered an economic activity. This implies that Internet search, although users do not pay for it, can constitute an economic activity as a result of which it can indeed be defined as a relevant market.

Also, as the substitutes for users of Google’s search engine would be Yahoo!, Bing or local search engines, the relevant product market on which Google operates for antitrust purposes is the market for online search. Moreover, with regard

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\(^{141}\) See also: Konstantana Bania, Abuse of Dominance in Online Search: Google as the New Content Gatekeeper (2013).


\(^{143}\) Ibid.
to the increasing advantages of search engines over offline comparables, the market can be defined as that of online search.\textsuperscript{144}

This market for online search needs to be taken into account in conjunction with the advertising side of the market, which generates revenues.

b. Online and Offline Advertising

Both the European Commission\textsuperscript{145} and National Competition Authorities\textsuperscript{146} have taken the view that online advertising is sufficiently different from traditional forms of offline advertising to constitute a separate product market since online advertising allows advertisers to precisely target their audience by combining various types of information such as geographical location, areas of interest, previous Internet use and the users’ search preferences.\textsuperscript{147}

In its Microsoft/Yahoo! decision, the Commission left open the exact product market definition as regards the possible distinction between search and non-search advertising since under any alternative market definition the proposed transaction would not raise serious doubts in the EEA. However, in the Google/DoubleClick decision the Commission, as well as the FTC\textsuperscript{148}, found that online advertising is a relevant market per-se. The same conclusion has been reached by the French competition authority, the Autorité de la concurrence.\textsuperscript{149}

And also to the District Court of Hamburg, it seemed necessary to, at least, take into account the area of online advertising when determining the relevant market.\textsuperscript{150}

Google has in the French competition case \textsuperscript{151} as well as in the Google/DoubleClick merger, claimed that there is only one advertising market in the broad sense of the term, encompassing not only online advertising but also offline advertising. The Autorité de la concurrence concludes in its Opinion that while a degree of convergence can be observed between these two advertising methods, their substitutability is not sufficient to classify them in the same relevant market.\textsuperscript{152} Already in its decision of 30 June 2010\textsuperscript{153}, the Autorité had recognized the existence of an online advertising market, which is distinct from other advertising media.

\textsuperscript{146} See for instance Autorité de la Concurrence Opinion No 10-A-29 of 14 December 2010 on the competitive operation of online advertising.
\textsuperscript{147} European Commission Decision Case No. COMP/M.4731, Google/DoubleClick, 11.03.2008, C(2008) 927, para 45.
\textsuperscript{148} Proposed Acquisition of Click Holding Company by Google Inc., File No. 0710170.
\textsuperscript{149} Autorité de la Concurrence Opinion No 10-A-29 of 14 December 2010 on the competitive operation of online advertising.
\textsuperscript{150} Unofficial translation of the decision of the District Court of Hamburg of 4 April 2013.
\textsuperscript{151} Autorité de la Concurrence Opinion No 10-A-29 of 14 December 2010 on the competitive operation of online advertising.
\textsuperscript{152} Ibid, para 111-112.
\textsuperscript{153} Autorité de la Concurrence Decision No 10-MC-01 of 30 June 2010, related to protective measures requested by Navx.
Also, the Commission did not go along with Google’s broad market definition. Firstly, because during the market investigation it had become clear that offline and online advertising are perceived as separate markets by the majority of respondents. Furthermore, according to the Commission online advertising is used for specific purposes: “As opposed to offline advertising, online advertising is considered to be capable of reaching a more targeted audience in a more effective way. Advertisers can precisely target their audience by combining information regarding geographical location, time of day, areas of interest, previous purchasing record of the user and search preferences. This option is not available in the case of offline advertising, for which the amount of “wasted circulation” is undoubtedly higher. In addition, respondents stated that online advertising has a unique reporting system that enables advertisers to check exactly how many users have viewed an ad or clicked on it, allowing a rapid "retargeting" of the ad.”

As a result, it is possible to precisely measure the effectiveness of online ads as opposed to measurement systems used in offline advertising. Finally, the two markets are also distinguished by the specific pricing mechanisms used: while offline pricing is in general based on "impressions" viewed by a possible number of consumers, online advertising is paid for on the basis of the number of Internet viewers that effectively establish a contact with the ad. Traditional offline media do not allow for such a precise connection between reach and the cost of the ad as is made possible by the "cost per click" and the "cost per impression". As a result, there is a separate market for online advertising.

c. Online Search-based Advertising

The next question is whether online advertising could be divided into the markets for search and non-search advertising.

In the Microsoft/Yahoo! case, the Commission left open the possibility to subdivide the market for online advertising into search and non-search advertising as the proposed transaction did not give rise to serious doubts as regards its compatibility with the common market in the EEA under such a narrower market definition.

With respect to Google/DoubleClick merger, the Commission has, however, concluded that the market for online search can be divided into a market for search-related advertising and non-search-related advertising. The Commission reaches this conclusion by making a distinction between advertisers and website publishers. As opposed to advertisers, search and non-search ads are from the

155 Ibid, para 46.
viewpoint of publishers considered as rather complementary: search advertising complements the sale of non-search advertising space by publishers.\textsuperscript{159} From an advertiser's point of view search and non-search ads can be considered substitutable to a certain extent.\textsuperscript{160} The Commission argues as follows.

From an advertiser's point of view search and non-search ads have different effects and serve different purposes. The essential difference influencing the choices of advertisers is constituted by the targeting characteristic: "while for search ads the targeting is based on the user's precisely revealed interests (via the search query), for non-search ads the targeting is connected with a less precise definition of the consumer's interests, determined by means of criteria such as the context of the visited web page and by its geographical location."\textsuperscript{161} Respondents to the market investigation have pointed out that despite the different appearance and targeting properties, the different types of ads can be considered as substitutable. The different forms of online advertising can be perceived as substitutes as they would compete for the same ad space inventory. The differences between the different types of ads seem to be diminishing. Although search advertising in the past has been perceived as more effective than non-search advertising, the ability of non-search advertising to target relevant consumers is improving. Market investigation has also shown that whereas non-search – and in particular display ads – have mainly focused on branding, a significant part of search advertising expenditure is now also focusing on generating brand awareness. Lastly, the fact that ad serving tools help advertisers to assess their return on investment are progressively converging across different types of advertising reinforces for the Commission the conclusion that all kinds of ads could be substitutable.\textsuperscript{162}

According to the Commission, from a content publisher’s point of view, the possibilities of substitution between search and non-search advertising are very different. Publishers could perhaps generate additional revenues by adding a search tool (a small search box on the homepage of the publisher) on their website and generate additional revenues by sharing the revenues of advertisement appearing next to the search results. However, according to the Commission, the search results will in general appear on a new website which is not part of the publisher's content inventory and will therefore not generate income for the publisher. As a result, there is no possible substitution between selling ad space for search and selling ad space for non-search.\textsuperscript{163}

This leads the Commission to the conclusion that, from a publisher's point of view, there is a separate market for the provision of online advertising space.\textsuperscript{164} It did, however, not reach a definitive conclusion as it found that the outcome did not hinge on the definition, and therefore left the exact definition of the product market open.\textsuperscript{165}

Although the Commission does not reach a definitive conclusion, it did mention that non-search advertising and search advertising could be separate markets.

\textsuperscript{159} Ibid, para 55.
\textsuperscript{160} Ibid, para 53.
\textsuperscript{161} Ibid, para 50.
\textsuperscript{162} Ibid, paras 48-53.
\textsuperscript{163} Ibid, paras 48-53.
\textsuperscript{164} Ibid, para 55.
\textsuperscript{165} Ibid, para 56 and 73.
To reach this conclusion, the Commission has, in my opinion, interpreted the term search advertising in a very limited way. Website publishers sell advertising space on their webpages in order to generate revenues and advertisers buy such space in order to place their advertisements on the Internet and target Internet users.\textsuperscript{166} Search advertising is a method whereby advertisements appear after an Internet user has typed in certain keywords. The Commission only makes reference to the possibility for publishers to generate additional revenues by adding a search tool on their website. According to the Commission, the search results that appear as a result of making use of the search box on the website of the publisher, are not part of the publisher's own content.\textsuperscript{167} This is, however, not a reflection of reality. In many cases the use of the search box on the website of the publisher will generate results within their own website. As a result they are able to generate additional revenues by sharing the revenues of advertisement appearing next to the search results. In my opinion, search and non-search advertising can be considered as substitutable. The Commission should therefore not make a distinction between a market for search and non-search related advertising.

However, next to the European Commission, also the Autorité, has stated that online search-based advertising is likely to be a relevant market within the broader sector of online advertising. The Autorité points out that the question of the division of the online advertising market is an issue shared by numerous competition authorities, including the US Federal Trade Commission, the Italian and German competition authorities. The Autorité, in its Opinion on the competitive operation of online advertising, notes that it had not – at that moment – issued a final opinion on whether or not distinct relevant markets exist within the online advertising market but it does refer to its decision in the Navx case where it had stated that online search-based advertising is likely to be a relevant market, within the broader sector of online advertising. In the Navx decision, the Autorité referred to the analysis of the Federal Trade Commission in the Google/DoubleClick merger who had there already adopted this segmentation, the Autorité however failed to give its own substantiation.\textsuperscript{168}

d. Horizontal & Vertical Search

Finally, the question could be raised whether horizontal search and vertical search belong to the same market as three of the complainants in the competition case against Google offer vertical search services.

The complainants, providers of vertical search services eJustice, Ciao and Foundem, state that Google lowers the ranking of their web pages in its (organic) search results and places the results of its own competing services at a more preferential position. As a result they will be less attractive for advertisers as advertisers prefer to advertise on search engines that appear higher in Google’s list of or-

\textsuperscript{166} Ibid, para 8.
\textsuperscript{167} Ibid, paras 48-53.
\textsuperscript{168} Autorité de la Concurrence Opinion No 10-A-29 of 14 December 2010 on the competitive operation of online advertising, para 109.
ganic search results. The complainants argue that Google’s practice eventually leads to the exclusion of competitors that offer vertical search services.\footnote{Press release of the European Commission. Antitrust: Commission probes allegations of antitrust violations by Google, 30 November 2010.}

Although three of the complainants in this case offer vertical search services, the activities of complainants are not decisive for the definition of the relevant market\footnote{Sophie van Loon, The Power of Google: First Mover Advantage or Abuse of a Dominant Position? In: Aurelio Lopez-Tarruella (ed.). Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models (2012).}. In addition, next to these complainants there are also others, not offering vertical search services.

Van Loon argues that vertical search engines are more attractive to advertisers because they enable them to target a more specific group of consumers.\footnote{Ibid.} As a result, vertical search advertising would provide more opportunities for advertisers to target consumers.

Also, a consumer generally makes use of a vertical search engine at a different point in their decision making process. For example, when searching for vacation destinations, consumers will usually start on a general search engine such as Google, coming across advertisements for various destinations. At this point in time, the consumer is more likely to be persuaded by an advertisement for a specific destination as opposed to when the consumer is searching on a vertical search engine for tickets to New York.

However, it could also be argued that vertical search advertising provides more or less the same opportunities for advertisers, notably to target consumers who enter certain keywords. Also both enable direct response advertisement campaigns. As a result, advertising through vertical search could be sufficiently similar to general search advertising and should therefore not be defined as a separate market.

3. Google’s Geographic Market

As Google’s search engine is accessible worldwide and not (solely) available in one particularly geographic area, it could be argued that the market for search is worldwide.

The same view was taken by the Commission in the Microsoft/Yahoo! case where it stated that: “The geographic scope of a potential market for Internet search could potentially be wider than national or linguistic markets because the largest search engines like Google, Yahoo or Microsoft operate on a global basis. Those search engines strive to index the whole Internet and are accessible from anywhere in the world. Also, fluency in English (the language of most of the websites) is increasingly extended across the world.”\footnote{European Commission Decision Case No COMP/M.5727, Microsoft/Yahoo! Search Business, 18.02.2010, C(2010) 1077, paras 96-98.} The Commission did however not come to a definitive conclusion and left the exact definition of the market open as – even under the narrowest possible definition of the relevant geographic market (national basis) – the transaction would not raise serious doubts in the EEA.\footnote{Ibid.}
The market for online advertising is, however, more nationally orientated as the conditions for competition, such as the price of advertising, differs between national markets. Also, a majority of the advertising campaigns is conducted on a national basis. Therefore the Commission’s decisions in Google/DoubleClick and Microsoft/Yahoo! should be followed at this point. The Commission stated in Google/DoubleClick that the provision or purchase of advertising space is the subject of differentiation based on national preferences, languages and cultural specifics and that the market for online advertising space should therefore be considered divided alongside national or linguistic borders within the European Economic Area.

Referring to its decision in Google/DoubleClick, the Commission also concluded in Microsoft/Yahoo! that the scope of the relevant geographic market for online advertising is national or linguistic. The same conclusion has been reached by the French competition authority.

B. GOOGLE’S MARKET POWER

Market shares play an important role when assessing market power. However, already in the early days, far before the introduction of search engines, it has been recognized that market shares may not, alone, capture precisely an undertakings’ actual market strength. As a result, where an undertakings’ market position comes under scrutiny, the analysis of market shares will be supplemented by the examination of entry barriers and buyer power.

As set out earlier, focusing on market shares is particularly problematic as regards the high tech sector as this fails to acknowledge the dynamics of markets operating in the New Economy since they do not properly reflect the competitive constraints that the ‘winner’ of the market in question is under. As a result, significant market shares are not necessarily equated with significant market power. This has also been recognized by the European Commission in the Microsoft/Skype merger case and confirmed by the General Court on appeal, as it stated that market shares only give a preliminary indication of the competitive situation in dynamic markets. Second, when assessing market power, antitrust authorities need to take into account the rational expectation of significant market power for some period of time and in this regard actual and potential innovative threats to leading undertakings.

When assessing Google’s position, market shares alone are therefore not a useful tool for assessing dominance with regard to the markets Google is active on and can therefore not be conclusive: they need to be regarded in conjunction with other factors indicating market power such as barriers to entry and buyer power.

174 Ibid, para 84.
175 Ibid, para 93.
176 Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.
But also the competitive threats Google is under need to be considered. Competition authorities should give answer to the question if it is a real expectation that Google will enjoy significant market power for a significant period of time, or is it to be expected that Google will be challenged and that there will be a race for its leading position?

The developments that were discussed earlier indicate that Google is indeed under competitive threat. Microsoft, who is already a player in the online search and online search advertising market, is on the rise and could become – if it not already is – a fierce competitor of Google in the future. Facebook, the worlds’ most visited website, which is partially owned by Microsoft and provides a search service powered by Bing, is creating more traffic for Microsoft’s search engine that enables Microsoft to further experiment and innovate and ultimately improve the relevance of its search engines. Therefore, at least Microsoft needs to be considered as a potential competitor and taken into account in the competitive assessment.\footnote{Nicolo Zingales, Product Market Definition in Online Search and Advertising, The Competition Law Review, 9(1) (2013).}

In its opinion of December 2010, the Autorité de la concurrence points out several factors which lead to the conclusion that Google has a dominant position in the search-based ads market. These factors consist of market shares, profitability and pricing levels. In addition, while the capacity to set high prices in this market seems limited, Google appears to be in a position at the very least to exercise market power through the contracts it concludes with its advertisers. Finally, the existence of high barriers to entry due to the high cost of setting up an efficient rival search engine, scale effects concerning the relevance of the results provided by the search engine (an algorithm whose efficiency increases with the number of requests, especially for the very specific and hence less common requests) and Google’s lead with regard to the exhaustiveness of indexing. Next to the difficulties of producing an efficient search engine, the Autorité also noted that there are barriers to entry in the search-related advertising business.\footnote{Autorité de la Concurrence Opinion No 10-A-29 of 14 December 2010 on the competitive operation of online advertising, para 229.}

In its interim decision, the Autorité states that Google holds a dominant position on the advertising market related to online searches. Its search engine enjoys a wide popularity and currently totals around 90% of the web searches made in France. Moreover, there are strong barriers to entry for this activity. Finally, its AdWords online advertising service, which is linked to its search engine, meets a specific demand from advertisers.\footnote{Press release of the Autorité de la concurrence of 30 June 2010: Online advertising market.}

Although the Autorité looks somewhat beyond Google’s high market share, it does not take into account the peculiarities of its two-sided market. The same goes for the European Commission’s, who has taken the preliminary view that Google is dominant in the European Economic Area both in web search and search advertising. The Commission substantiates this as follows: \textit{“For instance, Google has been holding market shares in web search well above 90% in most European countries for several years now, a level which is higher than in many other parts}
of the world. There are also significant barriers to entry and network effects in both markets.” 183

The Commission should, however, instead of focusing on high market shares and the fact that it has become and has been for several years now the most important player in the market, also take into account the characteristics of the markets involved and perform an analysis of the competitive constraints that Google is under. The same goes for the Autorité. What for instance has been neglected is the fact that users and also advertisers can easily and at no cost switch to other search engines, they are not restrained by lock-in effects. This indicates that barriers to entry may not be that high.

VII. CONCLUSION

The purpose of this contribution was to examine the challenges that emerge when conducting antitrust analyses involving the market for search engines as part of the New Economy and the implications for the competition case against Google. These challenges have raised questions about how competition authorities need to define Google’s market(s) and what relevant product and geographic market(s) should be defined by the European Commission with regard to Google’s alleged dominance and how Google’s market power should be assessed.

Markets within the New Economy differ considerably from traditional ones. They are characterised by very high rates of rapid technological progress, direct and indirect network effects, they are inclined to have high fixed or sunk costs and low marginal costs of production and they often include two- or multi-sided platforms. Particularly search engines also benefit from supply-side economies of scale which, in conjunction with network effects, generally result in a single firm with lowest costs and a large share of the market.

These distinct dynamic characteristics of the New Economy pose a set of challenges on competition analyses. When traditional methods for market definition are applied, this may lead to incorrect market definitions in dynamically competitive industries. An assessment of product substitutability will make the market seem narrower than it actually is which could lead to the (incorrect) conclusion that an undertaking is dominant, whereas in reality the undertaking involved may be under severe competitive constraints.

As a result, the practical implications with respect to market definition of the two-sidedness of markets in the New Economy should be taken into account.

As for market power, focusing on high market shares fails to acknowledge the dynamics of markets in the New Economy since incumbents are under the permanent threat of entry and are only able to keep their leading position if they continue to innovate.

As a result, a new way to approach competition law is required. The specific characteristics of the New Economy need to be taken into account when applying Article 102 TFEU and they also need to lead to an adjustment of the traditional approach to market definition and the assessment of market power.

183 European Commission MEMO/13/383 of the European Commission 25/04/2013 Commission seeks feedback on commitments offered by Google to address competition concerns — questions and answers.
Applied to Google, this means that when assessing Google’s position, competition authorities need to take into account the two-sidedness of Google’s market. This, however, makes it difficult to apply certain standard tools, such as the SSNIP-test. A method that could be used to define Google’s product market has been suggested, where the definition of the relevant product market consists of an analyses of the substitutability of the products of both sides, search results and advertising space.

After answering *how* Google’s relevant product market should be defined, the next question that was answered was *which* product markets the Commission needs to consider when assessing Google’s market position.

First, Internet search, even though it is not paid for, can be considered as an economic activity and therefore Internet search could be defined as a market. Next, online advertising constitutes a separate product market since it is sufficiently different from traditional forms of offline advertising. Then, the question was raised whether online advertising can be divided into the markets of search and non-search advertising. It was concluded that search and non-search advertising could be considered as substitutable. The Commission should therefore not make a distinction between a market for search and non-search related advertising. Finally, the question was raised whether horizontal search and vertical search belong to the same market. It was concluded that advertising through vertical search could be sufficiently similar to general search advertising. Therefore, it should not be defined as a separate market.

As for the geographic market, it has been considered that Google’s search engine is accessible worldwide and not (solely) available in one particularly geographic area. Therefore, it could be argued that the market for search is worldwide. The market for online advertising is, however, more nationally orientated. As a result, the Commission’s decisions in *Google/DoubleClick* and *Microsoft/Yahoo!* should be followed at this point stating that the provision or purchase of advertising space is the subject of differentiation based on national preferences, languages and cultural specifics. As a result, the market for online advertising space should be considered divided alongside national or linguistic borders within the EEA.

As for market power, when assessing Google’s position, market shares alone are not a useful tool for assessing dominance with regard to the markets Google is active on and can therefore not be conclusive: they need to be regarded in conjunction with other factors indicating market power such as barriers to entry and buyer power. But also the competitive threats Google is under need to be considered.

It appears, from the examples given, that competition authorities do not take into account (enough) the peculiarities of Google’s two-sided market and it also seems that at this moment the focus is still primarily on Google’s high market shares and the fact that it has become and has been for several years now the most important player in the market. Instead, the assessment of Google's position in the market for Internet search and online advertising should be the result of a detailed analysis of Google's market power, taking into account the characteristics of its two-sided market and the consequences thereof and also the competitive constraints that Google is under. Because although it is clear that Google has a high market share on both the search engine market, as well as on the market for online
advertising this should not be decisive in the assessment of Google’s alleged dominance as the company is part of the New Economy market, where high market shares are common and often do not properly reflect a company’s competitive position towards its competitors.