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WHAT'S THE PROBLEM WITH GOOGLE?

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I. INTRODUCTION

The antitrust winds have been blowing at gale force around Google, most notably in the EU. This paper will look at the course of the EC proceedings, from the charges to the pending probable settlement. It will then consider the question whether the conduct under discussion can reasonably be found to violate Section 2 of the Sherman Act or abuse of a dominant position under EC law. That it has been so labeled raises some important and fundamental questions of antitrust policy, and suggests a re-examination of the purposes of international competition and trade regulation law.

Google is not only a major international commercial force, but also an extremely beneficial one in many ways. Its success, size, and dominance have also subjected it to heightened antitrust scrutiny. For outsiders, who use Google as the home page on their web browsers and find it an invaluable search engine, the questions naturally arise, "What are the antitrust issues with Google," and "Why do they matter"? This paper will examine these questions, in particular the intersection of antitrust and public policy in areas not usually associated with competition.

II. THE EC PROCEEDINGS

A. Opening the Investigation

On November 30, 2010, the European Commission issued IP/10/1624: "Antitrust: Commission probes allegations of antitrust violations by Google." According to the press release:

> The European Commission has decided to open an antitrust investigation into allegations that Google Inc. has abused a dominant position in online search, in violation of European Union rules (Article 102 TFEU). The opening of formal proceedings follows complaints by search service providers about unfavorable treatment of their services in Google's unpaid and sponsored search results coupled with an alleged preferential placement of Google's own services. This initiation of proceedings does not imply that the Commission has proof of any infringements. It only signifies that the Commission will conduct an in-depth investigation of the case as a matter of priority.

The release noted "two types of results when people are searching for information" on Google: "unpaid search results, which are sometimes also referred to as 'natural', 'organic' or 'algorithmic' search results, and third party advertisements shown at the top and at the right hand side of Google's search results page (so-called paid search results or sponsored links)."

The alleged problem complained of by other "internet search providers" and focused on by the EC was "lowering the ranking of unpaid search results of competing services," a number of which provided pricing comparisons, and "according preferential placement to the results of its own vertical search services in order to shut out competing services." The EC also stated that it would look at whether "Google lowered the 'Quality Score' for sponsored links of competing vertical search services," and thereby adversely affected "the price paid to Google by advertisers." Finally, the EC announced that it would examine "allegations that Google imposes exclusivity obligations on advertising partners, preventing them from placing certain types of competing ads on their web sites, as well as on computer and software vendors, with the aim of shutting out competing search tools," and whether Google imposed "restrictions on the portability of online advertising campaign data to competing online advertising platforms."

The nature and scope of the announced proceedings give rise to several observations.

First, the announced impetus for the investigation was competitor complaints, which suggest sour grapes, questionable antitrust injury and standing, and misuse of the antitrust laws to suppress competition and punish a successful rival, rather promoting and preserving competition. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1984) ("…the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws."); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477 (1977).

Second, Google's alleged discrimination against rival search engines and certain advertisers – exclusive dealing requirements excepted – would appear to be behavior condoned even for a monopolist under United States Supreme Court antitrust jurisprudence. The offense of monopolization under Section 2 of the Sherman Act consists of the wilful acquisition or maintenance of monopoly power. *United States v. Grinnell Corp*., 384 U.S. 563, 570-71 (1966). Monopoly power is "the power to control prices or exclude competition." *Id*., at 571. No claim exists that Google obtained monopoly power other than "as a consequence of a superior product, business acumen, or historic accident," which does not violate Section 2. *Id.*; *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945; L. Hand, J.) (no violation where a monopoly results from "superior skill, foresight and industry.").

Hence, the focus must be on whether Google's discrimination against rival search engines and advertisers constitutes the wilful maintenance of monopoly power. This would consist of "use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 US 585, 595-96 (1985). As the Supreme Court further explained, "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.*, at 605.

Recent Supreme Court decisions, however, have held that a monopolist's choice of its customers and the terms on which it will deal with them are generally not violative of Section 2 except in very limited circumstances. *Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 129 S.Ct. 1109 (2009).

In *Trinko*, Justice Scalia, writing for the Court, blessed monopoly pricing:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.* [540 U.S. at 407.]

In words that now seem prescient in their application to Google, Justice Scalia continued,

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.,* 250 U. S. 300, 307 (1919). [*Id*. at 407-08.]

In *linkLine*, a unanimous Supreme Court went even further in unshackling monopolists. In an opinion written by Chief Justice Roberts, the Court for the first time recognized an "antitrust duty to deal," 129 S.Ct. at 1115, which generally is inapplicable to monopolists.

Given the *Trinko* and *linkLine* decisions, and assuming, *arguendo*, convergence in this area of the law with the EC, one must ask what could be amiss with Google giving preferential treatment either to its own search functions or to advertisers and other search firms that are willing to pay the tribute Google requires. Under *Trinko* and *linkLine*, Google had no duty to deal at all with competitors in the search engine business or advertisers that would not meet its demands and prices. The Supreme Court could have said in those decisions, but did not, that if a monopolist chooses to deal with rivals or customers, it must do so on nondiscriminatory and fair terms that do not unduly hamper their ability to compete. Instead, the Court largely left monopolists free to set their own terms and choose their own customers. Hence, the EC accusations against Google appear at first blush to be somewhat surprising.

Third, the EC's pressing ahead in the face of *Trinko* and *linkLine* suggests the possibility of substantial divergence from U.S. antitrust jurisprudence with respect to so-called essential facilities and refusals to deal. In *Trinko*, the Supreme Court cast doubt on the essential facilities doctrine, by refusing to find the plaintiff's claim viable "even if we considered to be established law the 'essential facilities' doctrine crafted by some lower courts." 540 U.S. at 410. In a footnote, the Court distinguished *United States v. Terminal Railroad Assn. of St. Louis,* 224 U. S. 383 (1912), the leading case on the essential facilities doctrine, as involving "*concerted* action, which presents greater anticompetitive concerns and is amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club."

Prior to *Trinko*, however, lower courts had not so construed *Terminal Railroad*. To the contrary, they had read that case and its progeny as establishing a monopolist's duty to deal under certain specified circumstances:

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Communications v. American Tel. & Tel. Co., 708 F. 2d 1081, 1132-33 (7th Cir., 1983).[1] The Google investigation by the EC raises the question whether essential facilities law is alive and well in the EU, if not generally, then with respect to the Internet.

Fourth, that the EC is investigating "allegations that Google Inc. has abused a dominant position in online search" implies that it is in fact possible to obtain "a dominant position in online search," a proposition with which not everyone would agree. That bottomless repository of knowledge, Wikipedia, lists, as of the writing of this article, approximately 40 "active" search engines. http://en.wikipedia.org/wiki/Internet_search_engines. The high tech highway is littered with the wrecks of past "dominant" firms (e.g., AOL, BlackBerry, Gateway), while others have had to be reborn from their own ashes of dominance to survive in another form (e.g., IBM, HP), and still others scramble through high-price acquisitions to keep up in order to cling to dominance (Facebook, Apple). Obviously, the question arises whether the Internet is one area where the inexorable working of the marketplace and the irreversible tide of innovation render dominance transitory, if not illusory.

B. The Commission's Preliminary Assessment

On March 13, 2013, the Commission adopted a Preliminary Assessment, in which it found a number of concerns, which it communicated to Google. These included the following "business practices that may violate Article 102" (available at http://eur-lex.europa.eu/ LexUriServ/LexUriServ.do?uri=OJ:C:2013:120:0022:0024:EN:PDF):

" – the favourable [sic] treatment, within Google's horizontal Web search results, of links to Google's own vertical Web search services as compared to competing vertical Web search services…"

1 Citing *Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 992-93 (D.C.Cir.1977); *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973); *United States v. Terminal Railroad Association,* 224 U.S. at 405; and *City of Mishawaka v. American Electric Power Co.,* 465 F.Supp. 1320, 1336 (N.D.Ind.1979), *aff'd in relevant part,* 616 F.2d 976 (7th Cir.1980).

Translation: "Google prominently displays links to its own specialized [sic] search services within its web searches and does not inform users of this favourable [sic] treatment." Users don't realize Google is favoring its own search services and may be steered away from "potentially more relevant competing services." "[C]ompetitors' results that are potentially more relevant are less visible and sometimes not directly visible to users." "The Commission is concerned that this practice unduly diverts traffic away from Google's competitors…"

Reaction: So what? It's Google's bat, ball, and playing field. Google can decide who plays and on what terms. Under *Trinko* and *linkLine*, what's the problem?

" – the use by Google without consent of original content from third party websites in its own vertical Web search services…"

Translation: In displaying search results describing other web sites, Google uses content from those sites without obtaining permission, such as customer reviews. When content owners object, Google says if they don't like it, they can opt of being displayed in Google searches.

Reaction: This is certainly a concern of copyright and intellectual property law (i.e., is Google engaging in fair use), but is it a concern of antitrust law? In some sense, this might be seen as a form of reciprocal dealing, which at one time was condemned as a per se violation of Section 1, and, presumably, *a fortiori* a violation of Section 2, when engaged in by a monopolist. *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir., 1995); *Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1561-62 (11th Cir. 1990); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 987-88 (8th Cir. 1982). Today, one can search in vain for even a rule of reason violation of Section 1 premised on reciprocal dealing. In essence, Google says that if a web site wants to appear in a Google search without charge, the web site must give Google a royalty-free copyright license to its content. Query whether this amounts to the wilful exercise of monopoly power.

" – agreements that de jure or de facto oblige websites owned by third parties…to obtain all or almost all of their online search advertisement requirements from Google…"

Translation: Google is accused of requiring online publishers, such as newspaper web sites, to agree that the only ads on their sites for Internet search services will be Google's, and that they will not accept ads from search services competing with Google.

Reaction: At last, an alleged violation that clearly falls within traditional United States antitrust jurisprudence. This is classic Microsoft naughty behavior, invoking shades of *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

" – contractual restrictions on the management and transferability of online search advertising campaigns across search advertising platforms…"

Translation: When companies sign up with Google to have ads linking to their web sites appear next to Google search results, Google allegedly requires them to do this exclusively with Google and makes the transferability of such advertising to other search engines difficult.

Reaction: Again, a traditional *Lorain Journal* type of misconduct easily falling within Section 2.

C. Google's Proposed Commitments

In response to the Commission's concerns, Google offered a number of "commitments," while denying that it had engaged in any of the subject practices. *See*, "Commission seeks feedback on commitments offered by Google to address competition concerns." Available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013XC0426%2802%29.

First, Google basically rolled over on the last two alleged violations and abjured exclusive dealing practices going forward. Google committed that it would "no longer include in its agreements with publishers any provisions or impose any unwritten obligations that would, de jure or de facto, require publishers to source their requirements for online search advertisements exclusively from Google." It also agreed that it would "cease to impose any written or unwritten obligations…that will prevent advertisers from porting and managing search advertising campaigns across Google's AdWords and non-Google advertising services." One would expect such commitments from a business with the slogan "Do no evil," and the belief "You can make money without doing evil," which appears as number six in Google's list of "Ten things we know to be true." (http://www.google.com/intl/en/about/company/philosophy/)

What is more interesting and problematical is Google's response to the first two alleged violations.

As regards its alleged discriminatory treatment in favor "of links to Google's own vertical Web search services as compared to competing vertical Web search services," Google committed to a program of full disclosure.

> Google will label links to Google's own vertical Web search services that are subject to a favorable placement in Google's horizontal Web search results. The label shall inform users that the links to Google's own vertical Web search services have been added by Google to provide access to its vertical Web search services, so that users do not confuse links to Google's own vertical Web search services with links to other horizontal Web search results. Where applicable, the label shall also inform users of where, in Google's horizontal Web search results, they can find links to alternative vertical Web search services.

Also, "Where applicable, Google will also distinguish links to Google's own vertical Web search services from other horizontal Web search results, so that users are made aware of their different nature." Finally, Google will display links to three web search competitors in search results where it displays its own vertical search services under certain circumstances.

Reaction: This appears to be application of the essential facilities doctrine in spades, something no United States regulator would request and no United States Court would require.

As regards the use of original content from web sites referenced in search results, "Google will offer third party websites a Web-based opt-out from the use of all content

crawled from their site in Google's vertical Web search services," without prejudice to their ranking in Google search results. Google will further allow competing search services "the possibility to mark certain categories of information in such a way that such information will not be indexed or used by Google."

Also, "Google will maintain for newspaper publishers…mechanisms to enable them to control, on a web page by web page basis, the display of their content in Google News."

Reaction: What does this have to do with regulation of competition, or even false advertising? Unless one is resurrecting the old reciprocal dealing cases, this commitment is a head-scratcher in terms of how Google is avoiding a restriction a competition authority or court could impose on its business.

Following a recitation of Google's above-described commitments, the Commission invited comments.

D. The Commission's Questions and Answers Sheet

Concomitant with its release of Google's proposed commitments on April 25, 2013, the Commission also released its own Questions and Answers, which illuminate its thinking on the challenged practices. See, "Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers." Available at: http://europa.eu/rapid/press-release_MEMO-13-383_en.htm. Some of the more interesting sections include:

> ***Why does the Commission decide to intervene in such a fast-moving market, where the pace of innovation is rapid and a company that may be dominant today could be challenged or even replaced by another tomorrow?***
>
> In high-tech markets in particular, network effects may lead to entrenched market positions. Google has had a strong position in web search in most European countries for a number of years now. It does not seem likely that another web search service will replace it as European users' web search service of choice.

Reaction: This certainly poses a key question, but whether the answer is convincing is another matter. The answer assumes the conclusion that Google's "strong position in web search in most European countries for a number of years" is the result of network effects or has produced network effects that will ensure its continuance. Both propositions are far from self-evident and would benefit from further explication, which the Commission unfortunately fails to provide.

> ***The US Federal Trade Commission investigated the way Google displays links to its specialised search services in its web search results and concluded that there was no competition issue with it. Why does the Commission come to a different view?***
>
> The factual and legal environments are different in the US and Europe. In particular, Bing and Yahoo represent a substantial alternative to Google in web search in the USA: their combined market share is around

> 30%. In contrast, Google has been holding market shares well above 90% in most European countries for a number of years. Web sites therefore rely more on traffic from Google in Europe than in the USA. Given the resulting commercial significance of Google for specialized search services, the way Google presents its web search results therefore has a much more significant impact on users and on the competitive process in Europe than it does in the USA.

Reaction: This is another very important question, with, regrettably, a rather facile and far from persuasive answer, which purports to reconcile a significant divergence in enforcement. The Commission's point seems to be that it is consistent enforcement policy for the Commission to be concerned with a 90 percent market share and for U.S. regulators to be unconcerned with a 70 percent market share. Who is kidding whom? Global antitrust enforcement can only benefit from a candid response here that the Commission believes the U.S. regulators to be wrong, and why. It is not credible to posit or imply an enforcement continuum on which certain behavior is antitrust-compliant with a 70 percent market share and violative with a 90 percent share.

Is the Commission not seeking to protect competitors rather than consumers?

> The Commission does not act to protect competitors as such, but to preserve the competitive process for the benefit of consumers. It acts only when there is harm to competition with negative effects on consumers, in particular in terms of reduced choice and less innovation.
>
> In particular, the Commission is concerned that the way in which Google currently presents its web search results limits the ability of European users to find their way to specialised search services competing with Google which contain information relevant to their query. Many such services might be potentially very innovative and Google's practices could therefore be limiting European consumers' opportunities to benefit from such innovative services. At the same time, it is for users to decide whether they wish to visit these sites based on their merits.

Reaction: This is the most disappointing of all the Commission's responses, in which it punts on one of the most important of all global antitrust enforcement questions. The question itself goes to the very heart of the underlying purposes of antitrust laws, wherever in the world they exist. It is impossible "to preserve the competitive process for the benefit of consumers" without protecting competitors. Once the focus of the discussion shifts to protecting "consumers," the objective becomes lower prices. When lower prices are the desideratum of antitrust law, alleged efficiencies attain importance. When alleged efficiencies are an antitrust objective, concentrations of economic power are not only tolerated, but welcomed and approved. When concentrations of economic power are sanctioned, concentrations of political power follow. When those concentrations involve communications and information-sharing media, critical instrumentalities of functioning democracy are foreclosed and stifled. If any part of the world is familiar with these principles, it is Europe, which has learned its lessons the hard way, if not the hardest way. The Commission, as the competition authority and spokesperson for Europe, ought to say so, and not pay lip service to the myth of the market and consumer welfare that all too often informs United States antitrust jurisprudence.

In fairness, the Commission invokes consumer choice in its discussion, which is a surrogate for protecting competitors without using those terms. Nonetheless, addressing the issue directly is greatly preferable to circumlocution. Indeed, as will be discussed, what is really behind the Google proceedings is exactly this view of competition regulation. It ought to be addressed for what it is, because it is ultimately a defensible view of the purposes and proper application of antitrust law.

> ***What is the problem with Google using snippets of third party sites? If Google is infringing IP rights, can't third parties sue Google?***
>
> Intellectual Property law and competition law are two different bodies of law. Compliance with one does not necessarily imply compliance with the other, just like breaching one does not necessarily imply breaching the other.
>
> The Commission has analysed Google's practice from the point of view of competition law. If Google's market position in web search gives it the ability to copy and use all relevant information available on the web on its own specialised search services, users may no longer have incentives to visit competing services. Competitors of Google may lose the incentive to innovate or invest in the generation of original content. This competition concern arises whether or not the information copied and used by Google is covered by IP rights.

Reaction: This is another rather oblique, if not obscure explanation by the Commission. It should say instead that it believes that "Google's market position in web search gives it the ability to copy and use all relevant information available on the web" without permission, while competing search engines lack the market power to use content from web sites without appropriate licenses. The Commission should also make express reference to the law of reciprocal dealing, inasmuch as this is essentially what is supposedly happening: Google is requiring in substance a royalty-free copyright license from any web site that wishes to appear in Google search results. Eliminating such opacity in the Commission's explanations, though inviting criticism, would at least intelligibly frame the issues for the open and honest dialogue they deserve.

> ***Is Google benefitting from special treatment by the Commission?***
>
> The Commission is exploring the possibility of a settled outcome with Google on its four competition concerns. The possibility for a company subject to an antitrust investigation to propose commitments which the Commission can decide to make legally binding was established in 2004 by Article 9 of the EU Antitrust Regulation (Regulation 1/2003). Since this possibility was established, the Commission has taken 30 decisions making such commitments legally binding on companies.
>
> Using this possibility may be particularly useful to swiftly restore competitive conditions on a market, for example in fast-moving markets in the IT sector. In particular, the Commission has accepted commitments by Microsoft (see IP/09/1941), Apple (see IP/12/1367) and IBM (see IP/11/1539) and turned them into legally binding obligations.

Reaction: This time the Commission fairly poses and fairly answers the question. Google is entitled to the same procedures as other targets of EC investigations, and the Commission is rightfully providing them.

What are the next steps?

> The commitments are now subject to a market test of one month. Complainants, third parties and members of the public are therefore able to comment on the commitments, and the extent to which they address the Commission's four concerns.
>
> If following the market test, the commitments form the basis for a satisfactory solution to the Commission's competition concerns, the Commission may make them legally binding on Google by way of a Commitments Decision (so-called "Article 9 procedure"). Such a decision does not conclude that there is an infringement of EU antitrust rules, but would legally bind Google to respect the commitments offered. If a company breaks such commitments, the Commission can impose a fine of up to 10% of its annual worldwide turnover.
>
> The Commission will study all feedback very carefully and will take it into account in its analysis of whether Google's proposals address the four competition concerns. The Commission will in particular assess whether the commitments may need to be improved to adequately address the four competition concerns that have been identified.

This is in fact the procedure that ensued.

E. The Commission Accepts Google's "Improved Commitments Proposal"

On February 5, 2014, the Commission announced that it had accepted "an improved commitments proposal" from Google with respect to "the favourable [sic] treatment, within Google's horizontal Web search results, of links to Google's own vertical Web search services as compared to competing vertical Web search services," which was the first of the Commission's four competitive concerns. Available at: http://europa.eu/rapid/press-release_IP-14-116_en.htm; http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm; and http://europa.eu/rapid/press-release_MEMO-14-87_en.htm?locale=en.

According to the Commission, Google agreed "to guarantee that whenever it promotes its own specialised search services on its web page (e.g., for products, hotels, restaurants, etc.), 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." This "improved" commitment would apply "not only for existing specialised search services, but also to changes in the presentation of those services and for future services."

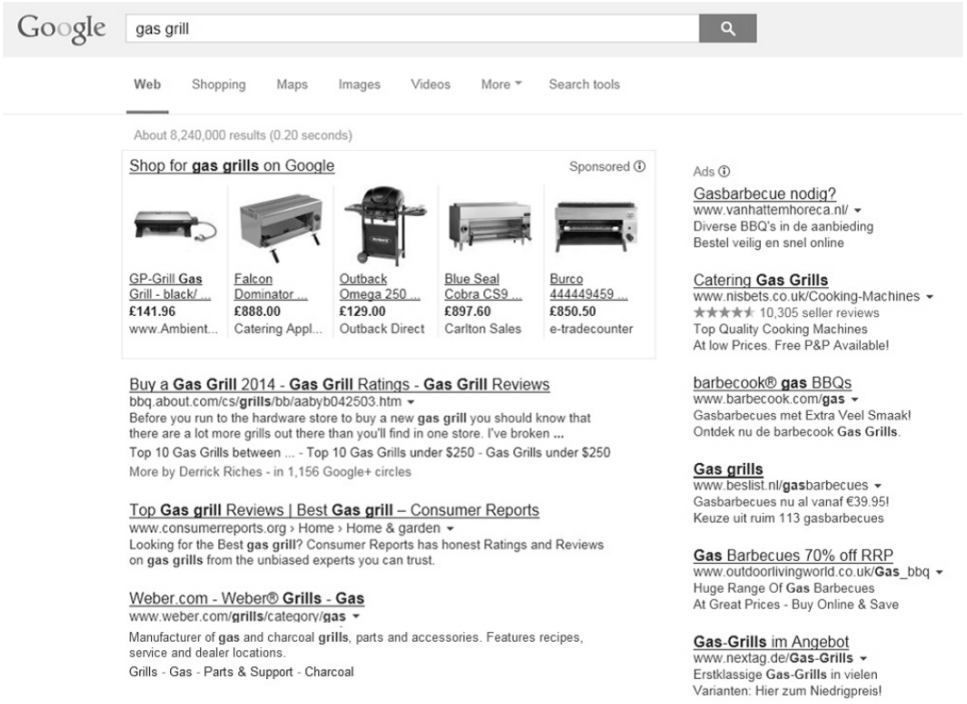
The Commission's acceptance of the Google proposal means that the Google investigation will end, unless discussions with complainants convince the Commission that it needs to reopen the matter. The procedure, as explained by Vice President in charge of competition policy, Joaquín Almunia, will be as follows:

> …we will now engage with all the 18 formal complainants in this case by outlining transparently and in detail in pre-rejection letters the reasons why we believe Google's final offer can now address the competition concerns that have been identified. Those letters will also explain why we do not believe that other issues raised by complainants are founded.
>
> I will analyse thoroughly the feedback they will provide and only after that will I propose to the College of Commissioners to adopt a final decision. This process will take a number of months.

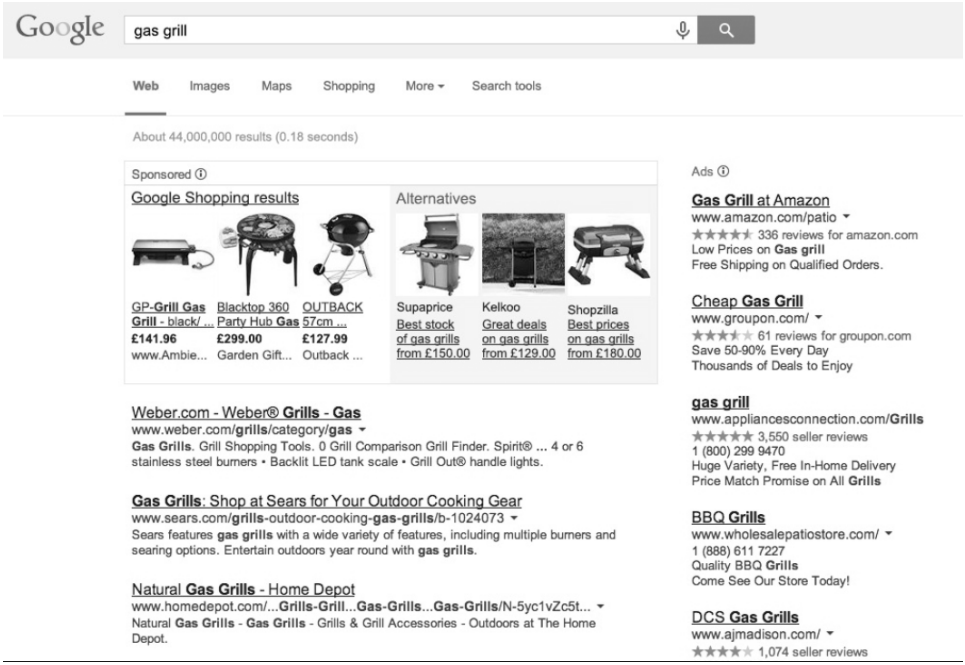
The Commission also provided a number of screen shots to illustrate the changes to Google's search displays that will result from Google's commitments:

1) Shopping

The Google page today:

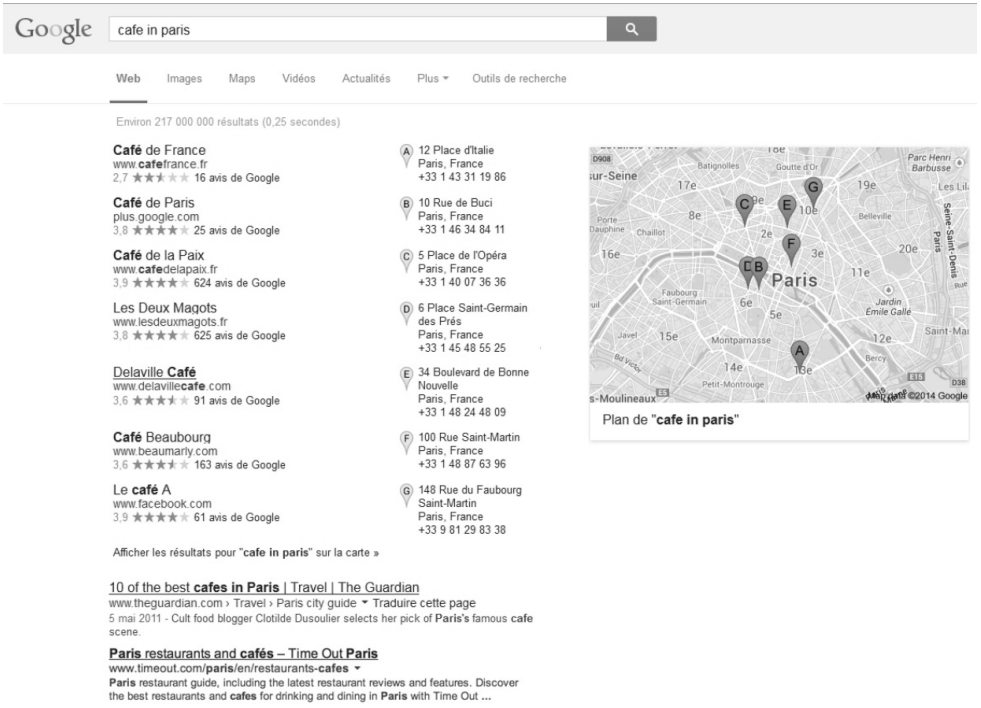


Screenshots with implementation of commitments:

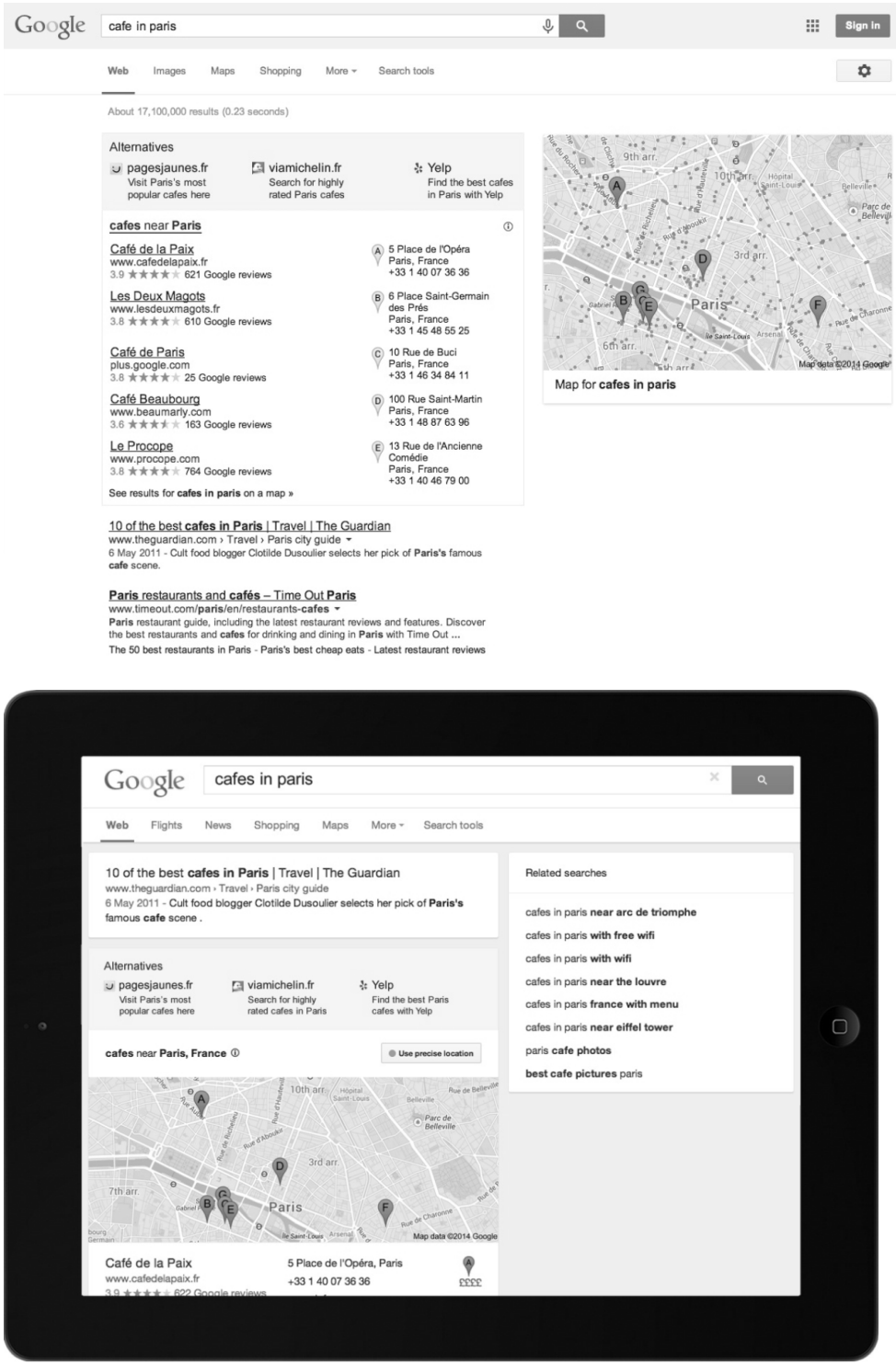


2) Local search

The Google page today:



Screenshots with implementation of commitments:



Defending its decision, the Commission set forth a statement from Mr. Almunia:

> My mission is to protect competition to the benefit of consumers, not competitors. I believe that the new proposal obtained from Google after long and difficult talks can now address the Commission's concerns. Without preventing Google from improving its own services, it provides users with real choice between competing services presented in a comparable way; it is then up to them to choose the best alternative. This way, both Google and its rivals will be able and encouraged to innovate and improve their offerings. Turning this proposal into a legally binding obligation for Google would ensure that competitive conditions are both restored quickly and maintained over the next years.

Reaction: The first sentence from Mr. Almunia is regrettable, a sop to discredited Chicago school antitrust dogma and the myth of the market. It is really time for someone in authority to say that competition cannot be protected without protecting competitors. United States antitrust jurisprudence is on the unfortunate path to protecting competition all the way to monopoly, where there are no competitors, or oligopoly, where competitors exist in name only, and not only economic power, but political power resides in one or a few firms. This is obviously not what Congress or the European Union intended when each enacted its antitrust laws.

The interesting question is whether the Commission obtained a sufficient commitment from Google to remedy the perceived problem of anticompetitive discrimination by Google in its search displays, or whether the Commission accepted the best concession it could get from Google because the Commission perceived it was on shaky legal ground in charging an abuse of dominance. The Commission obviously takes the former view, but the 18 formal complainants in the proceedings may not concur.

The likely upshot, however, is that the Google investigation is all but over, with the Commission proposing to the College of Commissioners a final order adopting the Google commitments, and the College of Commissioners accepting it, notwithstanding howls of protests from Google's competitors.

III. CONCLUSION

At the end of the day, half of the Google settlement is unremarkable from an antitrust standpoint, while the other half is quite remarkable, not necessarily for the results achieved, but for the purpose and intent of the Commission in pursuing difficult and important issues all too infrequently linked to present-day antitrust enforcement.

First the unremarkable part. Google should never have expected to be able to require publishers to source their requirements for online search advertisements exclusively from Google, or to prevent advertisers from porting and managing search advertising campaigns across Google's AdWords and non-Google advertising services. These types of exclusive dealing arrangements by firms with monopoly or market power have long been forbidden under established antitrust precedents. Google's voluntary commitment to abjure such practices is further proof, if any is needed, that discretion is the better part of valor. Litigating the defensibility of these practices would have been a losing battle.

Now the remarkable part. In challenging Google's use of third party web site content and favoring its own search engines in search displays, the Commission entered territory long abandoned by United States regulators and Courts: reciprocal dealing and forced sharing via essential facilities doctrine. Just as remarkably, the Commission secured commitments from Google addressing both issues, though perhaps not everything the 18 formal complainants wanted.

In doing so, the Commission struck a blow for divergence, not convergence – for which the Commission deserves applause and commendation. The wielding of great economic power, whether singly or through consolidation, is an appropriate subject for antitrust regulators; and, as was once the conventional wisdom in U.S. antitrust jurisprudence, those possessing such power are forbidden in many respects from undertaking conduct open to those without it. When such power exists in the sphere of communications media or channels of information dissemination, greatly enhanced antitrust scrutiny is both appropriate and necessary, inasmuch as economic power in these industries inevitably leads to and goes hand in hand with political power.

Where foreclosure of economic freedom portends foreclosure of First Amendment and other political freedoms, antitrust law has, indeed has always had, an important part to play. As the Supreme Court said in *Associated Press v. United States*, 326 U.S. 1, 20 (1945),

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. ***The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary.*** That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. ***Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.*** Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. ***The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.*** [Emphasis added.]

Miami Herald Publishing Co. v. Tornillo, 418 US 241, 251-52 (1974); *Citizen Publishing Co. v. United States,* 394 US 131, 139-40 (1969); *Kansas City Star Company v. United States*, 240 F. 2d 643, 665-66 (8th Cir. 1957):

> The theory of equal justice under law does not admit to the proposition that there is one brand of justice for some people and a different brand for others. Publishers of newspapers must answer for their actions in the same manner as anyone else. A monopolistic press could attain in tremendous measure the evils sought to be prevented by the Sherman Anti-Trust Act. Freedom to print does not mean freedom to destroy. To

> use the freedom of the press guaranteed by the First Amendment to destroy competition would defeat its own ends, for freedom to print news and express opinions as one chooses is not tantamount to having freedom to monopolize. To monopolize freedom is to destroy it.

Hale v. FCC, 425 F. 2d 556, 561 (D.C. Cir., 1970) ("It is also becoming increasingly obvious that application of antitrust doctrines in regulating the mass media is not solely a question of sound economic policy; it is also an important means of achieving the goals posited by the first amendment."); *Herbert v. Lando*, 568 F. 2d 974, 977 (2nd Cir., 1977) ("Even the one governmental control – antitrust legislation – that has long been applied to the press and does not contravene the First Amendment has been justified by its instrumental role in insuring the broad distribution of news.").

The strictures of the foregoing decisions have unfortunately been forgotten or ignored of late in the United States, as regulators have regrettably blessed Comcast's acquisition of NBC Universal and may be about to do the same for its grab of Time Warner cable. All credit therefore goes to the European Commission for its Google investigation. Even if the Commission did not articulate the rationale for its actions in language specifically redolent of the foregoing decisions, the intent and spirit informing the Google proceedings are undeniable, important, and essential to the maintenance of both economic and political liberty.