The Challenges of Applying Competition Law to Online Platforms: The Case of Search Engines Markets

ความท้าทายในการปรับใช้กฎหมายการแข่งขันทางการค้ากับแพลตฟอร์มออนไลน์: กรณีศึกษาตลาดเสิร์ชเอนจิน

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Received 26 March 2023; Revised 15 June 2023; Accepted 16 June 2023

Abstract

The fast-emerging aspect of online platform economic structures cast into doubt whether antitrust enforcement in information technology industries can protect consumers without damaging businesses that are rapidly developing. Adapting the current competition law system to the high technology market and, more specifically, to the case of online platforms, will not be a simple task as the developments in these markets have been unforeseen or hardly considered. The application of established case law, legal tools, and economic theories may require some adjustments in the context of online platforms. The legal concepts and economic considerations in the context of competition law are still in the initial phase of development whereas the EU Commission and the national competition authorities try to discover how competition law should apply in the case of the online platform markets. This article analyzes the application of the EU competition law in a Google

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manipulating search results case. The case of Google search engine represents the most high-profile competition investigation. This is because it raises questions about the effectiveness of Article 102 of the Treaty on the Functioning of the European Union in regulating online platform markets. Therefore, in this article, the allegations of the Google search engine case are crucial to examine to illustrate that competition law may not effectively be applied to control the abusive power in the online platform market and may require changes in application methodologies when concerning online platforms.

Keywords: Online Platform Market, Search Engine, Abuse of Dominant Position

บทคัดย่อ

เมื่อโครงสร้างทางเศรษฐกิจของแพลตฟอร์มออนไลน์พัฒนาไปอย่างรวดเร็ว ทำให้เกิดคำถามว่าจะสามารถปรับใช้หลักการแข่งขันทางการค้ากับอุตสาหกรรมเทคโนโลยีสารสนเทศเพื่อคุ้มครองผู้บริโภคโดยไม่ขัดขวางการพัฒนาทางธุรกิจและเทคโนโลยีได้หรือไม่ การปรับใช้กฎหมายการแข่งขันทางการค้ากับตลาดเทคโนโลยีขั้นสูงนั้นไม่ง่ายนัก โดยเฉพาะกับแพลตฟอร์มออนไลน์ เนื่องจากตลาดที่เกี่ยวข้องกับเทคโนโลยีเหล่านี้มีการพัฒนาอย่างต่อเนื่อง รวดเร็ว และคาดการณ์ได้ยาก การปรับใช้คำพิพากษาของศาลหรือคำวินิจฉัยขององค์กรที่เกี่ยวข้อง หลักกฎหมายและทฤษฎีทางเศรษฐศาสตร์อาจต้องมีการปรับเปลี่ยนเพื่อให้เหมาะสมและสอดคล้องกับบริบทของแพลตฟอร์มออนไลน์ ปัจจุบันคณะกรรมาธิการยุโรปและคณะกรรมการการแข่งขันทางการค้าของแต่ละประเทศกำลังเผชิญกับความท้าทายในการปรับใช้หลักการแข่งขันทางการค้ากับตลาดแพลตฟอร์มออนไลน์ บทความนี้วิเคราะห์ถึงการพิจารณาและการปรับใช้กฎหมายการแข่งขันทางการค้าของสหภาพยุโรปในคดีที่กูเกิ้ล (Google) ปรับเปลี่ยนผลการค้นหา (search result) ในแพลตฟอร์มของตน คดีนี้เป็นกรณีศึกษาสำคัญซึ่งเป็นคดีเกี่ยวกับการแข่งขันทางการค้าและเสิร์ชเอนจิน (search engine) ที่ได้รับความสนใจอย่างมากเนื่องจากมีประเด็นถกเถียงในทางวิชาการถึงการวินิจฉัยมาตรา 102 ในสนธิสัญญาว่าด้วยการดำเนินงานของสหภาพยุโรป (Treaty on the Functioning of the European Union) กับตลาดเสิร์ชเอนจินอย่างกูเกิ้ล บทความนี้จึงนำเสนอบทวิเคราะห์ว่ากฎหมายการแข่งขันทางการค้าอาจไม่เหมาะสมที่จะนำมาใช้แก้ปัญหาสถานะผู้มีอำนาจเหนือตลาดในตลาดแพลตฟอร์มออนไลน์ และอาจต้องปรับเปลี่ยนวิธีการในการวิเคราะห์การกระทำของผู้ให้บริการที่เป็นตัวกลางในการเข้าถึงข้อมูลออนไลน์

คำสำคัญ: ตลาดแพลตฟอร์มออนไลน์, เสิร์ชเอนจิน, การใช้อำนาจเหนือตลาดโดยมิชอบ

1. Introduction

Online platforms currently constitute a focal point of competition law developments. The growing attention to online platforms is due to the vast economic opportunities that they facilitate. Giant online platform companies such as Facebook and Google have achieved extravagant market valuations in a short period of time. The economic and societal potential lies in the fact that online platforms have succeeded in creating new markets and disrupting the well-established. Furthermore, online platforms are likely to become even more prominent with the recent increase in the use of smartphones and tablets to promptly access the Internet. With such a significant increase in use, there will undoubtedly be more occasions that need competition law scrutiny.

However, online platforms are part of a highly dynamic and competitive market, which raises consideration of whether intervention is even appropriate and whether it can be done adequately. A key challenge is the economic model that online platforms are based upon. The intensity of competition can be witnessed in the changes that have occurred in the online market since the early twentieth century. Online platforms that were considered dominant by competition authorities were heading toward failure and were eventually replaced by new, more innovative players.[1] The intensity of competition is constantly growing with the development of Internet technology which allows for lower launching costs for businesses and often in combination with low switching costs by consumers. Companies that were once unique in their market must now compete with multiple competitors. Such intense competition results not only from newcomers to the market, but also from established players that choose to expand their business operations.[2]

Additionally, in some cases, online platforms can be linked to one another in a new model to provide a new type of platform. These circumstances make the assessment of competition on the market difficult, compared to offline markets. Also, online platform businesses may often compete not only for an existing market but also for future markets that have yet to fully materialize. Such competition will only intensify with the development of internet technology which will allow more online platforms to gain increased access to consumers. Similarly, the provision of zero-priced goods or services and the way in which

[1] P.A. Geroski, 'Competition in Markets and Competition for Markets' (2003) 3(3), Journal of Industry, Competition and Trade, 151, 159.

[2] Ibid.

personal data has become an aspect of the trade will also be relevant for competitive assessments and are likely to increase complications. [3] Furthermore, market transparency, algorithmic trading, and online interaction between competitors participating in online platforms will challenge the discovery and prohibition of coordination between competitors.

With the abovementioned taken into account, there will be challenges when attempting to apply competition law to online platforms. There are concerns that even when enforcement correctly concludes anti-competitive conduct in online platform markets, it could cause more harm than good because the effects of such harmful conduct will be short-lived. Also, the authority's decisions to initiate an investigation are likely to become outdated and possibly cause detrimental effects on economic growth. [4] Consequently, specific platform characteristics and the dynamics of the online markets in which online platforms play a prominent role must also form part of the assessment concerning potential violations of competition law. Therefore, competition law should be applied cautiously when investigating big online platform companies such as Google and Facebook because a false positive would chill its innovation and competition that is currently providing immense benefits for consumers. [5]

This article discusses the application of competition law to regulate online intermediaries. It analyzes the situation where giant online intermediaries such as Google manipulates its result recommendations to favor its affiliated services. For instance, Google may promote content or sites of its business partnership over other sites. It may have a contract to present certain viewpoints of news or current affairs in its search results rather than the opposite opinions. Therefore, it is important to analyze how competition law can be applied to these actions. This article specifically examines an EU competition case in which Google manipulated its search engine results to favor its affiliated services. Part 2 of the article, therefore, provides the background of the EU Google Shopping case. An analysis of the EU Commission and the General Court decision will then be provided in Part 3.

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[3] Howard A. Shelanski, 'Information, Innovation and Competition Policy for the Internet' (2013) 161 University of Pennsylvania Law Review, 1663, 1666.

[4] Ibid.

[5] Geoffrey A. Manne and Joshua D. Wright, 'Google and the Limits of Antitrust: The Case Against the Case Against Google' (2011) 34 Harvard Journal of Law & Public Policy, 171, 244.

2. Background of the Google Shopping Case

In November 2010, the European Commission announced the opening of the formal antitrust inquiry into the competitive violations performed by Google.[6] The complaints were initiated by three search service providers: Foundem, Ciao, and eJustice about the unfavorable treatment of their vertical search services in Google's organic search results. The complainants have claimed to the European Commission that Google placed its own affiliated vertical search services (i.e. Google Shopping) at a more preferential position in its organic search results (Google general search engine) and lowered the ranking of the competing vertical search services (i.e. comparison-shopping service) in Google organic search results.[7] Since users tend to click predominantly on the first few entries on the screen, advertisers will most likely prefer to advertise on a higher ranking in search results (which are Google's affiliated vertical search services in this case). Google thus exploited consumers' reliance on defaults with the effect that consumers stuck with Google Shopping rather than looking out for a competing comparison-shopping website. This would then lead to the consequence that Google Shopping would generate more and more traffic, putting itself in a better position to convince merchants to provide information about their products, generate more revenue, and collect more information on users. Consequently, the downgrading vertical search services of competitors of Google's affiliated services will be less attractive to advertisers and this practice eventually leads to the exclusion of Google's competitors in the affiliated vertical search services market. Therefore, Google allegedly abuses its dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU).

The European Commission started the formal process of finding an infringement after rejecting Google's third package of remedies. After a 7-year-long period of investigations, on the 27th of June 2017, the European Commission ruled a controversial decision that Google had been abusing its market dominance as an organic search engine by promoting its own comparison-shopping service in its search results and demoting those of competitors.[8] In other words, The Commission found that Google abused its market dominance as a search engine:

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[6] European Commission, *Antitrust: Commission Probes Allegations of Antitrust Violations by Google* (Press Release IP/10/1624, 30 November 2010).

[7] European Commission, *Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns* (Memo/13/383, 25 April 2013).

[8] European Commission, *Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine* (Press Release IP/17/1784, 27 June 2017).

firstly, by systematically giving prominent placement to its own comparison-shopping service and, secondly, by demoting rival comparison-shopping services in its search results. In particular, the Commission found that most highly ranked rival firms appeared on average only on page four or further of Google's search results while Google Shopping would show up at the very top of the general search results page, displayed separately and in a particular rich format (e.g., including pictures) in the "Product Universal Box" or the "Google Shopping Unit" (which contained paid advertising) and were not subject to the general relevance-based ranking of the generic search results. This preferential treatment to own comparison-shopping services results in Google Shopping being much more visible to consumers in Google's organic search results, whilst rival comparison-shopping services were much less visible.

Since the Commission's Decision does not clearly address various arguable issues related to the case, there is a lot of criticism about this decision (which will be delineated in Part 3). The specific existing law upon which the case has been built is also unclear. Besides, this case has fallen under which existing case law or which existing type of abuse is uncertain. The Commission's decision was based on a theory of self-preferencing without relying on the essential facilities doctrine as abusive conduct. However, there is a debate on whether self-preferencing can fall under Article 102 of the TFEU since a prohibition of self-preferencing contradicts the strict requirements for access to a dominant undertaking's infrastructure that has been developed under the essential facilities doctrine.

However, this is not the end of the case. Google brought an action against the Commission's decision by appealing the decision to the General Court of the European Union which took several years before the matter was fully resolved in 2021. In November 2021, The General Court largely dismissed Google's action against the decision of the Commission and found that Google abused its dominant position by favoring its own comparison-shopping service over competing comparison-shopping services. The Google Shopping case is considered to be a landmark case setting a precedent which can be used as a framework to analyze the legality of similar conduct that online intermediary companies such as search engines (e.g. Google) and social media platforms (e.g. Facebook) may have engaged in regarding other actions in the online platform market.

This article will examine legal issues and controversial debates related to this case. Precisely, the concerns are based on the fact that the fast-emerging aspect of technological industries makes competition enforcement ineffective to protect consumers without damaging business development. In other words, competition law (i.e. Article 102 of the TFEU) has

limitations to regulating the action of Google. The following section will illustrate the application of competition law to regulate online intermediaries.

3. The Application of Article 102 of the TFEU

The action of online intermediaries in placing their own affiliated content at a preferential position in their result recommendations and lowering the ranking of other competing content can reduce the advertising revenue of content-generated websites. Since users tend to click on the first few entries on the search engine or social media screen, advertisers will most likely prefer to advertise on a higher ranking in result recommendations. Consequently, the downgraded content of other sites will be less attractive to advertisers and this practice eventually leads to the exclusion of these sites from online intermediaries' platforms. Therefore, the online intermediaries' manipulation of result recommendations can be considered a violation of the prohibition of abuse of a dominant position to exercise anti-competitive conduct.

The Google's manipulation of organic search engine results can be considered a violation of the prohibition of abuse of a dominant position to exercise anti-competitive conduct under Article 102 of the TFEU which states:

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade within Member States".

To apply Article 102 of the TFEU, there are two elements to be concerned with. One is a dominant position in a relevant market and another element is the abusive manner which is harmful to competition.

3.1 Dominant Position in a Relevant Market

The finding of dominance entails a two-stage process: starting with the definition of the relevant market and followed by an assessment of the market power within the relevant market of the concerned undertaking.

3.1.1 Relevant Market

Before determining a dominant position of Google, the relevant market needs to be defined. In competition law, products which can reasonably be interchanged are counted as

the relevant market.[9] Defining the relevant market in the case of online platforms is not easy and straightforward. This is because the fact that the development of online platforms is fast-changing: online companies have expanded or invented a new way of their business to intersect and compete with other product markets. Consequently, the line drawing of interchangeable products is a blur and will make less sense to clarify over time.

For example, it is difficult to distinguish Facebook and other different types of social media to define the relevant market. Social media which have features or functions similar to Facebook such as Myspace, Google +, and Tumblr are included in the relevant market. However, Facebook can be considered to compete with microblogging such as Twitter, content communities such as Flickr and YouTube, and social curation such as BuzzFeed and Reddit. These sites are enabling the sharing of texts, pictures, videos, audio files, and applications which are overlapping and competing with Facebook. In practice, social media have many forms and some of them may overlap with each other; people can substitute these social media services with Facebook in some circumstances. Therefore, it causes practical problems if regulators try to differentiate the relevant market of each online platform. Due to the convergence of platforms and technology, many online platforms combine various services and can reasonably be interchanged.

For search engines such as Google, search engines now turn to Universal Search which displays results not only from Web sites but also from images, videos, news, maps, and products (replacing Ten Blue Links which displayed ten search results). Universal Search bridges many information search services to compete with each other by allowing a user to search for specific content such as books through a general search which negates the need to use specialized searches or online merchant search services. Therefore, it could be debatable that the relevant market of Google's organic search engine should not be as narrow as a general search engine market and should broadly encompass any virtual search activities for

[9] The European Commission's Notice on the definition of the relevant market 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." (European Commission, *Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law* (OJ C372, 9 December 1997) para.7.

information.[10] This is because, in competition law, products which can reasonably be interchanged are counted as the relevant market.

In this case, two markets are involved: first, the general search market across the entire internet for whatever one enters in the search engine, and the latter, the comparison-shopping service market that allows users to search for specific products and compare prices and characteristics across different online retailers. There is a vertical link between the two markets as general searches can be used to locate suppliers of comparison-shopping sites, and thus be considered upstream.[11] Google has argued that Google organic search engines face aggressive competition for the audience's attention with other finding information services such as specialized search engines, online merchant search services like Amazon, social media like Facebook and Twitter, and other tools. These services are overlapping and competing with each other to provide search navigation for people and people can substitute these services for Google search engines in some circumstances.

However, in the European Commission's assessment of the Google Shopping case, the general search market is separated from other aggregators such as online merchant platforms, social media, and specialized searches.[12] The decision does not provide a clear distinction of why other information search services should be separated from general searches. The high market share of Google is considered only from the narrow relevant market definition of general search engine market. Moreover, the Commission focuses on a very small number of comparison-shopping sites and constitute the relevant market for comparison-shopping service which excludes online merchant platforms, specialized searches focusing on one subject matter and online search advertising platforms.[13] In other words, the Commission assumes that there is a distinct market between comparison-shopping services (where consumers do not actually shop but only compare offers such as Google Shopping) and online merchant platforms (such as Amazon and eBay which offer products for sale).

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[10] Andrew Langford, 'gMonopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention?' (2013) Indiana Law Journal, 88(4) 1559, 1568; Google, 'The New Gründergeist' (*Google Europe Blog*, 13 October 2014) <http://googlepolicyeurope.blogspot.be/2014/10/the-new-grundergeist.html> accessed 17 January 2023; Amit Singhal, 'The Search for Harm' (*Google*, 15 April 2015) <http://googleblog.blogspot.be/2015/04/the-search-for-harm.html> accessed 17 January 2023.

[11] European Commission, Commission Decision Case AT.39740 - Google Search (Shopping), Recital 154-263.

[12] European Commission, Commission Decision Case AT.39740 - Google Search (Shopping), Recital 161-190.

[13] European Commission, Commission Decision Case AT.39740 - Google Search (Shopping), Recital 191-250.

In the author's point of view, this definition of comparison-shopping market is problematic and arguable. To put it simply, this also implies that the market definition would change easily only if Google Shopping provides 'One Click Shopping' for directly buying retailing products on its own as an online merchant service.[14] Furthermore, the Commission ignores the role of merchant platforms that also enable consumers to compare prices and assumes that consumers do not choose between Amazon and Google Shopping when they want to compare offers for products. People typically do not search for direct links to the product, but for information. For almost every specific question that Internet users have on product, there are more options than searching on comparison-shopping services: the user experience with these services is similar. The rationales of the Commission in the Google case ignore actual consumer behavior and online merchant platforms as competitors in comparison-shopping services.

Google appeals that the Commission has inappropriately excluded merchant platforms from the relevant market definition and the definition of the relevant markets is erroneous in that users compare products on merchant sites as they do on comparison-shopping sites. Thus, competition in the market for comparison-shopping services remains strong because of the presence of merchant platforms in that market. However, The General Court also rejects Google's argument and confirms the Commission's assessment that those platforms are not in the same market. Although both categories of websites offer product search functions, they do not do so under the same conditions, and users, whether internet users or online sellers, do not use them in the same way but do so on a complementary basis. Consequently, there is little competitive pressure on Google from merchant platforms.

3.1.2 Dominant Position

Even if the relevant market can be defined, a dominant position or market power itself still needs to be identified. Market share is one of the important factors to determine a dominant position. For instance, market share is a significant factor to differentiate the conclusions of the Google manipulating search results case in the US and the EU. As described by the European Commission, the fact that the market share of Google's competitors in the US is around 30 percent, while in Europe, Google has above 90 percent of market share is

[14] Justus Haucap, 'Why the European Commission's decision against Google is in many respects dubious, at best' (*D'KART*, 9 June 2017) <https://www.d-kart.de/the-google-case-first-comments/> accessed 17 January 2023.

the reason why the Commission continues investigating Google's actions, even though the US Federal Trade Commission has concluded that there was no competition issue.[15] It can also be implied that Yahoo! and Bing, whose combined market share are less than 5 percent in Europe and 30 percent in the US, can manipulate their search results without raising any competition investigations. Moreover, in circumstances where the search engines or social media market is an effective competitive market and there are no dominant companies in the market, any actions of online intermediaries do not have competition issues.

According to the Google Shopping case, the decision concludes that Google is dominant in general search markets: the assessment of dominance is based on the fact that Google's general search engine has held exceeding 90 percent of market shares in most EU countries.[16] Noteworthy, the fact that an online platform has a large market share does not always mean that it has a dominant position. Market share alone, though is an important factor, is not sufficient to determine a dominant position.[17] The assessment of market power is whether the constraint from the threat of rival competition exists. This needs to be considered in conjunction with many competitive factors.[18]

The assessment of a dominant position in a relevant market of an online platform is not straightforward even in the case where that platform has a large market share. The challenges posed by the new economy markets may make a big online platform such as Google and Facebook a leading competitor but not a dominant player with market power. [19] Particularly, the characteristics of online intermediaries and online services in the new economy market may address uncertainty and the problem of applying Article 102.[20]

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[15] European Commission, *Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns* (Memo/13/383, 25 April 2013) p.3.

[16] European Commission, Commission Decision Case AT.39740 - Google Search (Shopping), Recital 273-284.

[17] European Commission, 'Decision Case Microsoft/Skype COMP/M.6281' para.99; 'Decision Case Microsoft/Yahoo! Search Business COMP/M.5727' para.99; *Cisco Systems Inc v European Commission* (T-79/12) (2013) at [67].

[18] Andrew Langford, 'gMonopoly' (2013) 88(4) Indiana Law Journal 1559, 1573.

[19] Geoffrey Manne and Joshua Wright, 'Google and the Limits of Antitrust' (2011) 34(1) Harvard Journal of Law and Public Policy 194.

[20] Joyce Verhaert, 'The Challenges Involved with the Application of Article 102 of the TFEU to the New Economy' (2014) European Economics: Microeconomics & Industrial Organization eJournal < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340958> accessed 17 January 2023.

Five characteristics of the digital sector and the difficulties they cause on EU competition law will be examined as follows:

(1) Intensive Competition and Innovation

The first characteristic of a new economy market to be considered is the intensive competition in innovation developments. Continuously investing in the improvement of existing applications and refining existing platforms are crucial for the input of production and cost reduction. Therefore, to survive in the online platform market, Google has to provide a certain level of innovation and needs to keep improving constantly to compete with other operators.[21] For instance, by considering that consumers use digital platforms and applications for their own advantage, the competitive product in search engine market is the quality of search results[22]; it is not difficult (compared to physical products) for competitors to produce better search results to suit the demand of users.[23] Consequently, although Google is now the leading search engine operator, it must preserve its higher innovation rates and have to provide a better quality of its search results than competitors to maintain its market leadership and keep users attracted to its service. The degree of dynamic and innovative competition can also be emphasized by the fact that numerous specialized search platforms have constantly emerged and the fact that the leadership in the search engine market has changed regularly.[24] This intensive degree of improvement can be the indicator that any of Google's decline in innovation or the quality of search results will lead to the loss of users to other search engine operators.[25] This characteristic of a new economy which is driven by strong innovative competition makes it difficult to define the dominant position of the online platform market.

(2) High Fixed Cost but Low Marginal Cost

The second characteristic of a new economy market is 'high fixed cost but low marginal cost'. Digital platforms usually have high sunk costs because the development of novel and original products requires enormous investments; but once the products are made, the

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[21] OECD Competition Committee, 'Competition Policy and Policy and Knowledge-Based Capital: Key Findings' (OECD, 2013) 7.

[22] European Commission, 'Decision Case Microsoft Yahoo' (Comp/M.5727, 18 February 2010) para. 101.

[23] Mark Patterson, 'Google and Search Engine Market Power' (2013) Harv.J.L.Tech 1, 4.

[24] John Battelle, *The Search: How Google and Its Rivals Rewrote the Rules of Business and Transformed Our Culture* (Penguin Group 2005) 49-63.

[25] Christian Kersting and Sebastian Dworschak, 'Does Google Hold a Dominant Market Position? – Addressing the (Minor) Significance of High Online User Shares' (2014) Ifo Schnelldienst 6.

developing costs of production are often low marginal costs. This characteristic compensates companies for the large capital investment and business risk by allowing them to charge above the marginal costs. Therefore, for dynamic competition to exist in the digital market, it has a rational expectation for significant market power to persist for a reasonable amount of time.

For the issue of the high sunk cost but low marginal cost in search engine market, this characteristic of search engine markets tends to cause a barrier to entry into the market which supports the first movers to have the advantage and market power.[26] Therefore, Google may be considered to have a dominant position in the search engine market. However, by considering the factual evidence of the past and present states of the online platform market, it shows that the high sunk cost does not create a barrier which allows the leading firm operators to have a dominant position. For example, Altavista and Yahoo! were once the leading search engine operators at the time when Google entered the market. Google did not only succeed in entering the market but also displaced its competitors. Similarly, Yandex surpassed Rambler which is the former leading Russian search engine operator.[27] Even now Google does not only face pressure from Bing and Yahoo! but also from new potential competitors such as Baidu and ChatGPT. Therefore, this dynamic nature of the search engine market indicates that Google which is now the leading search engine operator in Europe is not insulated from the competitive threat by a barrier to entry into market.

(3) Network Effect and Two-side Market

The third and fourth characteristics of a new economy market are 'network effect' and 'two-sided market'. The major characteristics of the search engine market and social media market are the two-sided market which creates a network effect. Network effect arises when the value of a product to its customer grows with the number of other users of the product. In two-sided platforms, network effect can be seen where a rise in the number of consumers increases the attractiveness of the platform developers and vice-versa.[28] For example, the value of social media for users depends on an increase of other users using that social media. This so-called direct network effect relates to the number of users in certain services.

[26] Andrew Langford, 'gMonopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention?' (2013) Indiana Law Journal, 88(4) 1559, 1574 - 1576.

[27] Justus Haucap and Ulrich Heimeshoff, 'Google, Facebook, Amazon, eBay: Is the Internet driving competition or market monopolization?' (2014) 11 International Economics & Economic Policy, 49, 56.

[28] OECD, 'Hearings: The Digital Economy' (DAF/COMP(2012)22, 7 February 2013), 8.

The more users, the greater utility those users receive directly.[29] They, therefore, create a barrier to entry and tend to reinforce leading companies to become dominant players. There is a distinction between the indirect network effect and the direct network effect. In the case of the indirect network effect, the number of users on one side of the market increases the number of customers (e.g. advertising companies) on the other side of the market: however, the increase of customers on the other side does not directly benefits users on the one side.[30] Therefore, market power will not always occur on both sides of the two-sided market.

Another characteristic of the search engine market is the two-sided market: the search advertising market and the unpaid search engine market. The Commission states that there is also a high barrier to entry into the organic search engine market because of network effects. However, the major characteristic of search engine's two-sided market is that it creates an indirect network effect. In particular, the indirect network effect in the search engine market appears in the market of search advertising. The number of users in the unpaid search engine market increases the value of the search advertising market. Besides, any unfair conduct of Google to advertisers does not affect the number of users in the unpaid search engine market side which is the key competition in search advertising market. Thus, Google has market power on the advertising market side. On the other hand, in the unpaid search engine market, users do not care about how many other users in Google or the number or the cost of advertising in search advertising market. They are primarily concerned about the quality of search results. Therefore, Google organic search does not have direct network effects as the Commission stated and the "revenue [from advertiser in search advertising market] which can be reinvested...and improvement...to attract more users"[31] is not directly in the definition of network effects. The indirect network effect does not provide market power to Google in the organic search engine market which is the market in the consideration of the case.

(4) Switching Cost

'Switching cost' is the final characteristic of the new economy market which is a factor to assess market power and identify a dominant position in the market. If people can easily switch from using one service to another without losing anything e.g. money and time to process, it tends to be that there is intense competition in the market. For example, in the

[29] Neal Finnegan, John Kwoka and Lawrence White, *The Antitrust Revolution* (OUP 2014) 520-527.

[30] Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3601 (Ct. First Instance), para. 1061.

[31] European Commission, Commission Decision Case AT.39740 - Google Search (Shopping), Recital 296.

social media market, the switching cost is a near-zero cost. People are 'just one click away' from other social media without incurring any penalties if they are unhappy with the services or community from their current social media platform.[32] In particular, they just type in a URL and download or install any software or sign up for an account. Besides, in fact, users now utilize more than one social media in parallel (so-called 'multi-home'). Therefore, the ease to switch service providers constrains Facebook from exercising market power.[33] However, it can be argued that search engine market has a high information cost to click away because it is difficult for people to evaluate the quality of search results whether they receive better results than using other search engine providers. Thus, instead of switching to competitors when search result is defective; users simply modify search query. Nonetheless, it does not mean that leading search engine provider such as Google has a dominant position in search engine market since Google still cannot provide poor results than its competitors and the constraint from the threat of rival competition is exist.[34]

In my opinion, it can be academically debatable whether Google is the dominant undertaking in the search engine market. This is due to the complication of the various characteristics of the new economy market which needed to be considered. In order to determine market power, the factors which must take into account are such as the dynamic change in the digital platform market, the intensive competition of technological developments, the low switch cost, and the indirect network effect.

3.2 The Anti-competitive Conduct

Even if the relevant market can be defined and the market power of Google can be specified, a dominant position in the market in itself is not an offense under Article 102 which raises competitive concerns. To apply Article 102 to search engines' manipulation of search results, a dominant position in the market must be accompanied by the abuse of market power to prevent competition. The action of Google will be an abuse of market power on the condition that such bias "must be sufficient in magnitude to exclude rival search engines

[32] For search engines, see Joshua Hazan, 'Stop Being Evil: A Proposal for Unbiased Google Search' (2013) 111(5) Michigan Law Review 789, 813.

[33] Marina Lao, 'Neutral Search as a Basis for Antitrust Action?' (Harv.J.L.Tech Occasional Paper Series, 4 April 2013) 7.

[34] Eric Goldman, 'Search Engine Bias & the Demise of Search Engine Utopianism', in Berin Szoka and Adam Marcus, *Essays on the Future of the Internet* (TechFreedom 2010) 470-471.

[or social media] from achieving efficient scale".[35] It is uncertain whether the manipulation of result recommendations to favor their own content over other rival content can be regarded as anti-competitive conduct.

Not all forms of bias in content recommendations would be considered anti-competitive conduct under competition law.[36] Anti-competitive conduct under competition law is behavior that deviates from normal competitive manners and is regarded as an unfair or distortion of competition.[37] Actions which cannot be explained as having other incentives (such as serving consumers, improving innovation, or creating efficiency) than the purpose to destroy competition can be considered as an abuse of market power.[38] Therefore, for the operations of online intermediaries to plausibly raise competitive concerns, they have to cause significant impacts on anti-competitive foreclosure (not merely affecting a single competitor but must have a negative effect on the competitive process).[39] Merely the fact that online intermediaries manipulate their content recommendations and make some competitors (especially less efficient companies) hard to survive and consequently leave the market is not a concern of competition law at all.[40] From the aspect of competition law, manipulating content recommendations can be regarded as the action to differentiate between online intermediaries which is a natural by-product of competition, is desirable, and is beneficial to consumers.

3.2.1 Abusive Conduct

According to the Commission decision, Google abused its dominant position on the internet search market by systematically giving prominent placement to its own comparison-shopping service to be displayed at or near the top of the organic search results; while demoting rival comparison-shopping services in its search results (leading them to typically be

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[35] Joshua Wright, 'Defining and Measuring Search Bias' (George Mason Law and Economics Research Paper No. 12-14, 3 November 2011) 8.

[36] Ioannis Lianos and Evgenia Motchenkova, 'Market Dominance and Quality of Search Results in the Search Engine Market' (2013) 9(2) Journal of Competition Law & Economics 419, 452.

[37] Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 196-197.

[38] Marvin Ammori and Luke Pelican, 'Competitors' Proposed Remedies for Search Bias: Search "Neutrality" And Other Proposals' (2012) 15(11) Journal of Internet Law 1, 10.

[39] Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 196-197.

[40] Joshua D. Wright, 'Defining and Measuring Search Bias: Some Preliminary Evidence' (2011) George Mason Law & Economics Research Paper No. 12-14, 7.

ranked very low and appear on the fourth page).[41] However, the relevant abusive conduct stated by the Commission remains unclear. While the Commission neither objects to Google's design of its display search results pages nor to Google's demotion of certain results, the Commission precisely lists these two practices when explaining how Google has abused its dominant position.[42] Also, US Federal Trade Commission found the same practices to be product improvement to the benefit of consumers.[43]

There are counter-arguments that the mere fact that search engines or social media favors their own content cannot be implied as anti-competitive conduct under Article 102. The discrimination of Google in favor of its own content will be an abuse of market power on the condition that such bias "must be sufficient in magnitude to exclude rival search engines from achieving efficient scale".[44] Nonetheless, Google's manipulation of search results to favor its own sites may lead to more consumer traffic to that sites but does not (and cannot) block competitors to enter or appear in the market. Besides, Google's manipulation of search results does not prevent consumers from visiting competitors' sites through various means such as using other search engines, using social media, or typing URLs.[45] Therefore, the Google's manipulation may not significantly exclude competitors from achieving efficient scale to compete with Google.

Based on the author's analysis, the conduct of search engines and social media in manipulating result recommendations can be considered an efficient competitive strategy of these online intermediaries in order to be different from their competitors; such conduct benefits consumers rather than an abuse of market power.[46] For example, Google may promote certain viewpoints of current affairs or content of its business partnership over others

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[41] European Commission, Commission Decision Case AT.39740 - Google Search (Shopping), Recital 292-296.

[42] European Commission, *Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine* (Memo IP/17/1785, 27 June 2017) 1-2.

[43] Federal Trade Commission, 'Statement of the Federal Trade Commission Regarding Google's Search Practices: *In the Matter of Google Inc.*' (FTC File Number 111-0163, 3 January 2013).

[44] Joshua D. Wright, 'Defining and Measuring Search Bias: Some Preliminary Evidence' (2011) George Mason Law & Economics Research Paper No. 12-14, 8.

[45] Daniel A. Crane, 'Search Neutrality and Referral Dominance' (2012) 8(3) Journal Of Competition Law And Economics 459, 466.

[46] Federal Trade Commission, 'Statement of the Federal Trade Commission Regarding Google's Search Practices: *In the Matter of Google Inc.*' (FTC File Number 111-0163, 3 January 2013) 3.

in its search results. Facebook may conduct a policy of its platform which prefer certain content such as prioritizing content produced by its sponsorship and preventing content generated from other social media platforms to be shared on Facebook. To be noteworthy, these actions may very well end up being a bad strategy from the consumer's viewpoint and users may prefer a different platform. Consequently, an alternative search engine or social media can be a competitive product substituted for Google and Facebook. Punishing online intermediaries for favoring certain content may reject the competitive process where customers are free to choose from various search and social media platforms.

However, the General Court found that by favoring its own comparison-shopping service over competing services rather than a better result over another result, Google departed from competition on the merits. The General Court noted that even if the results from competing comparison-shopping services were more relevant, they could never receive the same treatment as results from Google's comparison-shopping service in terms of their positioning or their display. In other words, the discrimination did not lie in a different treatment based on the nature of the results, i.e., product-related, but on the differential treatment between the origin of the results (those coming from Google were treated better than those coming from competitors).[47]

It should be noted that while the Commission had found potential anticompetitive effects in both markets (comparison-shopping service market and general search service market), the Court only regards anticompetitive effects in the comparison-shopping services market. Traffic and market shares of competing comparison-shopping services declined after Google implemented its practices, potentially reducing their incentive to innovate and reducing the ability of consumers to access the best-performing comparison-shopping services. In contrast, in the market for general search, the Court does not consider the fact that Google's action in protecting the revenue generated by specialized search resulting in financing the general search service is an anti-competitive practice.[48]

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[47] *Google and Alphabet v Commission (Google Shopping)*, Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, paras. 284 and 351.

[48] *Google and Alphabet v Commission (Google Shopping)*, Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, para. 451.

3.2.2 Theory of Harm

There are concerns that the action of search engines and social media in placing their own affiliated content at a more preferential position in their result recommendation and lowering the ranking of the other competing content will lead to the exclusion of competitors and have a significant effect on the competitive market.[49] These anti-competitive foreclosure arguments are premised on the notion that the disappearance from the top of the search results will exclude competitors from the market. Since users tend to click predominantly on the first few entries on the search engine or social media screen, advertisers will most likely prefer to advertise on a higher ranking in result recommendation. Consequently, the downgrading content of other content-generated sites will be reduced the revenue from the advertising and this practice eventually leads to the exclusion of these sites from online intermediaries' platforms.

In contrast, in my opinion, it is questionable whether these conducts are not abusive but instead a disruptive innovation resulting in the introduction of new products. One of the characteristics of a new economy market is disruptive innovation. Disruptive innovation refers to new technologies that displace existing markets: it is also referred to as 'dynamic competition' or 'competition for the market'.[50] While price has traditionally been the main competition for conventional competition, in dynamic competition such as in the online business, innovation becomes a relevant parameter for competition.[51] Especially where users get access with zero prices to online services such as search engines and social networks, their choice is based on quality and the level of innovation. Innovation can result in the improvement of existing products or in new business models that displace the earlier and create a new market.

The author agrees with some scholars that competition law focuses on the action of consumer harm and quality-related product degradation, not harm to only a group of competitors. In other words, competition law does not seek to protect inefficient competitors.

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[49] Fairsearch, 'Can Search Discrimination by a Monopolist Violate U.S. Antitrust Law?' (*Fairsearch* 2011) 1 <http://www.fairsearch.org/wp-content/uploads/2011/07/Can-Search-Discrimination-by-a-Monopolist-Violate-U.S.-Antitrust-Laws1.pdf> accessed 17 January 2023; Fairsearch, 'Google's Transformation from Gateway to Gatekeeper' (*Fairsearch* 2011) 2 <http://www.fairsearch.org/wp-content/uploads/2011/10/Googles-Transformation-from-Gateway-to-Gatekeeper.pdf.> accessed 17 January 2023.

[50] See Clayton Christensen, *The Innovator's Dilemma* (HBSP 1997).

[51] J. Gregory Sidak and David Teece, 'Dynamic Competition in Antitrust Law' (2009) 5(4) J.C.L.E 581, 585.

Therefore, to impose any punishment under competition law, it must be clear that the harm caused to competitors is outweighed by the benefits gained by customers. The prevention of certain businesses and the punishment for introducing innovative products conflict with the key objectives of competition law. As Atkinson comments on the Google Shopping case:

"Today's ruling is bad for consumers and bad for innovation. … The EU's actions have created a cloud of uncertainty that will make large tech companies overly cautious about making changes to the user experience and service offerings that would benefit consumers."[52]

The Commission's explanation of the theory of harm for the abusive conduct in Google Search is also flawed. The decision appears to revolve around harm to a group of competitors and there is practically no discussion convincing how the users have been harmed. As Kucharczyk added[53]:

"It seems the Commission's case is mainly focused on competitors who disagree with Google competing on the merits. We fail to see the evidence for consumer harm and for quality-related product degradation."

Google appealed to the Court that the harm caused to competitors is outweighed by the benefits gained by customers. In contrast, the punishment imposed on Google causes limited benefits granted to Google Shopping's competitors but clearly diminishes benefits for society. Google's Shopping Unit reflects efficiency and is responsive to consumers, rather than exclusionary conduct. The categorization of the search result in the form of images, places, or news (not merely through the text-only links to Web sites) is more useful for consumers since they want to find the products quickly and easily. People usually prefer links that take them directly to the products they want, not to websites where they have to repeat their searches. Therefore, the way Google displays shopping advertisements saves consumers both time and frustration and benefits advertisers who want to promote those same products. In contrast, comparison-shopping services have likely been an outdated business as a result of the normal dynamics of competition as they could not innovate to catch up with the powerful online merchant services (e.g. Amazon).

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[52] Robert Atkinson, 'Record EU Fine Against Google Risks Creating New "Too Big To Innovate" Standard' (*ITIF*, 27 June 2017) <https://itif.org/publications/2017/06/27/record-eu-fine-against-google-risks-creating-too-big-innovate-standard> accessed 17 January 2023.

[53] Jakob Kucharczyk, 'EC Issues Record Fine In Google Shopping Case; CCIA Concerned About Chilling Effect On Innovation' (*CCIA*, 27 June 2017) <http://www.ccianet.org/2017/06/ec-issues-record-fine-in-google-shopping-case-ccia-concerned-about-chilling-effect-on-innovation/> accessed 17 January 2023.

The General Court rejects Google's arguments and points out that Google's arguments take into account only the impact of the display of results from Google's comparison-shopping service, without considering the impact of the poor placement of results from competing comparison-shopping services in the generic results. By analyzing numerous factors such as specific traffic data generated by Google's general search engine for comparison-shopping services, the correlation between the significant increase in traffic for Google's own comparison-shopping service and the overall decrease in traffic from its general results pages to competing comparison-shopping services, the Court noted that there was a sufficient basis for showing the potential outcome was the disappearance of comparison shopping services, less innovation on their market and less choice for consumers, characteristic features of a weakening of competition.

Noteworthy, the Court emphasized that the demonstration of an infringement of Article 102 of the TFEU did not necessarily have to identify actual exclusionary since the Commission had sufficiently established potential effects by showing a correlation between the practices and the reduction in traffic.[54] In other words, abuse remains abuse even if it was unsuccessful by taking into account all the relevant circumstances. Furthermore, to reject Google's argument that the Commission had not established anticompetitive effects leading to higher prices, the Court held that the as-efficient-competitor test is warranted only in the case of pricing practices (e.g., predatory pricing or margin squeeze) and the test does not aim to assess actual market participants' efficiency.[55] Thus, the test was irrelevant in this case that does not involve pricing issues.

3.2.3 Essential Facility Doctrine

It can be considered that Google, which holds a large amount of market share in the general search engine market in Europe, has more responsibility than its competitors to refrain from doing some conduct concerning competition issues.[56] As the European Court of Justice

[54] *Google and Alphabet v Commission (Google Shopping)*, Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, para. 382.

[55] *Google and Alphabet v Commission (Google Shopping)*, Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, para. 538.

[56] Paul Craig and Grìnne de Búrca, *EU Law text, cases and materials* (5th edn, OUP 2011) 1025; Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) 192.

stated, a firm in a dominant position has a 'special responsibility' and this special duty becomes even greater if a firm is in a super-dominant position.[57]

The Court considered that general search engines have characteristics akin to those of an essential facility since there is currently no actual or potential substitute available to be replaced in an economically viable manner on the market and competing shopping services are generally dependent on traffic from Google.[58] Nevertheless, while the Commission accused Google of refusal to grant (equal) access, the Court considers that the practice at issue is based on a difference in treatment by Google for the sole benefit of its own comparison service. The Court confirms that not every practice relating to access to such a facility necessarily means that it must be assessed in the light of the conditions applicable to the refusal to supply. Unlike traditional infrastructures, whose value lies in the owner's ability to exclude others, Google's search engine's value lies in its capacity to be open to results from external sources.[59] A general search engine is an infrastructure that is, in principle, the value of which lies in its capacity to be open to results from external (third-party) sources and to display those sources, which enrich and enhance the credibility of the search engine. If it is Google's business model to show results from other parties and therefore use them in its infrastructure, it must be treated differently than companies whose business model it is to invest in their own infrastructure to use it exclusively. Google then cannot both claim to be a neutral search engine using results from diverse sources and then discriminate between them. Therefore, Google's preferential treatment towards its shopping service in the general search result was not a competition on the merits because it was "not consistent with the intended

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[57] Opinion of AG Fenelly in Cases C-395/96 *Compagnie Maritime Belge NV and Dafra-Lines v. Commission*, 29.10.998, (2000) ECR I-1365; Court of Justice Case T-83/91, *Tetra Pak International v. Commission*, 6.10.1994, II (1994) ECR 755; Court of Justice Case T-228/97, *Irish Sugar v. Commission*, 7.10.1999, (1999) II ECR 2969.

[58] *Google and Alphabet v Commission (Google Shopping)*, Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, para. 224.

[59] *Google and Alphabet v Commission (Google Shopping)*, Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, para. 178.

purpose of a general search service".[60] In other words, the promotion of one type of specialized result involves a certain form of abnormality.[61]

However, there is a counter-argument that self-preferencing is widespread also in other industries with more competitive market structures, such as supermarkets. Also, the manipulation of search results can be regarded as an industry standard practice since other search engines such as Bing and Yahoo! also favor its own services to be on a higher ranking in the search results. It is common for search engines (including the dominant one) to link its affiliated businesses in search results which is similar to a publisher advertising its own products. Besides, if search results are regarded as free publicity for websites, these sites will have no right to demand the appearance in search results which is in the interest of search engines whether to provide it or not.[62] Therefore, this special responsibility to refrain from the 'methods different from those which condition normal competition'[63] (known as 'compete on the merit') does not prevent Google from favouring their services in search results.

In contrast, from my point of view, Google's business model is more directly aimed at providing consumers with choices which differ from supermarkets. Although consumers seem also to prefer supermarkets with a wide range of choices, it is at least theoretically possible to imagine a supermarket offering only one product per category coming from the same producer. On the other hand, Google's general search engine would completely collapse if it would show only results from the same source. Google's proximity to and influence over consumer choices are the delineating factors compared to the essential facilities cases. In this light, giving up neutrality completely for the most visible part of the search result page is hardly explainable by pro-competitive motives.[64] Therefore, even if the manipulation of search

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[60] *Google and Alphabet v Commission (Google Shopping)*, Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, para. 184.

[61] *Google and Alphabet v Commission (Google Shopping)*, Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, para. 176.

[62] James D Ratliff and Daniel L Rubinfeld, 'Is There a Market for Organic Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability?' (2014) 10(3) Journal of Competition Law & Economics 517, 522-526.

[63] Court of Justice Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission (Vitamins)*, 13.2.1979 ECR 461.

[64] Johannes Persch, 'Google Shopping: The General Court takes its position' (Kluwer Competition Law Blog, 15 November 2021) <https://competitionlawblog.kluwercompetitionlaw.com/2021/11/15/google-shopping-the-general-court-takes-its-position/> accessed 17 January 2023.

results can be considered as a competitive strategy to be different from others, online platforms (such as search engines and social media), by its nature and functionality, should have special responsibility to be neutral at certain level in order to refrain from doing some conduct concerning anti-competitive issues.

4. Conclusion

The analysis of the situation when big online intermediaries prioritize their own affiliated content illustrates that competition law may not effectively be applied to control the actions of online intermediaries. The overview provided in this article delineates that the application of EU competition law to online platforms will be a complex matter and will primarily require changes in application methodologies when concerning online platforms. This is particularly true in the qualification of practices under Article 102 of the TFEU as well as with regard to the justification possibilities that undertakings have under these provisions.

The Court decision in the Google Shopping case is surely not the end of the story. On the contrary, this case could also mark the beginning of the anti-competitive online intermediaries' case that there are other pending cases against online platform companies in deciding what consumers access in terms of information, choice, and prices; for instance, a court in Munich put an end to Google showing health-related information from only one source in an info box on top of the search results[65]; the German Federal Cartel Office is already investigating the Google News Showcase[66]; and the European Commission has opened a formal antitrust investigation on Facebook distorting competition in the markets for online classified ads by tying its online classified ads service (Facebook Marketplace) to its personal social network (Facebook)[67].

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[65] Johannes Persch, Should Google Still be Allowed to Crown the Kings in Digital Markets? (*Promarket*, 13 July 2021) <https://www.promarket.org/2021/07/13/google-search-digital-markets-germany-antitrust/> accessed 17 January 2023.

[66] Bundeskartellamt, Bundeskartellamt examines Google News Showcase (Bundeskartellamt, 4 June 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/04_06_2021_Google_Showcase.html?nn=3591568> accessed 17 January 2023.

[67] European Commission, 'Antitrust: Commission sends Statement of Objections to Meta over abusive practices benefiting Facebook Marketplace' (Press Release IP/22/7728, 19 December 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728?fbclid=IwAR3EoXFlpcMbha0jTF8nmcZI0TdGvkkEizlA5t6m4pdPaEjpkpN23XH3Iu8> accessed 17 January 2023.

My analysis suggests that the judgment in the Google Shopping case will certainly make it more difficult for an online platform to develop its algorithm operation by deciding what to show to the consumer. Every change that an online platform company makes will be very carefully looked at by competition authorities (and competitors for that matter). Also, it will be tough for online platform companies to justify any behavior which is considered anti-competitive on the basis of product improvements.

Antitrust enforcement seeks to achieve a fair balance between short-static efficiencies, which include reducing costs and maximizing consumer surplus. Equally, the regulations aim to preserve a stimulating innovative environment for competitors as they strive to produce new and better products for their customers. However, considering the characteristics of online platform markets and the variety of problems in applying competition law in a new economy market, the illustration arises that the current competition law may not be an appropriate tool to tackle abusive power in the online platform market.

In order to adapt competition law to be effective and appropriate in applying to online platforms markets, the author provides primary recommendations as follows:

1. In defining relevant markets for online platforms, regulators should not differentiate the relevant market from each online platform separately and should not consider only from a narrow scope of certain product or service. Since online platforms combine various services and can reasonably be interchanged, new model of business providing a new type of platform intersects and competes with other product markets. Therefore, regulators should regard actual consumer behavior and the role of online platforms in responding to the need of consumers for defining a wide relevant market.

2. To determine dominant position in online platforms market, a large market share is not a sufficient factor to determine a dominant position. The characteristics of new economy markets such as the dynamic change in the digital platform market, the intensive competition of technological developments, the low switch cost, and the indirect network effect are needed to be considered. Consequently, a big online platform may be regarded as only a leading competitor but not a dominant player. Also, with the fact that digital platforms usually have high sunk costs, thus it has a rational expectation for significant market power to persist for a reasonable amount of time for the large capital investment of innovation.

3. Competition law should adopt new notions or principles in applying to the online platforms market as the European Court of Justice considered that general search engines have characteristics akin to those of an essential facility. The author agrees with the European

Court of Justice that a firm which holds a large amount of market share (a leading competitor) should have a 'special responsibility' and this special duty becomes even greater if a firm is in a super-leading position. Therefore, even if a firm is not a dominant player in the market, it should have an accountability to refrain from doing some conduct which is different from normal competition known as 'compete on the merit'.

4. In analyzing anti-competitive conduct, regulators should focus on the action of consumer harm which can be determined by the intensive competition in innovation developments. While price has traditionally been the main competition in conventional competition, in the online platforms market, disruptive innovation becomes a relevant parameter for competition. Therefore, for the operations of online intermediaries to plausibly raise competitive concerns, they have to cause significant negative effect on innovative products, not merely harm to only a group of competitors. The intervention that would chill innovation and competition conflicts with the key objectives of competition law.

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บทความแต่ละบทความเป็นความคิดเห็นอิสระของผู้เขียน