Abuse of Dominance in Digital Markets: The Case Against Google

6th GRUR Int./JIPLP Joint Seminar
Munich, 28 September 2015
Dr Thomas Höppner
Fundamentals of Search

Favouring of Own Services

The EU Competition Investigation

Market Dominance

Abuse of Dominance

Remedies
„For something that is used so often by so many people, surprisingly little is known about ranking at Google. This is entirely our fault, and it is by design. We are, to be honest, quite secretive about what we do“.

(Udi Manber, Google Vice President of Engineering, Official Google Blog)
„Over the first quarters of 2014, Google ranked first amongst all corporations in lobbying spending in the United States”.

“Google`s influence may be most profound – and least quantifiable – in its use of its vast resource to accrue ´soft power, such as funding who might otherwise raise alarms about its practices. [...] These funding practices [...] run the risk of silencing the watchdogs who might otherwise bark if Google goes too far`”.

(Public Citizen`s Congress Watch “Mission Creep-y”, 2014, S. 6f.)
Typical Search Engine Results Page (SERP)

organic results = horizontal=general
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Remedies
Self-Promotion: *Incentives to Distort Competition*

"to the degree that we host content, we ultimately have a monetary incentive to drive people to those pages"
(Former Google Manager, Marissa Mayer 2007)

"It is very difficult even for experts to evaluate search engines [...] this type of bias is very difficult to detect but could still have a significant effect on the market"
(Google Founder Page & Brin 1998)

"We rolled out Google Finance and we did put the Google link first. [...] That has actually been our policy then [...] that we have implemented in other places. So for Google Maps again, it's the first link and so on and so forth and after that it is ranked usually by popularity"
(Former Google Manager, Marissa Mayer, 2007)
Favouring of Own Services: Example 1

Google Finance: Stock market quotes, news, currency...
www.google.com/finance - Google
Get real-time stock quotes & charts, financial news, currency conversions, or track your portfolio with Google Finance.

In the news
Finance Committee approves Emanuel's $62.4 million tax package
Chicago Sun-Times - 19 hours ago
In fact, Finance Chairman Edward Burke (14th) asked if there were even more tax...

Rajiv Mehrishi appointed Finance Secretary
Economic Times - 2 hours ago
It's changed my life: Finance manager's incredible transformation after losing 23 stone
Mirror.co.uk - 21 hours ago

More news for finance
Favouring of Own Services: Example II
Favouring of Own Services:  
Example III
Demotion of Rivals

Example

Visits via Google Organic Search for Shopping Portal

-84% visits via Google’s organic search results within 12 days

-77% visits via Google’s organic search results over night

12 days
Effects on the Market for Product Price Comparison Services (UK)

Universal Search enabled for Google’s Product Price Comparison service

Panda Introduced in the UK

Source: ComScore
Effects on Google Shopping
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“Google is abusing a dominant position [...] by systematically favouring its own comparison shopping product in its general search results pages in the (EEA). The Commission is concerned that users do not necessarily see the most relevant results in response to queries – to the detriment of consumers and rival comparison shopping services, as well as stifling innovation.”

(Commission, Press Release 15. April 2015, MEMO/15/4/4781)
Milestones in the EU investigation

- **Nov. 2009**: First complaints submitted by Foundem and BDZV&VDZ
- **Jan. 2010**: Commission opens formal proceedings
- **May 2012**: Commission offers Google to submit commitment proposals
- **Aug. 2013**: Market Tests for 1. set of proposals: "very negative feedback"
- **Nov. 2013**: Commission finds 2. set of proposals "unacceptable"
- **Jan. 2014**: VP J.Almunia announces to settle on basis of 3. set of proposals
- **Sep. 2014**: VP J.Almunia announces that in light of "fresh evidence and solid arguments" 3. set of commitments is insufficient – requests improvements
- **Apr. 2015**: Commission issues Statement of Objections: Google Shopping
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Google`s Dominance: Market Share on Search & Search-Ad Market

StatCounter Global Stats
Top 5 Desktop, Tablet & Console Search Engines in Europe on 2013

- Google
- bing
- Yandex RU
- Yahoo!
- Conduit
- Other
Google`s Dominance:
*Tipping of the Market in 2001-2002*
Google's Dominance: Market Share >80% since 2005
Google`s Dominance: Barriers to Entry

Google`s Market Power

Infrastructure
Data
Network Effects
Economies of Scope
Financial Power
Google's Dominance: Network Effects

“Users go where the information is, so people bring more information to us. Advertisers go where the users are, so we get more advertisers. So more users more information, more information more users, more advertisers more users, more users more advertisers"

(Google Manager, Jonathan Rosenberg 2009)
Lock-in - switching costs on all platform sides

Internet Users (> 90% single-homing) due to
- pre-instalment on >1 m (advertising-) partner sites
- pre-instalment on Android, Chrome, Safari etc.
- habituation effects and cognitive switching costs
- unportable personalisation

Advertisers (> 80% single-homing) due to
- 20% of costs relate to operation of ad campaign
- campaign data may not be ported to other search engine
- costs multiply despite lower CTR

Website-operators (> 90% single-Google SEO)
- Search Engine Optimisation to Google`s requirements exclusively
- incompatible requirements of other search engines
Google`s Dominance: 
*Economies of Scope and Lock-In: Chrome*
Google's Dominance: Economies of Scope: Android

Global Smartphone Market Share By Platform

Source: IDC, Strategy Analytics
Google's Dominance: 
Economies of Scope: $5 \times \geq 1 \text{bn users}$
Google`s Dominance: 
The Power of Data

“Selling ads doesn't generate only profits; it also generates torrents of data about users' tastes and habits, data that Google then shifts and processes in order to predict future consumer behavior, find ways to improve its products, and sell more ads. It's a system of constant self-analysis: a data-fueled feedback loop that defines not only Google's future but the future of anyone who does business online.”

(Google Chief Economist Hal Varian, 2007)
Google’s Dominance:  
The Power of Data

„Scale is key. We just have so much scale in terms of the data we can bring to bear.“  
(Google CEO Eric Schmidt, 2009)

“We don't have better algorithms than everyone else; we just have more data.“  
(Google Chief Scientist, Peter Norvig, 2009)
Source: Ghostery panel data, Jan-Mar 2013.
Ordered by frequency of panel user interactions with tracking applications.
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Theory of harm

CJEU:

“The list of abusive practices contained in [Article 102 AEUV] does not exhaust the methods of abusing a dominant position”

(Case C-280/08P, Deutsche Telekom [2010] ECR I-9555, para. 173)
Theory of harm

CFI:
“a system of undistorted competition [...] can be guaranteed only if equality of opportunity is secured as between the various economic operators”.
(Case T-271/03, Deutsche Telekom [2008] ECR II-477, para. 198.)

• Bundling / Tying?
• Discrimination?
• Refusal to grant access to an “essential facility”?
• Refusal to deal?
• New type of abuse?
Theory of harm

CJEU:
It constitutes an abuse if an undertaking holding a dominant position on a particular market “reserves to itself [...] an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking”
(ECJ, Case C-311/84, Télémarketing [1985] ECR 3261, para. 27)

US Courts:
„They used a monopoly in one market to foreclose competition in another – a classic violation of the antitrust laws.“
(Fishman v. Estate of Wirtz, 807 F.2d 520, 536 (7th Cir. 1986))
Theory of harm

Requirements for an abuse under the monopoly leveraging concept:

- two separate markets;
- change of business conduct;
- capable of weakening competition on the secondary market by foreclosing equally efficient existing competitors; and
- no objective justification.

Not required:

- dispensability of primary service;
- elimination of any competition on secondary market.
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Google`s 3rd Commitments Proposal

Total number of clicks on results: 1000
Number of clicks on shopping results, shopping search and links to rival offerings: 352
Number of clicks on information icon: 0
Remedies

European Commission:

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

(MEMO/15/4781)

- Classical remedy for an abuse?
- Classical remedy for a monopoly leveraging?
- Link between abuse and remedy?
Some general conclusions

• Competition between multi-sided digital platforms is determined by network effects
• As data drive network effects „data is the new currency of the internet“ (Margrethe Vestager 2014)
• Determining dominance for multi-sided platforms is tricky
• Any hampering of multi-homing and/or artificial increasing of switching costs may constitute an abuse
Thank you for your attention!

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HAUSFELD