

# Google's antitrust woes around the world

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## Abstract

In this paper, the author analyses the last seven years of the European Commission's antitrust proceedings involving Google (AT.39.740). She reports on the search giant's negotiations with Vice-President Joaquín Almunia between 2010 and 2014, and then on the current status of the procedure under Margrethe Vestager.

The essay details the position of news media publishers regarding the European case in particular, and Google and antitrust in general. The author concludes with an overview of the antitrust probes in Google's business practices the world over.

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Keywords: Google, Antitrust, Vestager, Almunia, European Commission

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### 1. 2010-2014: Opening of the European investigation

On 30 November 2010, the European Commission announced its decision to open an antitrust investigation into allegations that Google Inc. «has abused a dominant position in online search, in violation of European Union rules»<sup>1</sup>. The antitrust enquiry followed formal complaints by competing companies Ciao, Foundem and ejustice.fr. The legal basis for the Commission's decision was Article 11(6) of Council Regulation No 1/2003<sup>2</sup> and article 2(1) of Commission Regulation No 773/2004<sup>3</sup>.

On 21 May 2012, Vice-President Joaquín Almunia issued a statement<sup>4</sup> expressing four main concerns regarding Google's business practices that might violate EU antitrust rules and that had emerged from the market investigations conducted since 2010:

1. The more favourable treatment, within Google's general web search results, of its own content and its own vertical search services<sup>5</sup>.

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\* L'articolo è stato sottoposto, in conformità al regolamento della Rivista, a referaggio a "doppio cieco".

<sup>1</sup> Press Release IP/10/1624, at [http://europa.eu/rapid/press-release\\_IP-10-1624\\_en.htm](http://europa.eu/rapid/press-release_IP-10-1624_en.htm)

<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Chapter IV "Cooperation", Article 11: «Cooperation between the Commission and the competition authorities of the Member States [...] 6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority».

<sup>3</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Chapter II "Initiation of Proceedings", Article 2: «Initiation of proceedings 1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation or a Statement of Objections or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier».

<sup>4</sup> Joaquín Almunia, Speech 12/372 at [http://europa.eu/rapid/press-release\\_SPEECH-12-372\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm)

<sup>5</sup> Specialised, or vertical, search sites are search engines that let users search specifically in a particular domain. Joaquín Almunia, Speech 12/372 (supra, note 4): «Vertical search services are specialised search engines which focus on specific topics, such as for example restaurants, news or products». Examples: Google Shopping and its competitors Amazon, eBay or Foundem; Google Local and its competitor Yelp; and Google Travel and its competitors Tripadvisor, Kayak, Opodo and Expedia. "Horizontal" or general search engines are instead for example Google, Yahoo!, Bing and DuckDuckGo.

2. The use of third-party content by Google without prior consent (known as “scraping”), for the benefit of its own vertical search services<sup>6</sup>.
3. Advertising exclusivity: exclusivity agreements obliging third-party web sites to obtain all or most of their online search advertisements from Google, thus shutting out competing providers of search-advertising intermediation services.
4. Undue restrictions on advertisers: contractual restrictions on the transferability of online search-advertising campaigns to rival search advertising.

Almunia concluded his statement announcing that he had asked Google, in the person of Executive Chairman Eric Schmidt, to propose remedies to these points that would allow the matter to be solved through a “commitment decision” – pursuant to Article 9 of the EU Antitrust Regulation<sup>7</sup> – while avoiding the formal proceedings of a Statement of Objections<sup>8</sup>. The commitment decision is an enforcement instrument primarily designed to restore effective competition. It allows the Commission to conclude cases by rendering commitments offered by a company legally binding<sup>9</sup>: the decision does not conclude whether EU antitrust rules have been infringed, but does legally bind the company to respect the commitments.

In March 2013, the Commission formally notified Google of its preliminary assessment that the four concerns outlined above constituted abuses of a dominant position<sup>10</sup>.

Between then and February 2014, Google presented to the Commission two sets of commitments to address the four specific areas of antitrust concern. On each occasion, technical discussions and market tests/consultations were conducted, and complainants, third parties and members of the public were invited to comment. In both cases the Commission returned negative feedback to Google.

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<sup>6</sup> Joaquín Almunia, Speech 12/372: «Google may be copying original material from the websites of its competitors such as user reviews and using that material on its own sites without their prior authorisation. In this way they are appropriating the benefits of the investments of competitors [...] This practice may impact for instance travel sites or sites providing restaurant guides».

<sup>7</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Chapter III Commission Decisions, Article 9: «Commitments. 1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission».

2. The Commission may, upon request or on its own initiative, reopen the proceedings: (a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; or (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

<sup>8</sup> A Statement of Objections serves the purpose of officially informing the parties of the objections raised against them. For more details see footnote (4) above.

<sup>9</sup> See *Antitrust Manual of Procedures*, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, Module 16 “Commitment decision”, March 2012, at [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf)

<sup>10</sup> *European Commission, Antitrust: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns* (Press Release IP/13/371, 25 April 2013). The prohibition of abuses of dominant positions is provided for in Article 102 of the Treaty on the Functioning of the European Union, [2008] OJ C 115/47.

On 5 February 2014, Almunia announced he had obtained from Google a third, improved commitments proposal in the context of the ongoing antitrust investigation into online search and search advertising. As a proposal aimed at addressing the first of the Commission's concerns, Google vowed to guarantee that the services of three rivals would be displayed alongside and in a comparable way to its own specialised services (e.g. for consumer products, hotel rooms, restaurants etc). The Commission's press release<sup>11</sup> indicated that Google had already made significant concessions on the other three concerns raised by the Commission. In particular:

- On Commission's concern no. 2: Google would give content providers an extensive opt-out from the use of their content in Google's specialised search services if they so wish, without being penalised by Google.
- On Commission's concern no. 3: Google would remove exclusivity requirements in its agreements with publishers for the provision of search advertisements; and
- On Commission's concern no. 4: Google would remove restrictions on the ability for search-advertising campaigns to be run on competing search-advertising platforms.

The Commission concluded its press release announcing that the complainants in this case would soon be informed of the reasons why the Commission believed that Google's offer was capable of addressing the Commission's concerns. The complainants would then have the opportunity to make their views known to the Commission before a final decision was made on whether to make Google's commitments legally binding on the company.

Before summer 2014, the complainants received the pre-rejection letters from DG Competition, which aimed at detailing the reasons why the Commission did not intend to conduct a further investigation under Article 7 of Council Regulation (EC) No 1/2003<sup>12</sup>.

The complainants had to respond to these pre-rejection letters in the course of July. The opposition of interested parties to the solution of the Google antitrust case on the basis of this last set of commitments was extremely strong. In addition, the company was at the time facing bad publicity related to the Google Streetview and National

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<sup>11</sup> Joaquín Almunia, "Statement on the Google Investigation" (SPEECH/14/93, 5 February 2014); see also European Commission, "Antitrust: Commission Obtains from Google Comparable Display of Specialised Search Rivals" (Press Release IP/14/116, 5 February 2014) and the accompanying MEMO/14/87, at [http://europa.eu/rapid/press-release\\_IP-14-116\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-14-116_en.htm?locale=en)

<sup>12</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty Chapter III Commission Decisions, Article 7: «Finding and termination of infringement 1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy, or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past. 2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States».

Security Agency scandals, as well as concerns over privacy and its tax affairs. These circumstances prompted politicians to cast themselves as opponents of Google. In this complex scenario, Almunia was unable to finalise the Google commitments during his term as a Commissioner.

## 2. The EU Commission's Statements of Objections

### 2.1. April 2015: comparison shopping

In November 2014, Danish politician Margrethe Vestager assumed office as the new Competition Commissioner. That month, the European Parliament passed a non-binding resolution, calling on the Commission «to enforce EU competition rules decisively and to consider proposals aimed at unbundling search engines from other commercial services». The Parliament moreover recommended that «indexation, evaluation, presentation and ranking by search engines must be unbiased and transparent»<sup>13</sup>.

On 15 April 2015, the Commission sent a Statement of Objections (SO) to Google on its comparison-shopping service, «outlining the Commission's preliminary view that the company is abusing a dominant position, in breach of EU antitrust rules, by systematically favouring its own comparison-shopping product in its general search-results pages in the European Economic Area»<sup>14</sup>. At the same time, the Commission opened a separate antitrust investigation into Google's conduct as regards the mobile operating system Android<sup>15</sup>.

The Statement of Objections related to the first of the Commission's original concerns – Google's alleged preferential treatment of its own shopping results on general web search-results pages. The Commission nevertheless specified that the other three concerns (“scraping,” advertising exclusivity and undue restrictions on advertisers) were still under investigation, the outcome of which would not be prejudiced by the SO on comparison shopping.

After declaring that Google indeed held a dominant position in online search throughout Europe, the Commission detailed its preliminary conclusions on the case, essentially declaring that since 2008 Google had been favouring its own comparison-shopping services by prioritising such results in search pages, while applying a system of penalties to competitors. Moreover, the Commission claimed that «Google's conduct has a negative impact on consumers and innovation. It means that users do not necessarily see the most relevant comparison-shopping results in response to their queries, and that incentives to innovate from rivals are lowered as they know that however good their product, they will not benefit from the same prominence as Google's product». The SO constituted a formal step in the investigations into suspected violations of

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<sup>13</sup> European Parliament, Resolution on Supporting Consumer Rights in the Digital Single Market (2014/2973(RSP)), B8-0286/2014, 27 November 2014, [15]–[18].

<sup>14</sup> [http://europa.eu/rapid/press-release\\_MEMO-15-4781\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm)

<sup>15</sup> [http://europa.eu/rapid/press-release\\_MEMO-15-4782\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4782_en.htm)

EU antitrust rules, and served the purpose of officially informing the parties of the objections raised against them. Google now had the opportunity to exercise its right of defence by replying in writing and requesting an oral hearing.

Google's immediate answer to the SO was published on its official blog, under the title "The search for harm"<sup>16</sup>. In the article, Google provided facts and numbers sustaining its thesis that the vast majority of its European users choose Google because of the quality of its products and its constant innovation.

In July, the European Parliament's Research Service published a briefing to provide MEPs and parliamentary staff with background on the ongoing Google antitrust proceedings<sup>17</sup>.

Google filed its official response to the SO on 27 August 2015, and reported on its content in an article<sup>18</sup> published on its official blog. «We believe that the SO's preliminary conclusions are wrong as a matter of fact, law, and economics. We look forward to discussing our response and supporting evidence with the Commission, in the interest of promoting user choice and open competition».

## **2.2. April 2016: Android**

In the first half of April 2016, rumours started spreading about the European Commission's intention to file an antitrust complaint against Android.

As Politico<sup>19</sup> noted, the case had the potential to be even scarier for Google than the then six-year-long litigation over the search engine. With sales of smartphones in 2015 beating those of computers by 500%, an action against Android was likely to cripple Google's business strategy, which largely focused on mobile development. On 20 April, the European Commission indeed sent a Statement of Objections to Google<sup>20</sup>. With about 80% of smart mobile devices in the world running Android<sup>21</sup>, the constraints that Google allegedly imposes on manufacturers and mobile network operators were found to be in breach of EU antitrust law.

Google Play, which stocks more apps than the Apple store and four times more than Amazon, was at the core of the complaints. Because of this wealth of apps and of the popularity of the Android operating system, Google Play appears to be an essential service to most phone manufacturers, but Google allows access to Google Play only when the other proprietary services are installed, namely email, maps and

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<sup>16</sup> <http://googleblog.blogspot.be/2015/04/the-search-for-harm.html>

<sup>17</sup> [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565870/EPRS\\_BRI\(2015\)565870\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565870/EPRS_BRI(2015)565870_EN.pdf)

<sup>18</sup> <http://googlepolicyeuropa.blogspot.fr/2015/08/improving-quality-isnt-anti-competitive.html>

<sup>19</sup> <http://www.politico.eu/article/why-margrethe-vestagers-android-case-is-googles-worst-nightmare/>

<sup>20</sup> European Commission, *Antitrust: Commission sends Statement of Objections to Google on Android Operating Systems and Applications*, Press Release, IP/16/1492, at [http://europa.eu/rapid/press-release\\_IP-16-1492\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1492_en.htm)

<sup>21</sup> Fun fact: Apple's iOS holds only 18% of the world market, but in 2015 it had collected 84% of the global profits (source John Gapper, footnote 24).



search. Under special scrutiny were the licensing agreements that Google signs with manufacturers of mobile phones intended to run Android. In those contracts, the fact that Google search be pre-installed and set as default search engine was conditional to being granted access to Play Store.

In addition, in the view of the Commission, Google had breached EU antitrust rules by «preventing manufacturers from selling smart mobile devices running on competing operating systems based on the Android open source code; giving financial incentives to manufacturers and mobile network operators on condition that they exclusively pre-install Google Search on their devices».

Google published its reaction on its Europe blog<sup>22</sup>, in an article signed by Kent Walker, its Senior Vice-President & General Counsel. Walker countered Vestager's claims, pointing out that pre-loaded apps include products from its competition, such as Facebook and WhatsApp, and that users are free to personalise their devices. He added that "Android is free for manufacturers to use" and that at Google «we offset our costs through the revenue we generate on our Google apps and services we distribute via Android».

For further analysis, Financial Times journalist John Gapper explained how Android had managed to gain control of 80% of the world mobile-search market without yet facing antitrust charges<sup>23</sup>. He drew an insightful parallel between Google's and Microsoft's EU troubles, and explained that the secret is «a masterpiece of craftiness, a case fit for a business-school study of how to advance without appearing to attack».

### **2.3. July 2016: Google Advertising and a supplementary SO on comparison shopping**

On 14 July 2016, the European Commission opened its third investigation on Google's business practices, focusing this time on Advertising, after Google Search and Android<sup>24</sup>. This marks the first time Brussels had three simultaneous sets of charges against the same company.

The Statement of Objections related to the Commission's preliminary view that Google has consistently engaged in practices aimed at protecting its dominant position in online search advertising.

Through its "AdSense for Search" platform, Google acts as an intermediary and places advertising onto third-party websites, for example retailers or newspapers. Interested websites sign up to AdSense and insert a string of HTML into their pages, which prompts the appearance of ads that are relevant to the content of the host site. Advertisers then bid for the ad space in the publisher's website in a real-time auction, and the publisher receives payments upon views and clicks, after a minimum amount is

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<sup>22</sup> <http://googlepolicyeuropa.blogspot.fr/2016/04/androids-model-of-open-innovation.html>

<sup>23</sup> <http://www.ft.com/content/53d919a0-063a-11e6-9b51-0fb5e65703ce>

<sup>24</sup> [http://europa.eu/rapid/press-release\\_IP-16-2532\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2532_en.htm)

accrued<sup>25</sup>.

The Commission estimated Google's market share in search advertising intermediation in the European Economic Area (EEA) to represent around 80% over the last ten years. A large proportion of Google's revenue from this business comes from its relationship with a limited number of "Direct Partners". The agreements tying these to AdSense are what prompted the Commission to claim an abuse of dominant position, in that the third parties were "artificially restricted" from displaying competitors' ads. These contracts provide in fact for a variety of limitations, including exclusivity and/or premium placement for Google search ads, and an obligation to seek Google's authorisation before displaying competing ads.

On the same date, the Commission also issued a supplementary Statement of Objections on the comparison-shopping probe that started in April 2015. The function of this second SO was to reinforce the original one, following Google's response on 27 August 2015 and pursuant to additional evidence.

One last important note: July 2016 is when the Commission brought Alphabet into the antitrust proceeding, notifying the two SOs to this entity in addition to Google. The parent company was created in October 2015, after the investigation had started.

### **3. June 2017: the (first?) EU fine and rumours of the next<sup>26</sup>**

On 27 June 2017, the European Commission delivered its decision on the first antitrust probe from April 2015: «Google's practices amount to an abuse of Google's dominant position in general internet search, thereby stifling competition in comparison-shopping markets»<sup>27</sup>.

After a seven-year probe, the European Commission fined Google 2.42 billion euros – a little more than Alphabet's fortnightly turnover<sup>28</sup> - for abuse of its dominant position in search with regard to comparison-shopping services. The fine is impressive: back in 2005, the "exemplary" antitrust fine for Microsoft amounted to 497 million euros. According to our senior accountant, this means that, taking inflation into account, Google was still fined 4.34 times more: this notwithstanding the fact that, according to commentators such as John Gapper, Google learned from Microsoft's European misadventures, and cleverly fine-tuned its business practices accordingly<sup>29</sup>.

Google has 90 days to cease the illegal practices and start ensuring equal treatment to competitors in its search results, or face heavy penalty payments. The EU's competition commissioner Margrethe Vestager argued that «Google abused its market dominance as a search engine by promoting its own compar-

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<sup>25</sup> <https://www.google.com/adsense/start/how-it-works/#/>

<sup>26</sup> Russia was in fact the first country to impose a fine on Google for antitrust violations. See below.

<sup>27</sup> [http://europa.eu/rapid/press-release\\_MEMO-17-1785\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm)

<sup>28</sup> <https://www.ft.com/content/c4ac383a-5295-11e7-a1f2-db19572361bb>

<sup>29</sup> <https://www.ft.com/content/53d919a0-063a-11e6-9b51-0fb5e65703ce>



ison-shopping service in its search results and demoting those of competitors». Only the day before the decision was made public, major US companies - including WAN-IFRA member News Media Alliance, a US publishers' trade association<sup>30</sup> - wrote a letter sustaining the EU Commission initiative, and rejecting widespread allegations that the European probe was fuelled by anti-Americanism. «As US companies, we wish to go on record that enforcement action against Google is necessary and appropriate, not provincial», the letter read<sup>31</sup>.

At the beginning of July 2017, Reuters reported that EU antitrust officials had set up an expert panel to give an opinion on the Android antitrust case, potentially paving the way for a decision against Google on the charge by the end of the year<sup>32</sup>. EU regulators are thus rumoured to be “weighing another record fine” when they conclude what is arguably the most damaging of the antitrust probes underway against Google in the EU.

## 4. The position of newspaper publishers

### 4.1. In Europe

AEDE (the Spanish Association of Daily Newspaper Publishers), BDZV (the Federation of German Newspaper Publishers) and VDZ (the Association of German Magazine Publishers) have been complainants in the Google antitrust case from the beginning.

They steadily refused Google's first two proposals, and launched a proper press campaign against the third. Their efforts were sustained by all the newspaper publisher associations in Europe, through the coalition of the European Magazine Media Association (EMMA), the European Newspaper Publishers' Association (ENPA), the European Publishers' Council (EPC) and Online Publishers Association Europe (OPA Europe).

On 4 September 2014, the publishers and their trade associations released their response<sup>33</sup> to the third set of Google commitments. In the view of the signatories, the commitments put forward by Google were not addressing the dominant market position of the search engine, and they did not solve the major problem of the «use of unauthorised third-party content, along with their blatant discrimination against search results that are not paid-for, or are not actual, Google services».

The press release and its annex stressed that «the commitments proposed so far would not even remedy the four competition concerns identified by the Commission, let

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<sup>30</sup> <https://www.newsmediaalliance.org/>

<sup>31</sup> <https://www.recode.net/2017/6/26/15878518/yelp-oracle-news-corp-letter-supporting-eu-action-against-google-antitrust>

<sup>32</sup> <http://www.reuters.com/article/us-eu-google-antitrust-exclusive-idUSKBN19Q1RU>

<sup>33</sup> <https://www.enpa.eu/press-releases/european-press-publishers-urge-the-commission-to-stop-google-s-abusive-promotion-of-its-own-services-and-restore-competition-to-the-digital-economy/>

alone address the urgent competition concerns raised in the various complaints»<sup>34</sup>. On the contrary, «accepting these commitments would [...] secure Google's dominance in any market it wished to enter, and legalise its anticompetitive conduct».

In parallel to this process, most of the European members publishers' associations conducted a strenuous lobbying campaign with their respective Commissioners, in order to voice their concerns.

In April 2014, Mathias Döpfner, CEO of German publishing house Axel Springer, famously took a personal stand<sup>35</sup> with an open letter to Google's then Executive Chairman Eric Schmidt, published in the *Frankfurter Allgemeine Zeitung*<sup>36</sup> under the title "Why we fear Google."

One month later, Italian newspaper tycoon Carlo de Benedetti, then President of Espresso Group, voiced his strong support for Döpfner's position in a piece published in both Italian and in English, in *La Repubblica* and on the Huffington Post website<sup>37</sup>. The settlement of the European antitrust case was also opposed by, among others, French publishing house Lagardère and by Rupert Murdoch's News Corporation, whose European interests include British newspapers *The Times* and *The Sun*, as well as *The Wall Street Journal Europe*.

In April 2015, the European publishers welcomed the Commission's decision to send the first SO to Google with a note from EMMA and ENPA<sup>38</sup>.

In their joint letter, the trade associations indicated that in the ongoing competition case, their members specifically called for a ban on «preferential treatment of own services and products within Google's quasi-search monopoly». They also called for «no use of content from press publishers (newspaper, magazine and online publishers) beyond what is truly indispensable for navigation purposes in the horizontal search without prior consent and no preferential treatment of news aggregators compared to online press portals».

EMMA and ENPA released on 28 June 2017 a note applauding the Commission's decision to impose the record fine of 2.42 billion euros on Google for illegal abuse of its dominant position<sup>39</sup>.

Auke Visser, President of EMMA, said: «This historic decision against anticompetitive behaviour in the digital markets reinforces the value of Europe's creative-content sector and the significant contributions it makes to Europe's economy. Also Europe's free, independent, diverse and vibrant press needs to be defended against such anticompetitive practices».

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<sup>34</sup> <http://epceurope.eu/wp-content/uploads/2012/03/14-09-04-Publishers-Response-on-Third-Set-of-Commitments.pdf>

<sup>35</sup> <https://blog.wan-ifra.org/2015/09/09/coming-this-fall-a-redefined-relationship-between-google-and-publishers-courtesy-of-europ>

<sup>36</sup> <https://www.axelspringer.de/dl/433625/LetterMathiasDoepfnerEricSchmidt.pdf>

<sup>37</sup> [http://www.huffingtonpost.com/carlo-de-benedetti/why-i-like-mr-dopfner-fea\\_b\\_5331756.html](http://www.huffingtonpost.com/carlo-de-benedetti/why-i-like-mr-dopfner-fea_b_5331756.html) <sup>38</sup> <https://www.enpa.eu/press-releases/european-press-publishers-welcome-the-commission-s-decision-to-take-action-in-google-anti-trust-case/>

<sup>39</sup> <http://www.magazinmedia.eu/pr/european-press-publishers-applaud-european-commission-landmark-decision-in-competition-case-against->

Carlo Perrone, President of ENPA, said: «While we are pleased with the outcome announced yesterday afternoon, we will continue closely following the implementation of the Commission's decision. As such, it is crucial that the ongoing procedures against Google are quickly concluded, specifically in relation to the unauthorised use of publishers' content and bundling of Android with other Google services».

### **4.2. Around the world**

In April 2016, News Corp was rumoured to have lodged a new antitrust complaint<sup>40</sup> before the EU Commission against Android. The complaint is alleged to argue that Google's search and news services, which are pre-loaded on Android phones, return enough content scraped from the original source, to prevent users from navigating to the website hosting the piece of news, which results in the publisher losing advertising revenues. The practice results in Google reinforcing its dominance position at the expense of content providers<sup>41</sup>. This was the second complaint filed before the EU Commission by News Corp with regard to Google's alleged antitrust practices, the first one dating back to 2014. Robert Thomson<sup>42</sup>, News Corp CEO, wrote to the Commission at the time to say that Google was a «platform for piracy and that “undermining the basic business model of professional content creators will lead to a less informed, more vexatious level of dialogue in our society»

The day before Commissioner Vestager announced her decision to fine Google for its comparison-shopping practices, seven US companies - including News Corp and WAN-IFRA member News Media Alliance (NMA)<sup>43</sup> - wrote a letter<sup>44</sup> to express their support for the Commission's enforcement action against Google. They rejected wide-spread allegations that a decision against Google would be largely motivated by European protectionism. They insisted that «Google operates on a global scale and across the entire online ecosystem, destroying jobs and stifling innovation» and wished that «counterparts in the United States will use this as an opportunity to address similar anticompetitive conduct by Google».

### **4.3. US publishers seek antitrust exemption to compete with tech giants**

David Chavern, President and CEO of NMA, published an opinion piece in The

<sup>40</sup> <http://www.bloomberg.com/news/articles/2016-04-18/news-corp-adds-to-google-s-antitrust-woes-over-android-search>

<sup>41</sup> <https://www.wsj.com/articles/news-corp-files-formal-complaint-to-eu-over-google-1460972405>

<sup>42</sup> [https://www.theguardian.com/technology/2014/sep/18/google-news-corp-piracy-platform-european-commission?CMP=twt\\_gu](https://www.theguardian.com/technology/2014/sep/18/google-news-corp-piracy-platform-european-commission?CMP=twt_gu)

<sup>43</sup> <https://www.newsmediaalliance.org/>

<sup>44</sup> <https://www.recode.net/2017/6/26/15878518/yelp-oracle-news-corp-letter-supporting-eu-action-against-google-antitrust>

Wall Street Journal on 9 July 2017<sup>45</sup>, taking a position that is certainly original in this debate. The article, strikingly titled “How antitrust undermines press freedom”, argues that Facebook and Google’s dominant position in the online-ads market is a call for the content industry to come together to negotiate better deals with the “duopoly”. He adds that this solution is presently made illegal by existing antitrust laws, originally intended to prevent monopolies.

In Chavern’s vision, a unified front of publishers would enable the content industry to negotiate «stronger intellectual-property protections, better support for subscription models and a fair share of revenue and data», resulting in the creation of a more sustainable future for the news business. NMA therefore calls for «a new law granting a limited safe harbour under antitrust for publishers to negotiate collectively with dominant online platforms. This would grant media organisations the flexibility to expand innovative digital models of news distribution, while also giving them more ways to sustain high-quality journalism». Chavern concludes noting that an antitrust safe harbour would probably not be necessary if the US authorities had followed the example of their counterparts in the European Union and pursued proper investigations of anticompetitive practices in the online-ads market<sup>46</sup>.

News Corp said in a statement that it supported the effort to «focus the public and Congress on the anticompetitive behaviour of the digital duopoly, especially as it adversely affects the news and information businesses»<sup>47</sup>. Mark Thompson, the chief executive of The New York Times, said that «the temperature is rising in terms of concern, and in some cases anger, about what seems like a very asymmetric, disadvantageous relationship between the publishers and the very big digital platforms».

## **5. International outlook: an overview of antitrust cases brought against Google around the world<sup>48</sup>**

### **5.1. 2012: India**

The New York Times noted that India became an increasingly important market for tech giants such as Facebook and Google, which find themselves largely shut out from China, and to some extent from Russia too<sup>49</sup>. The paper points out how Sundar

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<sup>45</sup> <https://www.wsj.com/articles/how-antitrust-undermines-press-freedom-1499638532>

<sup>46</sup> For an in-depth analysis of the background of the NMA move and a wealth of opinions on what comes next, see Ken Doctor’s piece: [http://www.niemanlab.org/2017/07/newsonomics-for-the-newspaper-industrys-next-feat-can-it-get-donald-trump-to-give-it-antitrust-protection/#disqus\\_thread](http://www.niemanlab.org/2017/07/newsonomics-for-the-newspaper-industrys-next-feat-can-it-get-donald-trump-to-give-it-antitrust-protection/#disqus_thread)

<sup>47</sup> <https://www.nytimes.com/2017/07/09/business/media/google-facebook-news-media-alliance.html>

<sup>48</sup> For a great timeline of Google’s antitrust cases around the world, consult this article from Reuters: <http://www.reuters.com/article/us-eu-google-timeline-idUSKCN0XG22N>

<sup>49</sup> <http://www.nytimes.com/2015/09/02/technology/google-antitrust-investigations-spread-across-the-globe.html>

Pichai, an Indian national, was appointed Google CEO in August 2015; he recently joined Al-phabet's board of directors. The Times also mentions the big push that Google made with Android One, the initiative launched in India three years ago – which has since failed – that aimed to make smartphones for less than \$50, in an attempt to tap India's rising community of first-time mobile personal computers users.

Google faced accusations in India from matchmaking website BharatMatrimony and from the watchdog Consumer Unity & Trust Society. The Competition Commission of India (CCI) investigated Google's practices for almost three years, before announcing in August 2015 its finding that the American company is abusing its dominant position<sup>50</sup>. The CCI report was not made public, but it allegedly argued that Google artificially ranked its own services higher than those of competitors, both in web search and in search advertising. The report is rumoured to total approximately «6,000 pages including annexures, including more than 2,000 pages of responses submitted by Google alone»<sup>51</sup>. The Indian case also had a complicated intellectual-property side. In the report, the CCI director general indicated that «Google is found to be abusing its dominance in online web search and online search advertising markets, to impose unfair conditions on the trade-mark owners (particularly those who have notified their trademarks to Google) whose trademarks are being allowed to be bid as keywords by third parties in online search ad-vertising». Specifically, a search for complainant's BharatMatrimony trademarked name on Google would bring up advertisements for competing matrimonial sites above the search results. Google had until 10 September 2015 to respond on the report, and a hearing was scheduled for 17 September. The CCI has the power to impose a fine of up to 10 per-cent annual revenues, averaged over a three-year period. Our research returned no more recent information on the case, which we assume is ongoing.

### **5.2. 2013: Brazil**

In 2013, Microsoft and local Google competitors Buscapé and Bondfaro lodged various complaints against Google with the Brazilian antitrust authority (the Administrative Council for Economic Defense – CADE). One of the accusations was that some of the provisions in AdWords contracts prevented advertisers from investing on other search engines. CADE also started investigations on claims of self-preferencing practices in search results, and of unfair scraping of competitors' content<sup>52</sup>. In May 2015 Microsoft dropped its case against Google, consistent with an agreement reached by the two companies to «move on from their regulatory fights while contin-

<sup>50</sup> <http://in.reuters.com/article/google-india-competition-cci-idINKCN0R136B20150901>

<sup>51</sup> For a colourful but complete account: <http://www.legallyindia.com/litigation-arbitration-disputes/google-cci-everything-you-need-to-know-20150902-6533>

<sup>52</sup> <http://www.reuters.com/article/us-google-brazil-idUSBRE99A0JM20131011>

-uing to compete in the marketplace»<sup>53</sup>.

Microsoft's withdrawal from the case notwithstanding, CADE confirmed that its anti-trust probes on Google would continue.

### **5.3. 2013: United States of America**

On 3 January 2013, the US Federal Trade Commission (FTC) released a statement announcing that it had completed a «wide-ranging investigation of alleged anticompetitive conduct by Google and that it had unanimously decided to close the portion of its probes relating to claims that Google unfairly preferences its own content on the Google search results page and selectively demotes its competitors' content from those results»<sup>54</sup>.

The FTC indicated that more than 9 million pages of documents from Google and all relevant stakeholders were reviewed, that industry participants were interviewed and empirical analyses were conducted, to investigate the impact of Google's behaviours in the relevant market and the effects on consumer choice.

The main allegations investigated by the FTC regarded "search bias". Google is a so-called "horizontal" search engine, which responds to a query displaying results from all sources in order to cover the Internet as completely as possible. "Vertical" search engines focus instead on narrowly defined categories of content, such as hotels or flights, and are thus an alternative to horizontal engines for specific searches. Some vertical engines accused Google of changing the algorithm of its general search in order to promote Google's proprietary vertical products (such as Google Flights for example) in the results, and to demote competing vertical websites.

The FTC concluded that «while Google's prominent display of its own vertical search results on its search results page had the effect in some cases of pushing other results "below the fold", the evidence suggests that Google's primary goal in introducing this content was to quickly answer, and better satisfy, its users' search queries by providing directly relevant information». Google was also accused of content scraping, and of placing «unreasonable restrictions on the ability of advertisers to simultaneously advertise on [...] competing search engines». Although the evidence with regard to both these allegations supported "strong concerns", the FTC considered Google's commitments to refrain from these conducts to be «appropriate and consistent with past practice»<sup>55</sup>.

Google's chief legal officer David Drummond commented on the decision, saying: «The conclusion is clear: Google's services are good for users and good for competi-

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<sup>53</sup> <https://www.law360.com/articles/792935/brazil-continues-google-antitrust-probe-without-microsoft>

<sup>54</sup> "Statement of the Federal Trade Commission regarding Google's search practices in the Matter of Google Inc". [https://www.ftc.gov/system/files/documents/public\\_statements/295971/130103googlesearchstmtofcomm.pdf](https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf)

<sup>55</sup> Further information on the FTC's settlement with Google in this Wall Street Journal video: [https://wsjvod-i.akamaihd.net/i/video/20130103/010313hubpmftcgoogle/010313hubpmftcgoogle\\_v2\\_ec,464,174,264,664,1264,1864,2564,k.mp4.csmil/master.m3u8](https://wsjvod-i.akamaihd.net/i/video/20130103/010313hubpmftcgoogle/010313hubpmftcgoogle_v2_ec,464,174,264,664,1264,1864,2564,k.mp4.csmil/master.m3u8)



tion»<sup>56</sup>.

In March 2015, a leaked report emerged from the FTC, showing that its staff had laid out a compelling case that Google had indeed tweaked its search results to favour its own products and demote competitors<sup>57</sup>. The fact that the FTC decided against filing an antitrust suit remains without official explanation.

In September 2015, the FTC started investigations into the Android operating system for smartphones<sup>58</sup>. The complaints are very similar to the ones brought against Google in the EU, and revolve around constraints allegedly imposed on manufacturers and mobile network operators. But commentators noted<sup>59</sup> that the FTC investigation might differ significantly from the one being conducted in the EU. The first reason is a significant difference in Android market share, which in Europe stands at 70%, and in the US, 59%. Moreover, the FTC might make a similar decision to the one in 2013 and conclude that Google's actions «had legitimate business justifications and improved experiences for [...] users, even if the conduct impeded rival firms»<sup>60</sup>.

### 5.4. 2015: Russia

On 18 September 2015, the Russian Federal Antimonopoly Service (FAS) found Google guilty of antimonopoly legislation violations in its Android practices, after investigations that had started in February<sup>61</sup>.

Firstly, FAS declared that Google held a dominant position, with a share of 58.18% in the market for pre-installed app stores for the Android operating system in the territory of Russia.<sup>62</sup>

As a consequence, the authority deemed illegal and anticompetitive the provision in the contracts with manufacturers of phones running Android, of the requirement to pre-install selected Google apps as a condition of gaining access to the Google Play store. FAS also sanctioned the prohibition to install applications from competing companies. Google had until 18 November 2015 to cease its illegal practices. In particular, it was required to amend the contracts with manufacturers of smartphones running Android «designated for introduction into circulation on the territory of the Russian Federation and to inform Russian users of “the possibility to deactivate pre-installed applications of Google» and to move away from Google Chrome<sup>63</sup>.

The original case was brought by Yandex, the dominant desktop search engine in Rus-

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<sup>56</sup> <http://www.politico.com/story/2016/05/federal-trade-commission-google-search-questions-223078>

<sup>57</sup> <https://www.wsj.com/articles/how-google-skewed-search-results-1426793553>

<sup>58</sup> <https://www.wsj.com/articles/ftc-looking-at-complaints-over-googles-android-control-1443201867>

<sup>59</sup> <http://www.digitaltrends.com/mobile/google-ftc-probe-extends/>

<sup>60</sup> <https://www.wsj.com/articles/ftc-extends-probe-into-googles-android-1461699217?cb=logged0.0031630070880055428>

<sup>61</sup> <http://www.rapsinews.com/news/20160811/276651091.html>

<sup>62</sup> <http://www.benedelman.org/docs/yandex-vs-google-translation-18sep2015.pdf> page 8 lines 12-21

<sup>63</sup> <http://www.benedelman.org/docs/yandex-vs-google-translation-18sep2015.pdf>

sia, with a market share exceeding 50%.

In March 2016, the Moscow Arbitration Court rejected Google's appeal of the FAS determination<sup>64</sup>.

In April 2017, it was announced that Google had decided to settle and that it had paid a fine of 438 million rubles (\$7.7 million) to end the two-year dispute. In addition to the fine, the settlement agreement provides for Google's obligation to refrain from pre-installing its applications on Android smartphones, and to prompt users to designate a search engine when they first start using their devices<sup>65</sup>.

Yandex Chief Executive Arkady Volozh said in a statement that he expected the resolution of the dispute with Google to «open the door to market-share gains on mobile (devices) in 2017 and beyond». Shortly after the announcement of the settlement, the company raised its revenue forecast for 2017 by 1%<sup>66</sup>.

## **5.5. 2016: South Korea**

In August 2016, the Korean Federal Trade Commission (KFTC) officially confirmed<sup>67</sup> for the first time its scrutiny into Google's alleged anticompetitive practices. Details of the probe are not available, but the press reports that the investigation focuses on advertising policies and abuse of Android's dominant position.

This is not the first time the KFTC has investigated Google.

In 2013, the authority cleared the company of any wrongdoing, after a two-year investigation into allegations of illegal clauses in agreements with manufacturers of phones running Android. The complaint had been brought by local search engine Naver, which with Daum (now Kakao) controls 90% of desktop search in the country<sup>68</sup>. Google benefited from the defence of smartphone makers, which argued that the system under Android saved them both time and money, and from the fact that its low market share in desktop search weighed heavily in the KFTC's determination.

But things might change in this new probe, especially if the KFTC takes into account the undeniably imposing presence in the country's smartphone market of Android – the operating system of choice of both Samsung Electronics and LG Electronics.

## **5.6. 2016: Canada**

In April 2016, Canada's Competition Bureau closed an enquiry dating back to 2013 into Google's search and advertising practices. The Canadian antitrust authority found

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<sup>64</sup> <https://www.law360.com/articles/914175/google-settles-android-dominance-abuse-claims-with-russia>

<sup>65</sup> <https://www.law360.com/articles/923370/google-pays-7-7m-fine-to-end-russian-antitrust-probe>

<sup>66</sup> <http://www.reuters.com/article/russia-yandex-results-idUSL8N1HZ4UG>

<sup>67</sup> <https://www.ft.com/content/59bd6b78-6044-11e6-b38c-7b39cbb1138a>

<sup>68</sup> [http://www.ft.com/cms/s/2/87d15ac0-673d-11e0-9bb8-00144feab49a.html?ft\\_site=falcon&desktop=true#axzz4nxuMD7Vr](http://www.ft.com/cms/s/2/87d15ac0-673d-11e0-9bb8-00144feab49a.html?ft_site=falcon&desktop=true#axzz4nxuMD7Vr)

no evidence that Google had abused its dominance. According to Reuters, the regulator considered that Google had made satisfactory changes to remedy the alleged practices, including undertaking not to introduce anticompetitive clauses in contracts when selling the Android operating system to manufacturers<sup>69</sup>.

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<sup>69</sup> <http://www.reuters.com/article/us-canada-regulator-alphabet-idUSKCN0XG29A>