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Abuse of Dominant Position on Digital Market: Is the European Commission Going back to the Old Paradigm?

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Abstract:

Purpose: *The study concerns abuse of a dominant position on digital markets on the example of practices used by Google. The main purpose of the article is to draw attention to the lack of appropriate tools for assessing abuse of a dominant position in such markets.*
Methodology: *The article was prepared based on the method of analyzing documents (mainly the European Commission and FTC) and literature on competition low and policy. The article also uses legal acts and the guidelines of the European Commission.*
Findings: *The study adopts the hypothesis that the European Commission is limited to instruments created for the needs of mature markets, whose attribute is static competition and not innovation. Such tools are not appropriate to assess the behavior of entrepreneurs on digital markets and should be used in a selective and flexible manner. The Commission's rigid approach to the application of existing mechanisms may harm innovation and expansion of companies operating under dynamic competition.*
Practical implications: *The article critically assesses the approach of the European Commission and indicates the factors that should be considered in assessing the abuse of a dominant position by entrepreneurs on digital markets.*
Originality/Value: *As a result, it was pointed out that abuse of a dominant position on digital markets is a relatively new practice and their antitrust assessment mechanisms have not yet been developed. This study provides a voice in the discussion on how antitrust authorities approach towards the assessment of abuse of dominance on digital markets and their sanctioning. At the same time, it draws attention to the need to develop appropriate tools for assessing a dominant position and then its abuse in markets with dynamic competition and whose main attribute is innovation.*

Keywords: *Abuse of dominant position, competition policy, dominant position, digital market, exclusionary practices.*

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1. Introduction

On digital markets with dynamic competition (these include high-tech industry, communication, and other technologies), it is difficult not only to assess the effects of anti-competitive behavior of dominant enterprises, but to determine whether the company has a dominant position. Such markets are usually highly concentrated due to high entry barriers (mainly technological and financial), but at the same time there is dynamic competition on them. This means that competition is not based on prices but on innovation. Dynamic markets are constantly changing, new and innovative products are constantly appearing on them. Companies must be innovative to maintain their market position. In the latest decision-making practice of antitrust authorities, the implementation of innovation is treated as a tool to exclude competitors from the market. An example of which is the Google case, which will be analyzed later in the study. Antitrust authorities in the European Union (EU) as well as in the USA have already conducted several proceedings in connection with the abuse of a dominant position on digital markets by companies such as Microsoft, Google, or Intel, but proper antitrust assessment tools have not yet been developed. This is problematic because antitrust authorities strongly interfere in the functioning of such companies and impose sanctions for abuse of a dominant position, even when it is difficult to clearly assess whether there has been abuse. For example, Google was suspected of abusing its dominant position on the search machine market both in the European Union and the US. However, the European and American Commission (FTC-Federal Trade Commission) have taken radically different decisions in this matter.

The article was prepared based on the method of analyzing documents (mainly the European Commission and FTC) and literature on competition low and competition policy. The article also uses legal acts and the guidelines of the European Commission. As a result, it was pointed out that abuse of a dominant position on digital markets is a relatively new practice and their antitrust assessment mechanisms have not yet been developed.

This study provides a voice in the discussion on how antitrust authorities approach the assessment of abuse of dominance on digital markets and their sanctioning. At the same time, it draws attention to the need to develop appropriate tools for assessing a dominant position and then tools to confirm (or not) its abuse in markets with dynamic competition and whose main attribute is innovation. Otherwise, there will be a risk of excessive interference by antitrust authorities and imposing high sanctions on dominant companies that may weaken their incentives to innovate.

2. Literature Review

Currently, there is a discussion in the literature on the advisability and legitimacy of different decisions taken by the European Commission and the FTC in the Google search case and the reasons for extremely different approaches. Some indicate the rightness of the FTC's decision, which stated that there was no abuse and Google's practices in the search machine market and its strong position are the result of its innovation (Eben, 2018; Kokkoris, 2018). Others, however, express the view that Google used search algorithms in such a way as to limit the traffic of competing search machine and try to demonstrate the legitimacy of the Commission's decision (Yun, 2018).

3. Purpose of Study

The purpose of the article is not to analyze Google's practices on the search machine market from the point of view of seeking arguments to determine abuse or to confirm its absence. The aim of the study is to identify weaknesses in the Commission decision because it did not use all the tools in its analysis and did not consider the nature of this market. Namely, she did not use the as effective competitor test, which is undoubtedly useful in the case of testing the abuse of a dominant position. In addition, the Commission has rather focused on the harmfulness of Google's behavior to competitors than on positive or negative effects for consumers, which should be key when considering antitrust policy objectives.

4. Results

4.1 Google's Practices on the Search Machine Market

In 2017, the European Commission imposed a penalty of 2.4 billion euros on Google for illegal promotion of its price comparison site (Commission decision in case AT.39740 - Google Search (Shopping), 2017). It accused Google of modifying the display of search results in a manner that is harmful to competitors, because of the risk of excluding them from the market in the long run. The Google search case was also initiated by the FTC, but in the absence of arguments determining the abuse of Google's dominant position, it was discontinued. Unlike the FTC, the European Commission has found that Google has violated EU competition rules because:

- redirected visits from competitive comparison websites to its own,
- positioned and displayed its own price comparison engine on the results pages of its general search machine (these actions involve the use of special algorithms that cause competing comparators usually have a lower position (ranking) on the Google general search results pages). As a result, visits of competitive comparison engines were redirected to Google.

The Commission considered such practices as abuse of a dominant position. However, it is difficult to fully agree with her decision. Goggle operates in digital markets where it is not easy to assess whether a company has a dominant position and even more to demonstrate its abuse. The main problem is that traditional tools used in the analysis of dominance are not appropriate in this type of market. First, in mature markets, the main indicator confirming dominance is the company's significant market power and high entry barriers. In digital markets, you should rather check consumer harm, the impact of dominant behavior on competitors and network effects. It should also be noted that the purpose of the abuse does not have to be to exclude competitors, but to maintain the dominant position on such a market. The European Commission in the Google case ignores these aspects of competition and focuses mainly on the negative effects of abuse of Google's dominant position, mainly in relation to vertical search machine.

According to the European Commission, Google uses practices different from another search machine. Namely, general search machine allows users to search the Internet based on one or several keywords, the search function was not limited to any area. There is also so-called vertical search machine. They focus on specific issues such as food services, technological innovations, travels (Commission decision, 2010). Vertical search services are carried out through specialized computer programs. The Commission accuses Google of displaying links to specific results from its own services in general search results differently from those of competing vertical services. This may result in the exclusion of vertical competitors from the market. In addition, according to the Commission, Google copies the content of competing vertical search machine and uses them in its own search results without the consent of the owner of such a site, which is also a competitor of Google in the market of vertical search services. As a result, the Commission concluded that Google may benefit from innovations made by competitors against their will, which may limit their willingness to invest in creating original content for Internet users.

4.2 Definition of Dominance on the Mature and Digital Markets

The essence of the dominant position boils down to influencing the behavior of various actors on the market. From an economic point of view, companies that dominate the market have a kind of economic power that limits efficiency because there is no competitive pressure, which could prevent price increases and limit production by dominant companies. Thus, an enterprise has a dominant position when it can operate independently of its competitors, contractors and consumers and is therefore "detached" from the operation of market mechanisms.

The dominant position is therefore identified with market power understood as the ability to determine (impose) sales prices, including prices that are below the competitive level (Areeda, Kaplow, and Edlin, 2013). The level of competition as a criterion for market power is examined considering potential competition. In many cases, by analyzing market power, potential competition is checked, i.e., one that does not yet operate on the relevant market but can enter this market at any time. This requires making many additional assumptions like the homogeneity of potential competitors' products, similar transaction costs, demand level, etc. The results are therefore difficult to predict. There is no space for dynamic competition in which enterprises discover new production possibilities, new products, services, changes in consumer needs, improve production or distribution processes and, consequently, achieve higher profitability and overtake competitors. Wingerter (2018) points out that for dynamic competition to work, there must be two real opportunities:

a) improvement of profitability and growth opportunities of the company in the event of any innovation,
b) deterioration of competitors' chances because of such innovation by actual or potential competitors.

The potential competition model does not include these factors. It only focuses on the potential for raising prices and its effects on market structure. Therefore, establishing (or not) a dominant position based on the market power criterion is not appropriate in digital markets.

Unfortunately, the definition of dominance adopted by the European Commission in the Google case corresponds to the current (traditional) approach of equating dominance with significant economic strength (measured by the size of market share) maintained over the longer term. A high market share may of course indicate that the company has market power, but not in every case. Sometimes companies with a large market share have little market power, e.g., when entry barriers are low. On the other hand, in an oligopolistic market, an enterprise may have market power with a small market share. For these reasons, determining the market power of an enterprise raises many doubts. In line with the impact (based on impact study) approach, the Commission takes three factors into account when assessing the market power of an undertaking:

- restrictions imposed by current competitors on existing suppliers and the market position of current competitors,
- restrictions on market entry and market expansion,
- restrictions imposed by the company's clients (clients' strength).

Market share indicates the current market situation. An enterprise may not have market power if existing competitors could easily expand, or potential competitors could easily enter the relevant market. As a result, the competition authority will consider whether there are development barriers or entry barriers (cultural, technical, financial, language). An additional, significant factor related to entry barriers is the level of innovation that exists on a given market. If it is high, it will be relatively easy to enter a new market. This means that an enterprise operating on a given market will not have market power. On the one hand, it can be said that even if the company has an 80% market share in the relevant market, it still competes with the company that has a 20% market share in the relevant market, and therefore the focus on high market share in establishing a dominant position means that the extent to which competitors may limit the behavior of the alleged parent enterprise. On the other hand, the current practice of antitrust authorities clearly indicates that high market share be decisive when establishing a dominant position. The Commission claims that market share is an important indicator of market structure, but at the same time indicates that high market share is an important and sometimes decisive factor in determining a dominant position. This method is proven in markets with static competition where price is the main reference point in assessing market power (Kostecka-Jurczyk, 2013).

Dominance means that an enterprise has market power and can harm competition either through damage to consumers (e.g., by raising prices) or damage to competitors (e.g., by offering lower prices to consumers so that they are not interested in buying competitors' goods). Meanwhile, search machine offers end users search services free of charge. So, you cannot measure Google's market position by changing the current price and the competitive price over the longer term (Niels, 2019). Significant and sustainable market power must therefore be shown on the search services market.

Nazzini (2016) indicates that basing the definition of dominance on prices should only be a theoretical reference point. In practice, dominance assessment contains many structural factors such as market share, entry barriers, and buyer power. These factors can be examined whether the end-user pays for the service or not. However, one should remember about the need to pay attention to the quality of services in this case and the costs of switching consumers to other services. If price is the main factor of competition on the market, it is easier to conclude that if consumers must pay more to the dominant and do not switch to other products, then they probably take into account the costs of switching. However, if consumers do not pay for services and quality is the only factor of competition, the mere fact that they do not change the service provider is irrelevant (Semeniuk, 2013). It is then necessary to examine why consumers are not switching to alternative service providers. As a result, if Google reduces the quality of its services by presenting less relevant results by preferring its own search machine, consumers can switch to another competitive search machine such as Yahoo or Bing. This means that Google will not have significant and lasting market power. Deterioration of quality will not be profitable. This is because when the number of users decreases, Google will have less ad revenue. Therefore, this is an argument indicating that also the study of changes in the market share of service providers in response to the deterioration of quality by the current supplier should not be included in highly innovative digital markets.

The difficulty in assessing the actual market situation and determining Google's market power also results from the fact that it is a diverse market. For example, many website users looking for different products use Amazon as a specific shopping search machine (Cassidy, 2015). It provides an alternative to Google for some search services (FTC, 2013). In addition, Google Search competes even with voice search tools like Apple Siri and Amazon Alexa. Assessment of substitution will therefore be difficult for any competition authority due to the high degree of heterogeneity of these products. It should also be noted that consumers are eager to switch to different platforms, as there are no significant barriers in this area. Many platforms are compatible due to the increase in coding convergence and the creation of certain coding standards. Google must therefore consider the elasticity of demand, and this limits the possibility of using its market power. It cannot be excluded that, for example, voice assist technology will replace the previously known Internet search machine. This can make many Google applications superfluous. This means that Google's market position in these markets, even if it is dominant, may not be lasting. Google must be innovative to match Amazon, who is the market leader in voice assistants. The share of Facebook is also growing dynamically in this market, who has turned its Facebook Messenger application into a platform that can be developed by users. In the light of the above, it is difficult to state unequivocally whether Google really has significant market power justifying the risk that, by using the practices alleged by the Commission, it will protect its dominant position by excluding competitors from the market.

4.3 Exclusive Practices in Relation to Vertical Search Machine

According to the Commission, Google's behavior had a negative impact on vertical search machine and was therefore classified as abuse seeking to exclude competitors from the market. Vertical exclusion should be understood as preferring (favoring) your own goods or services at the expense of competitors. The Commission considers as anti-competitive exclusion a situation where market access to an as effective competitor is impeded by the dominant company to the detriment of consumers (Kohutek, 2012). In the case of Google, the Commission indicated that it prefers its own search machine to the detriment of competitors. As Kokkoris (2018) rightly points out the abuse should be determined by the damage to the consumer and not by competitors' access to a specific product.

However, in this case, it is important that Google in some sense supports competitors in terms of increasing viewership by providing them with services of a certain standard that are necessary to compete in the relevant market. Nazzini (2016) expresses the view that to compete effectively it is necessary to achieve a certain audience and search machine performance while Google limits the possibilities of displaying competitors' websites in an unjustified manner. It limits the scope of responses to user queries in search machine. As a result, the competition of vertical search machine can be eliminated. The Commission also noted that abuse refers to Google's use of original content on other pages in its own search results. For example, Google shows content taken from the latest articles published on the Internet to show on its own news site.

Among other things, Google shows the article headline, picture, short summary and link to the full content on the editorial page of the article publishing. This may cause that the reader will not be interested in the content of the entire article and will not come to the publisher's website publishing the full content. This means harm to publishers who are interested in maximizing their online presence. Google uses the property rights of various publishers who are somewhat dependent on him. Publishers have the option of Google blocking their content, but then they will be removed from Google's search results. However, Google's practice results in a decrease in the attractiveness of the original content publisher sites and thus a decrease in advertiser interest. Kokkoris (2018), however, expresses the view that Google's behavior can only be qualified as abuse if it goes beyond the substantive aspects of competition. As Kokkoris said (2018) “Google’s conduct of favouring its own product can be considered anticompetitive only if it falls outside of competition on the merits…It means competition “on quality, design, innovation and marketing”. Google's goal was to improve search quality for the benefit of users. This means that Google's behavior was related to competition on the merits (Kokkoris 2018). In addition, Google is only one source of traffic because users can directly go to vertical search machine. However, Google search is not a "gate" that must be crossed to use them (Kokkoris, 2018). For this reason, it is difficult to talk about excluding vertical search machine. As Kokkoris (2018) noticed “Google is only one source of traffic as users can navigate directly to vertical search websites. Google’s search engine is not a gatekeeper”.

The Commission argues its view by the fact that Google uses the leverage to extend its dominant position to new, neighboring but separate markets. It is in such markets that competition has been distorted. According to the Commission, this should be considered a well-known form of abuse. In practice, however, it is difficult to find cases of such form of abuse and the thesis that this is a well-known practice is not confirmed. Leveraging is rather used in two or more different markets and is found in different types of abuse of dominance. Höpner (2017) also notes that Leveraging is not a separate form of abuse. The Commission appears to indicate that overall traffic in terms of Google’s main search results accounts for a significant proportion of traffic to competitive, comparable purchasing services. Google, in turn, claims that overall search traffic has increased from general Google search results pages to competing comparison services (Commission decision, 2017). The question then arises when it is abused and where the boundary between what is legal and what is not. The doctrine of abuse of a dominant position formulates the concept of an as efficient competitor (in other words - equally efficient competitor). It is worth considering, therefore, in this case should the exclusion of an equally effective competitor be demonstrated to confirm abuse.

4.4 Efficient Competitor Test

The problem with assessing whether Google abused a dominant position needs to examine whether its behavior could exclude as efficient competitor and the Commission should have applied this test in the present case. It is a tool for assessing exclusionary practices, which may result in the exclusion from the market of an equally effective competitor of a vertically integrated company. According to the above test, the conduct of an enterprise is contrary to EU competition rules (Article 102 TFEU) if it can exclude from the market a competitor that is at least as effective as a vertically integrated dominant undertaking (case C-280/08 P Deutsche Telekom AG v Commission). So far, such a test has been used, among others to assess margin squeeze as an abuse of dominant position. The concept of margin squeeze refers to the strategy of a vertically integrated enterprise selling components for production (or spare parts) at a higher level of the market and at the same time competing with other enterprises at a lower level of the market (Jones and Surfin, 2011; Dune, 2012; Hou 2011; Sidak, 2008). This strategy relies on significantly reducing competitors' margins at a lower market level with the intention of excluding them from this market. Cost-pricing shears can arise when vertically integrated enterprises have a dominant position at a higher market level and at the same time offer products (services) necessary for competitors to operate in a lower market. Aufm'mkolk (2012) noted that this type of situation often occurs in regulated sectors such as the telecommunications, when former monopolists compete with enterprises that are obliged to provide services at a higher level of the market (e.g., telephone access services).

However vertically integrated companies with a dominant position influence the entry prices at a lower level of the market in which they are also competitors - they can limit the profit margin of competitors operating at a lower level of the market by raising the prices of their services at a higher level of the market (Kostecka-Jurczyk, 2012). As a result, margin squeeze is created. For companies operating at a lower market level to be competitive, they should maintain sales prices at the level of vertically integrated companies (Edwards, 2011; Geradin and O'Donoghue, 2005). This, however, leads to losses and is not profitable in the long run. Margin squeeze is most often used by vertically integrated companies when:

- companies at a lower market level are forced to source from a vertically integrated undertaking operating at the same (lower) market level,
- vertically integrated companies have a significant share in the lower level of the market, and therefore the weakening of competitors has a significant impact on their level of profits,
- products of vertically integrated companies and their competitors are close substitutes, which means that customers can easily change the supplier of goods or services and take advantage of the offer of the former.

This test does not allow to explicitly confirm or exclude abuse, but it is a good indication justifying (or not) further investigation of the entrepreneur's behavior on the market (Crocioni, 2018). Unfortunately, in the Google case, the Commission did not carry out this test. However, it can be assumed that in the present case this test would not show the exclusion as efficient competitors. They had the ability to create search machine and many Google rivals appeared on the market (Körber, 2015; FTC, 2013). Perhaps Google combined two different products - a general search machine and other search tools narrowing the results to the user's question, making it difficult for competitors to achieve such traffic on their search machine as Google had. This behavior can be considered abusive, but it would have to be shown that consumers have suffered damage (e.g., they have limited access to the offer or are forced to use lower quality services). Meanwhile, in this case, consumers were not limited in their choice and Google search machine was chosen by users because of its high usability. In addition, the search results were satisfying for users.

It should be noted that users also use the application. Therefore, the important question is whether browsers and application stores compete? Despite the different technical aspects, they provide the same or similar functionality. Both platforms allow users to access content and services on the Internet, although the sphere of available content differs in both platforms. The app store gives the user access to "original applications" and "application redirection". In this way, all software offered in the form of a mobile application and all websites offering their content or service as a mobile application are available through the application store. Browsers provide all websites and software available through websites. Some mobile applications are available in this way because they are downloaded directly from the programmer's website. However, most mobile applications are based on stores with applications for their distribution. The common sphere of both platforms is content and services, and therefore they are substitutes for users. The above considerations indicate that it is difficult to demonstrate without doubt that Google acted with the intention of excluding competitors from the market. Kokkoris (2018) also indicates this problem. In this context, the FTC approach is interesting – it pointed out that the main purpose of implementing changes in the way Google displays search results was to improve the user experience (FTC, 2013), not to exclude competitors.

The FTC focused its proceedings mainly on potential harm to consumers and did not deal with competitors. In its proceedings, the FTC checked whether Google Search offers better customer services than other search machine and whether Google favored its own services. Google's revenue largely generates sponsored links and other similar search services launched by the advertisement. From the antitrust point of view, harm to consumers cannot be clearly confirm, quite the opposite - the benefits to consumers can be seen. If Google does not respond to users' queries satisfactorily, it will not generate high advertising revenue in the long run. Bork and Sidak (2012; 2013) emphasize that the nature of this market limits the ability of companies to behave anti-competitively. There are many search machines on the Internet. However, dynamic competition forces innovation, and therefore an important argument in favor of Google is that the introduction of specialized search algorithms on the market that improve the search quality of users has encouraged other competitors, such as Bing, to create similar search algorithms. In two-sided search machine markets, free search benefits consumers and advertisers.

Consumer’s value free information available, and advertisers value access to consumers (Leibowitz, 2013). Therefore, we are dealing with a two-sided market because internet search machine is considered as an intermediary platform that connects two players - search machine users and advertisers - for exchanges taking place via the Internet. Google sells highly targeted ads because it prioritizes search results using algorithms that place the most accurate results at the top of the page. However, it cannot be said that such a search machine design is intended to exclude competitors and violates antitrust regulations. Leibowitz (2013) indicates that there is no evidence that Google search machine eliminates competitors, and it is difficult to prove harm to consumers in such a market. For this reason, the FTC has not imposed a fine on Google because of lack of evidence of Google's guilt.

The Google case leads to the conclusion that, unfortunately, antitrust authorities in the EU, unlike the US, have adapted the existing tools, tested in conditions of static competition, to assess the abuse of a dominant position in the markets of the new economy. Analysis of digital markets using instruments appropriate for mature markets and based on the structure of the relevant market is not a good solution. The Commission seems to ignore the fact that the dynamics of digital markets are shaped largely by profit opportunities. Therefore, antitrust authorities should not attempt to recreate the conditions of perfect competition in these markets, as it may turn out that this is not an effective way to promote social welfare.

5. Conclusions

On a market with strong dynamic competition based on innovations, it is difficult to assess whether an enterprise has a dominant position. Traditional tools such as market power, entry barriers or potential competition are not useful here, because innovation is crucial. Basing the analysis of companies' behavior on digital markets on such instruments may lead to erroneous conclusions, which is confirmed by the Google Search case. The European Commission seems to treat innovations as anti-competitive practices, even if their effect is to increase the competitive advantage of the innovator. Google has introduced innovations in the design and operation of its browser, but it cannot be clearly stated that it has abused its dominant position.

To prove abuse, it is necessary to prove harm to consumers, and in this case, it is difficult to make such a conclusion. On the contrary, consumers have benefited from Google's improved search machine. In its decision, the European Commission only tried to show harm to competitors. One may wonder if this approach means a change in the adopted paradigm of antitrust evaluation of the behavior of companies with a dominant position. Or does it, however, confirm too tough antitrust policy, not adapted to dynamic competition, which may result in limiting innovation? The analysis of the discussed case confirms that currently there are no proper tools for antitrust evaluation of companies' behavior on digital markets, and the European Commission has lost the chance to create a framework for such an assessment or even to set a direction in which to follow.

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