

Searching a Rationale for Search Neutrality in the Age of Google

Valeria Falce (*) – Massimiliano Granieri (**)

I. Introduction

In the last ten years, Google has come repeatedly under the headlights of antitrust authorities in the U.S., in Europe and in other countries¹. The recurring charge, among
10 the many currently raised against Mountain View, is regarding the adulteration of search results in favor of Google's own services or related websites at the expense of a number of fiercely organized competitors. The charge is technically for discrimination or, more politely, for adopting search policies which are biased and not inspired by objectivity (whatever objectivity means in a context of distributed, unorganized, ever-changing information).

More generally, search biases over the internet and the broad principle of search neutrality fuel the information economy debate, in which Google is indisputably a major player (not necessarily dominant). Both national antitrust rules and less codified principles of internet governance are called into question. As usual, the world is divided
20 by those who, more or less intensely, justify search biases and those who criticize Google's conduct. Discussions range from the possible dominance of Google on the market, to the alleged anticompetitive behaviors, to possible remedies².

The way the whole debate unfolds today strongly echoes what happened over the last decades. Some ten years ago Microsoft (at that time the dominant player in the market for operating systems on PCs) ended up defending itself before antitrust authorities in its own country and in Europe. Before Microsoft, IBM faced antitrust challenges on the

(*) Professor of Commercial Law at the European University of Rome; Visiting Fellow at FSR Communications & Media, Schuman Centre, EUI; founding member of the Italian Academy of the Internet Code.

(**) Professor of Comparative Private Law, Department of Mechanical and Industrial Engineering, University of Brescia Health & Wealth, and adjunct professor of Intellectual Property, LUISS Guido Carli, Rome; member of the executive board of the Italian Academy of the Internet Code.

¹ Investigations against Google are open, or have been open, in USA (including Texas, Massachusetts and Delaware), Italy, Belgium, France, Brazil, Germany, Austria, Korea, UK, and India.

² One of the first arguments against Google was indeed about the nature of its service as an essential facility, which would have compelled a duty to share. The arguments, and its inconveniences, are dealt with in details by M. Lao, *Search, Essential Facilities, and the Antitrust Duty to Deal*, 11 *Northwestern Journal of Technology and Intellectual Property* 275 (2013).

market for computers³. As the years go by, technology becomes more complex, digital markets more interconnected, and antitrust actions more problematic. Many arguments now raised in the Google saga (*e.g.*, the opportunity of an antitrust enforcement in high-tech, fast-changing markets) do not sound new at all. The question that should be immediately asked is whether, faced with the radical changes that the internet has brought to markets and social life, antitrust principles and paradigm of analysis can still be applied as if we were dealing in a world of brick-and-mortar assets. We provide arguments to support a different, more sophisticated view.

This paper is organized as follows. Part II briefly discusses the search bias argument in light of the current European regulatory framework. Part III summarizes the main issues raised against Google, its alleged violations of competition rules and critically reviews the notion of search neutrality, that seems to underpin the antitrust initiatives of the European authorities. Part IV considers search bias in light of European competition rules, particularly as far as the abuse of dominant position is concerned. Part V focuses on a peculiar dimension of European antitrust enforcement, that is to say the trend to pursue antitrust violations by limiting the analysis to behaviors that are deemed to restrict competition by object, while an effect-based analysis is inevitable in such cases as Google. Part VI briefly reviews the arguments regarding the institutional dimension of antitrust enforcement at the European level in non-traditional, high-tech, fast-changing markets. Part VII sketches a preliminary conclusion about the dangers of using antitrust as a replacement for other regulatory solutions, if Google's conduct is found to frustrate the basic values of European Union law.

50 **II. The European perspective**

A great deal of scientific production in the U.S. has ever provided input to the debate on search neutrality and on the accusations against Google, but most authors have been cautious in limiting their analyses to the U.S. legal system, while reporting the still fluid

³ M.A. Carrier, *Google and Antitrust: Five Approaches to an Evolving Issue*, in Harv. J.L. & Tech., 2013, 1, recalls the timeframe of antitrust actions against the technological giants: IBM in the 1970s, Microsoft in the 1990s, and Google from 2013.

situation in Europe (or, at least, at the European Union level)⁴. And rightly so. Indeed, the case might yield (and so far it has) different results on either side of the Ocean. First of all, because Google's market share – a crucial and prejudicial element to defining market dominance or monopolization – can possibly be different in the U.S. market vis-à-vis the European market (or even other geographical markets, as the case may be).

60 Secondly, because antitrust authorities in the U.S. and in Europe have shown different institutional approaches to antitrust enforcement in high-technology markets. Thirdly, because the very antitrust goals – and, consequently, the paradigm of analysis – can be different, with European antitrust still wanting its own identity in terms of aims and purposes.

In contributing to the debate on search neutrality, this paper aims at filling the gap at the European level, not necessarily siding with this or that position about Google and search neutrality. It, rather, aims at providing a sound framework of analysis that is consistent with the current European regulatory background and particularly with antitrust rules and that tackles all the relevant dimensions of a case on search neutrality in the

70 profoundly modified world of interconnected markets, network externalities and wealth of information.

The implications for imposing search neutrality, either as an antitrust principle or as a regulatory yardstick, are too serious in terms of consumer welfare and dynamic efficiency for the debate to indulge in emotional and unsupported non-neutral positions about Google and its search services. Nor can antitrust in Europe be used as a quick (although not cheap) replacement for other regulatory policies or techniques in the pursuit of extremely diverse values.

The topic is relevant and timely, since the European Commission has issued a Statement of Objections against Google, alleging a possible abuse of dominant position «in breach

80 of EU antitrust rules, by systematically favouring its own comparison shopping product in its general search results pages in the European Economic Area». As to the fact sheet of the European Commission, the concern is that «users do not necessarily see the most relevant results in response to queries – to the detriment of consumers and rival

⁴ A peculiar position is held by B. Edelman, *Does Google Leverage Market Power through Tying and Bundling?*, _ Journal of Competition Law & Economics 1, 2 (2015) (no particular set of legal rules are applied since practices occur worldwide).

comparison shopping services, as well as stifling innovation»⁵. This statement by the Commission seems to underlie a prohibition of discrimination, under European antitrust rules, that would outlaw search biases that harm vertical search services (shopping sites) altogether and do not render relevant results to consumers. But all the underlying assumptions must be proven and not just stated. Taking a more rigorous and myopic view to the facts, search neutrality does not grant immediate credit to the allegations
90 against Google.

In the furtherance of this work, we propose a consistent framework of analysis that considers all the relevant dimensions of Google’s search strategies and their evaluation in light of current European policies on market regulation, particularly antitrust. We conclude that an antitrust case in internet search services is hardly sustainable since many constituents are missing. While other regulatory policies might be explored, antitrust is not suited for curbing certain behaviors that do not fit the current European antitrust setting.

100 **III. Framing the problem with search bias**

The charge against Google search options is of one of “search bias”. Several definitions have been proposed for search bias; all prove quite circular and logically flawed. Without a commonly accepted definition of a concept, it is hard to make it the pillar of a regulatory intervention or of antitrust enforcement⁶. As a consequence, any analytical effort should start by critically reviewing the notion of search bias.

At a broader level, search bias is the possibility that results provided by a search engine are not the plain and automatic results of a given search algorithm. The bias is not in the search itself, but in the way results are selected and shown for the benefit of users of the

⁵ European Commission, Fact Sheet, *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service*, April 15, 2015.

⁶ D.A. Crane, *Search Neutrality as an Antitrust Principle*, Public Law and Legal Theory Working Paper Series No. 256, 2011, 1, confirms that «[s]earch neutrality has not yet coalesced into a generally understood principle, but at its heart is some idea that Internet search engines ought not to prefer their own content on adjacent websites in search results but should instead employ “neutral” search algorithms that determine search result rankings bases on some “objective” metric of relevance». See also the skepticism of M. Lao, “Neutral” Search As a Basis for Antitrust Action? In *Harvard Journal of Law & Technology Occasional Papers Series*, 2013, 2 («Search neutrality, a malleable term that remains largely undefined, is generally understood to mean that a search engine should not prefer its own content in search results unless its own content is “objectively” superior to competing content based on the use of a “neutral” search algorithm»; footnote omitted).

search engine⁷. The whole debate about search bias seems to be relying on the fact that,
110 at least in principle, there can be an objective, neutral, unbiased way to conduct web
searches and to show ensuing results. In contrast to this paradigm, which only exists as
an ideal and not as a practical (or even desirable) possibility, all deviations (no matter
how significant) can be labelled as biased or even discriminatory, not because they
really are, but because they are simply not compliant with the unrealistic *ex ante* notion
of neutrality in searches.

It has already been sufficiently and convincingly remarked that search neutrality, as an
extension of a general claim for neutrality over the internet, is a vague concept⁸. And,
for the sake of logic, if neutrality as a concept does not exist or is not correctly defined,
a claim of search bias is inconsistent or mistaken. Creating a paradigm for market
120 behavior on a shaky and blurring concept is not necessarily a savvy strategy.

Charges of search bias against Google relate to complaints made by a number of
companies (not only direct competitors of Google, but also publishers, specialized
ecommerce websites and others). They insist on the fact that Google distorts results, so
that after the user launches a query, the results include not just blue links that direct
users to other websites, but also informational content that, in some instances (or even
systematically, as the Commission claims), comes from undistinguishable Google
services. In this way, so the argument goes (but it proves too much), users are naturally
guided to Google's services and sites at the expense of competitors, which will lose
traffic, attention, money and will eventually exit the market. In other words, Google is
130 using its alleged dominance in the market for searches to improve its position in other

⁷ As A. Renda, *Antitrust, Regulation and the Neutrality Trap: A plea for smart, evidence-based internet policy*, CEPS Special Report No. 104, April 2015, 14, has written, «[t]he key role of Internet intermediaries, and especially search engines, is to eschew neutrality by selecting the information that is likely to prove more useful and relevant for the end user».

⁸ See Renda, *supra* note 7, at 15 («In regulation, it is simply an ill-conceived extension of the important, but *per se* controversial, principle of network neutrality»). The intimate relationship between net neutrality and search neutrality is extremely complex. For an introductory explanation, A. Odlyzko, *Network neutrality, search neutrality, and the never-ending conflict between efficiency and fairness in markets*, available at www.ssrn.com («some simple calculations suggest that a net neutral communications infrastructure could be viable economically. But such an infrastructure might enable even more extreme forms of price discrimination by players such Google, and might then lead to new controversies and new forms of regulation»). In intermediating search results over the internet there is huge value that can be captured by discriminating in price. If such intermediation does not happen on a neutral network, the owners of the price can grab the profits of intermediaries and appropriate the benefits of the market for information.

markets for services or goods that Google integrates in its platform and whose visibility depends on searches⁹.

Before the European Commission issued the Statement of Objections, Google had offered a commitment to close a possible case and proposed changes to its search screenshots that would have visually differentiated results. The proposal was by no means evidence of Google's misconduct; it was rather one of the countless alternative ways a search page can be reframed and organized to also accommodate third parties' needs and requests. That any such change causes an improvement in consumer welfare is not necessarily an automatic consequence¹⁰.

140 One issue that has not come to the surface, and is yet a crucial one, is what internet users and consumers think about Google search services and their experience when retrieving information. This topic has gone suspiciously unaddressed but at some point of the analysis (and of the investigation) it needs to be seriously taken into account. So far, all that can be said about consumers is that they have decreed Google's success over other companies; as a matter of fact, when Google entered the market, other search engines were available and Google's current position is the result of undisputable technological superiority. The accusation seems to be premised on the fact that that technological superiority progressively became somehow market dominance and it is now being used for exclusionary purposes. Of course, evidence is required at all
150 possible interfaces of this legal discourse, about market dominance, about abuses and about the duty of neutrality.

In order to fully understand what search bias is supposed to be and if it really exists, an explanation of the market for search services is needed at this point. Later on, the following analysis will be compared with the institutional framework of antitrust enforcement to eventually determine the relevance of Google's behavior.

A. Search bias is a biased concept

⁹ According to Edelman, *supra* note 4, at 9, 33, Google is using its market power in the search market to tie its searches to «send ample traffic to its own service, gaining scale immediately and with virtual certainty», with respect to vertical searches, to advertising services, to Android for mobile applications.

¹⁰ About the evolution of Google's results page since 2006 (when results pages showed just organic results and keywords ads), see E. Goldman, *Revisiting Search Engine Bias*, 38 *William and Mitchell Law Review* 96, 102 (2011).

Google, as a search engine, offers free search services to users, who actually do not pay
160 for what they get. The search engine is powered by the mythological PageRank
algorithm. Google's business model is based on selling the attention of the search
engine's users to companies willing to advertise their product through Google's results
page¹¹. Paid advertisement is the service agreed upon by Google and its business
customers.

There is debate around the correct definition of Google's market as two-sided; as a
matter of fact, acting as matchmaker between queries and potential answers, and
charging only businesses and not users for the use of its platform, resembles pretty
much a multi-sided service that works to balance supply and demand by offering
(apparently) the same good. Sure enough, the ability of Google to charge advertisers
170 and their willingness to pay both depend on how much attention they receive and
eventually on the number of users that turn to Google for free searches. The antitrust
implications of the two-sided market theory, although fascinating in industrial
organization, are still unclear and its use has been inconclusive before the European
antitrust authorities (and by the European Court of Justice) in recent cases¹². Yet,
undeniably, what Google offers to users and to advertisers is connected and such a link
becomes instrumental in deciding the external boundaries of the relevant market in
antitrust analysis.

Since Google runs a successful platform, it has the chance to organize and offer
different services. First and foremost, Google can offer its service for unpaid search
180 results, that is to say a list of links to indexed pages, ranked according to the theoretical
relevance for the user. Theoretical, not actual, since Google's algorithm has to predict
whether the user (an abstract, ideal model, with her subjective idiosyncrasies and
preferences and biases) is looking for the exact results that the search engine is
providing. If search results are 'credence' good, as some authors have suggested, then
there is also an inherent difficulty for the provider (and not only for the user) to measure
ex post the utility of the information retrieved¹³. The only proxy of the quality for
Google is customer retention. Intuitively, Google's superiority relates also, if not

¹¹ This position is advocated by M.S. Gal, D.L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, available on www.ssrn.com

¹² European Court of Justice, September 11, 2014, C-382/12, *MasterCard Inc. v. Commission*.

¹³ The argument of credence good (although against Google) was firstly used by M.R. Patterson, *Google and Search-Engine Market Power*, Harv. J.L. & Tech, July 19, 2013.

exclusively, to the quality of the searches and to the attribution of relevance to results. Such results only approximate the expectations of the user and if at times they perfectly overlap (that is, the result is exactly about what that user was actually looking for), it is only by chance. Google's search outcome is based on probability, not on absolute truth¹⁴. While truth tends to be the same, almost by definition, probabilities change and the algorithm that provides results needs adjustments to constantly reflect modification in the magmatic informational base of the search engine and to meet users' expectations. Evidently, the outcome is good for users. Being otherwise, consumers would have the freedom to switch easily to other search engines or services that can provide answers, exactly as they did when Google first appeared on the market and displaced incumbents. In this respect, competition is really still one click away and even more so: switching costs for users are negligible¹⁵.

200 Unpaid results are typically grouped under two categories, that is, generic (also organic, or algorithmic) and specific.

Also for generic and specific results, although unpaid, relevance matters. The quality of the search service depends on the ability of the search engine to meet users' searching needs and to do it not in the abstract, but for any single query that is launched every moment on the internet.

Something that can remain unnoticed by users (but should be prominently clear to policy makers and antitrust authorities) is that the internet is an expanding universe, with content that changes continuously and is continuously enriched and modified, sometimes distorted by those same actors that resort to Google for the retrieval of information. Moreover, website administrators are constantly active to improve visibility of their sites, through search engine optimization (SEO) techniques. In a sense, all internet users are responsible for its continuous modifications. As a consequence, a

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¹⁴ There is evidence of this also in the Stanford patents that cover the search algorithm; see, for instance, US patent 8,131,715, *Page*. Absence of a normative standard for truth in searches prevent a judgement of true or false with respect to results. On the absence of such normative standard see Lao, *supra* note 6, at 3.

¹⁵ Lao, *supra* note 6, at 7 («Unhappy Google users can instantly switch to another search engine, such as Bing or Yahoo!, without incurring any penalties or costs»). In this respect, the accusation to Google to preset its search engines as default system on browsers sold by OEM in computers and other devices seem exaggerated; changing the default engine is easy and inexpensive even for the least experienced internet user. On low switching costs in digital environment as opportunity for new entrants to solve informational needs, Goldman, *supra* note 10, at 101.

performing search engine is a learning machine that has to adjust to ensure the best search experience for users¹⁶.

Any strategy of attraction and retention is based absolutely on the quality of the service provided (which is valuable not per se, but for the ability to then sell advertising opportunities), which in the case of internet services is relevance. If results are not relevant (according to the probabilistic meaning explained above), users move away, traffic slows down and the ability to sell their attention and traffic decreases.

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B. Search bias and market strategies

These preliminary issues about the services provided by Google require a little side discussion regarding market definition as a necessary step in antitrust analysis.

Although this specific topic will also be discussed later, it is necessary to touch upon it here in the correct explanation of search bias and in interpreting some of Google's behaviors.

When users need information over the internet they apparently only have the option of a search engine, which in practice turns out to be Google. This brings a way too easy
230 conclusion that Google is the dominant firm on the market for information over the internet, because search engines are the only viable solution to the information retrieval problem¹⁷. This same argument leads to the conclusion that Google is the gateway to the internet. Maybe such a view was true (although not proven) in a certain moment in time, but it is quickly and irreversibly changing. Online searches today are possible in different ways. First of all, smartphone users have access to information also through their virtual personal assistants, such as Siri for Apple users, Cortana for Microsoft, and Speaktoit for Android; users typically spend more time using their smartphone than their PCs or tablets. Second, Apps are now bringing vigorous competition to search services in a more specialized and pervasive way; providers of vertical services (such as
240 price-matching, online ticketing, hotel reservation, etc.) all have their Apps available on

¹⁶ Being otherwise, the internet would be dominated by companies with powerful and smart IT departments, displacing smaller companies with superior products or services, but reduced IT resources to gain visibility on the web.

¹⁷ Authors have expressed extremely different views about Google's dominance. According to Edelmam, *supra* note 4, at 6, 16, Google has significant market power in the search market. More dubitative is Lao, *supra* note 6, at 6. As a matter of fact, a clear showing of Google dominance is missing.

a number of platforms. Third, social media, such as Facebook or Twitter, are becoming active in facilitating access to information for their users¹⁸. If it is true that Google is complementing its services with direct content, it is no less true that social networks are becoming also a source of information.

Increasing inter-platform competition seems to characterize retrieval of information over the internet. These dynamics compel us to ask a number of questions. First, of all, what is the correct current perimeter of the market? Second, and most importantly to our purposes, what are the legitimate strategies of any firm (and, particularly, a dominant firm) if the competitive scenario is changing rapidly? Third, even if Google has to
250 interact with results to ensure relevance, is this something that can qualify as bias or it is just the nickname for the inevitable way each search engine works? Providing a final answer to these questions goes beyond the purpose of this paper, but contributing to the correct reading and qualification of the reality is precisely the aim.

As to the first question, the search results Google offers are not stand-alone free goods; none could afford to provide such free results without the goal of profiting from some related services. At a minimum, the market definition should include the market for ads as the one that is generating revenue. Some authors have shown that companies allocate their budget for advertising moving resources from online to off line services¹⁹. This
260 circumstance would add a further level of complexity in the definition of the market, as it somehow requires taking into account the substitutability of services. Off line advertising is putting pressure on online advertising services, not so much as to conclude that there is only one relevant market for advertising, but enough to admit that competitive forces are unexpectedly at work and can become an external constraint to the behavior of firms in online services.

If actual and potential competition is stronger than expected, due to off line services and to an expanded list of online services, any firm in the market for searches would need to reconsider its strategies, by rationally improving quality as a primary goal, regardless of whether this strategy qualifies as bias or not. Excluding competitors would be a naïve objective when the whole set of competitors proves to be quite big and diverse (ranging

¹⁸ Goldman, *supra* note 10, at 100, has pointed out how Facebook and Twitter do not compete directly with Google for keyword searches and yet they compete with Google for «user mindshare».

¹⁹ G.A. Manne, J.D. Wright, *If Search Neutrality is the Answer, What's the Question?*, *ICLE Antitrust & Consumer Protection Program White Paper Series*, 2011.

270 from alternative search engines, to online travel agencies, just to name a few). But adjusting search strategies in some instances can qualify as a legitimate reaction to increasing competitive pressure and not necessarily as abuse²⁰.

Indeed, as also explained in a post by Google's Senior Vice President for Google Search Amit Singhal²¹, Google evolved its model not just by providing a set of links on a flat web page, but bringing to the results the information users would likely need and that would have otherwise been found by selecting one or more links in the previous results page. From an antitrust standpoint, this evolution in Google's strategies and, in general, new models experimented with by the industry should challenge the traditional view regarding Google's dominance, since market definition cannot overlook the variety of
280 search opportunities and the competitive pressure put on Google by alternative services²².

Overall, what Google does is improve the user experience, by shortening the distance between the query and the answer, when there is likelihood that Google can provide directly, in the same screenshot, what the user is looking for (*e.g.*, the price of a plane ticket). In doing so, Google does not change the nature of the service, which is based on the predictive power of the algorithm *and* on the quality of results. This happens regardless of Google's presence in vertical markets. Because of the nature of the internet and the extreme variance of users' expectations, Google has to interact with results through its algorithm and organize answers in a way that always tentatively
290 matches users' preferences. If the algorithm learns relationally by users' choices, this is part of Google superiority, not its fault or its liability.

Moreover, the shift from the "ten blue links" model to an integrated web service entails more editorial responsibility; quality (which means, relevance) matters more now than in the past. Again, the fact that Google is also active in some vertical services does not

²⁰ See Crane, *supra* note 6, at 6 («Unless the search engine is to remain stuck in the ten blue links paradigm, search engine companies must have the freedom to make strategic choices about the design of their services, including the decision to embed proprietary functions traditionally performed by websites in the engine's search properties»). See also Lao, *supra* note 6, at 11 («Preventing general search engines from organically transforming themselves would only artificially interfere with the natural process of competition that is occurring»).

²¹ See <http://googleblog.blogspot.it/2015/04/the-search-for-harm.html>

²² Crane, *supra* note 6, at 5, questions the opportunity to now distinguish search and content, if eventually also a results page is a webpage that carries vertical information to users.

alter the substance of the analysis²³. Failure to provide relevant results would doom Google, as any other provider of search services. If this holds true, systematic preference of Google's vertical services on Google's page of results is technically possible, but economically irrational²⁴.

300 All of the above leads to the last question, about the meaning of search bias. If one and only one result existed ex ante, one that invariably matches the users' expectations and desires, then there would be only one correct way to provide results to users: take a snapshot of that result and place it on an aseptically flat webpage. Reality is different. First of all, there is no predefined truth in internet searches, unless one indulges in the «Nirvana Fallacy»²⁵. Second, there might be a plurality of potentially relevant results and those results cannot all be relevant at the same time and in the same way²⁶; more importantly, they cannot be displayed *as if* they had been relevant all along. Organization of results by relevance is made in a probabilistic way. Ranking is not a fortunate guess, nor the ultimate revelation. Search bias is the name of the inevitable imperfection of any ranking system, which aims at grasping the preference of the user, 310 by eschewing irrelevant results, manipulated results, and optimized third party results²⁷. Google and all other search engines never promised to provide the truth, not because they incline to falsehood, but because truth does not exist. They only implicitly promised (as a condition of survival and as a value proposition to users) to do their best to identify relevant results and, since relevance is relative (and actually dependent on a number of variables), to screen and order results by relevance²⁸.

²³ This does not mean that Google does not become a competitors for providers of vertical searches; the shift from a mere search engine to a website (something referred to as "portalization") changes the nature of the relationships between Google and third party web sites (see , Goldman, *supra* note 10, at 103).

²⁴ This argument was obviously advanced by two Chicago scholars like R.H. Bork, J.G. Sidak, *What Does the Chicago School Teach about Internet Search and the Antitrust Treatment of Google*, in *Journal of Competition Law and Economics*, 2012, 663 (page 10 of the original manuscript), 10.

²⁵ Manne & Wright, *supra* note 19, at 4, highlight this tendency of «comparing imperfect real world institutions with romanticized and unrealistic alternatives».

²⁶ This same argument is used by Lao, *supra* note 6, at 8-9, to explain why technically it is impossible to use the essential facility doctrine to impose search neutrality (the doctrine is premised on the idea that «top ranking in the organic *results listing* is the essential facility»; emphasis in the original; footnote omitted).

²⁷ About the "mythical" existence of neutral search engines, implied by the term "search neutrality", Goldman, *supra* note 10, at 107 («Every search engine design choice necessarily and unavoidably reflects normative values»; footnote omitted).

²⁸ As Crane, *supra* note 6, at 10, pointed out, there is no need to invoke neutrality do admit that a search engine should, under given circumstances, be liable for «intentionally interfering with their rivals' hits in search results».

IV. Does search bias fit the framework for abuse of dominant position?

There might be still room to argue that a legitimate market reaction amounts to abuse
320 when coming from a dominant firm and that such abuse is the result of a voluntary and
aforethought strategy. Thus, search bias – even in a more tech savvy meaning – could
reveal an exclusionary practice carried out by Google.

If Google search policies are discriminatory and exclusionary and aimed at
systematically (willfully) favoring Google’s own services, this is a charge that implies
an investigation about facts. But in order for such conduct to be an antitrust violation (as
the Statement of Objections seems to hint), a positive showing that such search policies
are against antitrust principles and, as to the results, significantly distort the competitive
process is also required. If this evidence is not carefully provided, there is the serious
risk that an antitrust enforcement action ends up being a claim of strict liability against
330 Google, not for its actions (abuses), but for its very position on the market, which was
not obtained (nor it is maintained) through exclusionary practices, but is the
consequence of service superiority²⁹. One aspect that should be given prominent weight
is the fact that search services are free and although there might be instances in which
free goods have negative welfare effects, shortcuts to antitrust liability should be
avoided³⁰.

As far as European Union law is concerned, the relevant provisions are those of art. 102
TFEU, concerning the abuse of dominant position³¹. The institutional framework of
adjudication (or enforcement) should be built on that specific provision, on the practice
of the European Commission and, importantly, on its interpretation by the European
340 Court of Justice.

²⁹ It should be recalled that when Google first appeared on the market there were already search engines and were dominant. Other search engines (and other solutions to retrieve information) are also available today and this should be sufficient evidence that there are not significant barriers to entry, that Google proved superior with respect to competitors and that the market is evolving faster than any perspective of antitrust enforcement.

³⁰ Gal & Rubinfeld, *supra* note 11, propose a more sophisticated reading of the welfare effect of free goods and one of the fields where such effects are investigated is that of free internet search.

³¹ Alike Lao, *supra* note 6, at 4, we do not contend that there is no antitrust theory of liability for search bias and in this respect we reinforce our position about differences between U.S. and European competition policies. We rather assume that search bias could be analyzed under the paradigm of abuse of dominant position and advocate an orthodox application of its elements.

There is no need to discuss in detail the rationale behind art. 102 or its logic. Suffice it to say that, under European antitrust principles, the dominant firm on the market has a special liability and some behaviors, that might be perfectly acceptable and tolerable in any other market condition, become forbidden when acted upon by a player with significant market power. Scholars and judges have been carefully repeating that it is not the dominant position per se that is unlawful, but its abuse (and some practices used to gain a dominant position). The implications of this statement are crucial in terms of the standard for evaluating the behavior of a dominant firm.

350 Alike art. 101, there are no redeeming conditions for the abuse of dominant position and, apparently, there is no room to distinguish restrictions which are harmful for competition according to their actual effects on the market and those which can be considered unlawful by object (no further evidence being requested). Yet, there is general agreement about the fact that conduct under art. 102 can also be subject to different evaluations depending on their restrictive potential or their actual restrictive effects on the relevant market³².

In fact, at least one author has recently recalled that the application of art. 101 by the European Commission has been progressively in the sense of a massive use of the notion of restriction by object, an interpretive option with serious (but questionable) practical implications³³. First, it allows speed and savings in terms of administrative costs, for the authorities (and the Commission) do not need to invest in intensive
360 investigations and the collection of quantitative and qualitative evidence regarding the impact of conduct in the relevant market. Second, it fosters predictability and, related to that, it increases deterrence.

However, this attitude of the Commission has been criticized and the European Court of Justice has shown dissatisfaction in recent cases (*Cartes Bancaires*), suggesting a limiting approach to the notion of restriction by object, for the antitrust enforcement to be consistent with the European antitrust framework. Being otherwise the case, the

³² A thorough discussion about the role of consumer welfare in defining harm to competition in exclusionary abuses that fall under art. 102 was in Centre for European Policy Studies, *Treatment of Exclusionary Abuses under Article 82 of the EC Treaty. Comments on the European Commission's Guidance Paper*, Brussels, 2009, 23 ff.

³³ G. Bruzzone, *Le restrizioni per oggetto nella giurisprudenza della Corte di giustizia: alla ricerca di un approccio sistemico*, Paper presented at the V Antitrust Symposium, Trento, April 17, 2015 (unpublished manuscript on file with the authors).

enforcement strategy of the Commission could turn into a surreptitious way to release the Commission itself from the burden of proving actual effects on the market even in those cases (and the Google case is certainly among those) where it is all but apparent that such effects are harmful. It might well be that indulgence to an antitrust enforcement reliant on the “by object” philosophy causes drawbacks in terms of over-deterrence with obvious hindering effects on innovation and dynamic efficiencies. Eventually, there are at least two additional arguments that would recommend an effect-based analysis, in a charge of abuse of dominant position by Google. First, the free nature of the service for one class of internet users (those using Google services). Second, the complex nature of the market at stake, which displays significant differences with respect to traditional situations in which standard antitrust analysis applies smoothly.

As to art. 102 TFEU, since *Hoffman La Roche*, the enforcement of the abuse of dominant position has been made dependent on a positive showing that the abuse refers to conduct that has the effect to harm the maintenance or the increase in competitiveness in the market³⁴. More recently, advocate general Colomer in his opinion on *Glaxo* supported the view that there should not be *per se* violations under art. 102³⁵ and, following the Court in *Post Danmark*, an evaluation of actual or potential effects on competition is always in order³⁶. Thus, an antitrust based only on heavy reliance on the nature of the conduct itself, and not on its effects, is not consistent with European principles of antitrust, both in art. 101 and in art. 102 cases³⁷.

As far as search bias is specifically concerned, to the extent that it is interpreted and construed as an exclusionary and/or discriminatory practice, in the abstract it may fall under art. 102, particularly if the charged firm has market power. But this is not enough to conclude that there is abuse and, consequently, to affirm antitrust liability. It only means that art. 102, if ever, is the correct normative framework for the analysis. A further step is necessarily required. Namely, a serious and comprehensive consideration

³⁴ ECJ C-86/76, *Hoffman La Roche*, § 91.

³⁵ Opinion of the advocate general Colomer in *Glaxo* C-468/06 and 478/06.

³⁶ ECJ C-209/10 §§ 24 and 39.

³⁷ In reviewing the Commission’s decision in *Intel*, the General Court T-286/09, *Intel Corp. v. Commission*, recalls the chance that restrictions by object are not considered unlawful if the entail efficiencies or are objectively justified. The principle is crystal clear in the U.S.; see Crane, *supra* note 6, at 9 («liability should only attach to those acts that have anticompetitive effects—those acts that create, enhance, or preserve market power»).

of the effects of Google's practices, in order to show that its choices, regardless of Google's intent, harm competition (and not just competitors, or some of them) and reduce consumer welfare, that seems to be a compelling ingredient of the analysis. When discussing the effects of Google's search practices, users' experiences and perceptions must be reinserted in the investigation, not just for the sake of complexity or
400 to indulge econometric fascinations³⁸, but to make sure antitrust policy is not diluted into a quicker, but stronger mechanism to inject fairness into business-to-business relationships even when, paradoxically, some conduct is beneficial to users.

We argue that in dynamic, high-tech industries, enforcement of antitrust rules that does not focus on effects of behaviors by firms (even the dominant firm) cannot possibly be reconciled with any statement about incentives to innovation that competition should preserve and reinforce. Any firm with commercial success would be frozen in its attempt to be more innovative and to respond to greater competition, even when its reaction would result in superior products or services for consumers. In complex
410 markets, such as internet-based, multisided services, there are no easy conclusions about conduct and no shortcuts to a cheaper antitrust approach. Needless to say, a line of reasoning based on the effects of a behavior is more difficult and laborious: the more complex the factual situation (such as in dynamic industries), the more rigorous and uncompromising the analysis should be.

V. Effect-based analysis of search biases

If art. 102 is the correct framework to assess the potential anticompetitive effects of search bias, a number of questions are in order and, among those, whether search strategies as described in paragraph III, *retro*, can be considered discriminatory at all
420 and, if that is the case, which interests should be taken into account in order to decide the harmful nature of such strategies and their anticompetitive effects.

The description in paragraph II provided arguments to conclude that what apparently can be considered exclusionary conduct by a firm in a dominant position is rather the exact way a search service is provided, not just by that firm but also by the industry at

³⁸ C. Osti, *Ma a che serve l'antitrust?*, in *Il Foro italiano*, 2015, V, 121, has recently remarked that a vigorous antitrust enforcement is not just about quantitative marginal analysis, but also a tool for protecting democracy and increasing social cohesion.

large. Condemning *that* firm for *that* behavior would automatically translate into a decision that that firm cannot stay in the market; but any decision that reduces competitors, rather than increasing their numbers, would turn antitrust policy on its head.

As should be clear by now, search bias is not the name of an antitrust misconduct, but
430 the very way information is processed and organized to provide users with an acceptable search experience. Moreover, a claim of neutrality can only be stated in the abstract and never become an objective milestone to define competitive behaviors, since paradoxically neutrality – in its purest form – would require that the information is left as it is found, with no added value for users (and, in a two-sided perspective, for advertisers). One might say that users do need bias in the search³⁹, which is just a more impressive way to say that relevance and neutrality are at odds and since users need relevant results (not just results) neutrality cannot be part of the analysis unless it results in clear and flagrant discrimination of all competitors⁴⁰.

An objection to this argument could be that even if a behavior is a common trait of an
440 industry, and not a competitive strategy or a business model adopted by one firm, to the extent that the firm is dominant, the behavior becomes anticompetitive. This argument proves too much, because even the dominant firm has the right to remain in the market and this reinforces the case for effect-based analysis⁴¹, since only behaviors that in actual terms harm the competitive process can be considered unlawful. The qualification of the conduct follows the analysis; it should not be its starting point.

As to the assessment of the effects, any antitrust analysis must be supported by evidence and in the stage following the Statement of Objections with no doubt that scholars and policy makers will go about collecting data to prove their case. Google has already started giving data that prove how some charges run counter to factual evidence⁴².

³⁹ Renda, *supra* note 7, at 14 («there are reasons to believe that a neutral search engine would be hated by consumers»).

⁴⁰ As FTC Chairman Leibowitz has declared, «[a]lthough some evidence suggested that Google was trying to eliminate competition, Google’s primary reason for changing the look and feel of its search results to highlight its own products was to improve the user experience».

⁴¹ As Crane, *supra* note 6, at 8, posits it, «[d]ominant firms may sometimes have special antitrust obligations not shared by weaker rivals, but those obligations should never stand in the way of the firms’s ability to innovate». The argument, needless to say, cannot be valid only on one side of the Ocean.

⁴² In two posts (which are the only two official documents by the firm), Google has shown that competition has not decreased and that its conducts are not producing exclusionary effects.

450 Apart from quantitative effects, there is a major issue that still needs to be considered in preparation for future quantitative analysis and to bring evidence to the correct institutional framework. To what extent do Google search strategies really disfavor competition, rather than fostering it? Coming to one of the points raised in the introduction of this paper, one of the questions is to decide what the real aims of European antitrust are and which values are competition rules aimed at protecting in Europe⁴³.

It may well be true that only those appearing on top of the search results page have visibility (which is ephemeral by the way, since the user is not interested in the ranking itself, but in the ranking to the extent that it brings about relevant results). But if results
460 are not adjusted by Google to ensure relevance (which means, users' preferences) given prominent value, how could new entrants on the internet gain visibility? If neutrality means aseptic editorial policy or purely unbiased provision of data, what is the guaranty that incumbents are not preferred vis-à-vis newcomers?

There are competitors that are happy with current Google search strategies and there might be potential competitors that would benefit from the fact that relevance – and not subjective and idiosyncratic requests by incumbents – is the main driver of search engines⁴⁴. If that is the case, then any assertion about Google's conduct being systematically discriminatory, exclusionary and comprehensively harmful for competition should be carefully checked and proven.

470 Running an effect-based analysis demands a granular approach. Eventually, once a market has been correctly defined and the dominance of Google clearly ascertained, in order for search bias to be considered abuse, there needs to be a showing of its impact on the competitive process as a whole and not just on some players. Unless antitrust authority openly explains that the ultimate goal of European antitrust policy is not just control of market power and pursuit of consumer welfare, but also general prophylaxis of conduct that might appear as unfair.

Nothing in the Google Search saga demands an exemption by antitrust scrutiny (probably not even the free nature of the service), but a prophylactic function of antitrust as a proxy for market regulation is outside the reach of art. 102 TFEU. Forcing

⁴³ The question of the final goal of European antitrust has been recently raised by Osti, *supra* note 38, at 114, comparing U.S. and EU antitrust policies.

⁴⁴ The issue of desirability for newcomers has been raised by Renda, *supra* note 7, at 15.

480 that provision to make sure search bias becomes abuse would cause more harm than any planned benefit that might be provided.

VI. Diversities that matter: the European institutional approach and the antitrust of the digital economy

As the case of the decade, Google cannot avoid raising the arguments that are common to the enforcement of antitrust rules in high-technology markets.

One such argument is about the timeframe of regulatory intervention. Google was investigated in the United States by the FTC for nineteen months. The case was closed
490 by the FTC in 2013⁴⁵. The European Commission issued a Statement of Objections in Spring 2015, after years of investigation, when a proposal for commitments by Google had been on the table for a while⁴⁶. The case will last months if not years, and in the end, whatever the conclusion, we will ask whether it refers to the market as it was five years ago, as it is now or as it will be in the future. In any event, things will be extremely different and the final decision will impact a situation that will be dramatically modified. If Google really is abusing its alleged enormous market power, as claimants repeat, a decision by the Commission will intervene when the market will be radically reshaped by the dominance of Google and reinstating competition by order of an authority will be difficult, if not impossible. If things remain as they are now, it
500 will be evidence that Google's conduct are not as dangerous and harmful as some are fond saying after all; then we would need to ask whether that action made sense and if public resources are spent correctly. And if market pressure causes Google to naturally lose market share and some other company to gain, then the market will have fixed itself of any problem. Whatever the case may be, any sound, well-thought out, deeply rooted, evidence-based and long-awaited decision in the future will be useless.

⁴⁵ Details of the investigations leaked out of the FTC's files in a Freedom of Information Act request. The news comes from *New Details In U.S. Probe Of Google*, Wall St. Journal, March 20, 2015.

⁴⁶ Against the prediction of A.A. Foer, S. Vaheesan, *Google: The Unique Case of the Monopolistic Search Engine*, 4 *Journal of European Competition Law & Practice* 199 (2013) («Given the high level of cooperation between these authorities in the Google matter, it seems unlikely that the pending investigations will reach significantly different results»), it seems that the European Commission will go its own way with regard to the case.

This by no means implies that an antitrust initiative per se is useless. The argument *ab inconvenienti* does not help to clear up the situation, no matter how difficult the case and how complex its implications. But the institutional approach – that is to say, the way antitrust rules are enforced – should be part of the solution, and not the main source of problems. If we accept the idea that the internet and related industries have caused a radical change in the market, insisting on a traditional approach (where time is but one of the variables) sounds contradictory.

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European markets are different from U.S., but some features of digital markets are the same and they relate more to the technological dimension of the problem, than to the economic aspect involved. The way and the speed with which technology evolves yields unexpected changes and these happen everywhere, with the same intensity and at about the same time. One question we cannot postpone is whether the perspective of a long investigation by the Commission makes sense at all when things change radically in a timeframe that is shorter than an administrative enforcement initiative and the main drive for change is technology, not regulation.

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Each complex antitrust case shows some peculiarities that require a cautious approach in generalizing problems and solutions⁴⁷. At the same time, antitrust authorities, policy makers and scholars have a duty to re-think the institutional framework whenever they are given an occasion to do so. The case for search neutrality should prompt a reflection about consistency of actions and foundations of antitrust. The Chicago School has brought more economics and quantitative analysis to antitrust and its teachings have somehow enriched the understanding of some market behaviors and conduct⁴⁸. Scholars now advocate a more technological approach in antitrust analysis, that would demand reinforced attention to the effects of behaviors and decisions, from a technological standpoint, and to dynamic efficiencies⁴⁹.

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⁴⁷ Foer & Vaheesan, *supra* note 46, at 200, incline to believe that Google is a unique case, that might require measures going beyond the simple option antitrust/regulation and could require «to consider all alternatives, including the deliberate use of public resources to maintain effective choice in information sources on the Internet».

⁴⁸ Bork & Sidak, *supra* note 24, at ... try to apply the Chicago School antitrust teachings to the Google search case.

⁴⁹ R. Podszun, *The More Technological Approach: Competition Law in the Digital Economy*, in G. Surblyte (ed), *Competition on the Internet*, Berlin/Heidelberg, 2015, 101; the original idea was already mentioned in Id., *Kartellrecht in der Internet-Wirtschaft: Zeit für den more technological approach*, in *WuW* 2014, 249.

The European Commission adopted on May 6, 2015 a Communication titled *A Digital Single Market Strategy for Europe*, where it highlights the pillar for a strategy of growth based on digital technologies. The Commission recalls the principles of Better Regulation to advance its mandate with respect to the Digital Agenda. Conceptually, it would appear institutionally schizophrenic if the regulatory policy is aimed at dealing with a “transformational change” and the competition policy relies on a crystallized institutional framework. Maybe the Google investigation and all the procedural steps that will follow can be used to start framing the new technological antitrust and to reconcile regulatory and antitrust policies.

540 Eventually, if Europe discovers that search neutrality is a compelling value of the internet and information aggregation, there is no reason to impose it via an antitrust action targeted at one single company. Although difficult, regulation would prove a much more effective, universal and balanced solution⁵⁰.

VII. Conclusions

At the beginning of this paper, we mentioned three basic differences that cause recommendations to analyze the case for search neutrality in a European perspective in a manner distinct from a purely U.S. standpoint. First of all, the market share that
550 Google has in European countries can be different. In this respect, we tried to post a note of caution since markets are not clearly defined yet and the dynamics of search engines are changing at a fast pace. Conclusions that hold true in a moment in time might not necessarily be valid in the timespan of an antitrust action. As a matter of fact, a clear showing of what the market is and where Google is dominant is missing and it should be the starting point of any credible action, in Europe as well as abroad. Second, institutional approaches to antitrust enforcement are different nonetheless and the way competition authorities interpret their role varies accordingly. Such a statement could simply be an acknowledgement of two models that do not even compete, since each authority has a reserved jurisdiction, either European or American. But in a
560 globalized context and before dynamic industries, differences become relevant and

⁵⁰ As Renda, *supra* note 7, at 18, points out, regulation of platforms «is much more complex than simply dictating the neutrality of platforms».

instrumental to competitiveness. From a policy standpoint, a timely antitrust enforcement that aims at giving reliable signals to market players may prove much more valuable than any other sounder, but slower approach. Any result of a timely action would be at least grounded in facts that maintain a degree of truth with respect to the market structure and competitive strategies of firms. That the European Commission has issued a Statement of Objection to one of the most innovative companies in the world, in 2015, sounds controversial if compared with the action of the Federal Trade Commission in the U.S. This is not to say that an antitrust authority has not the right to do so; the question is whether the authority should not be considering the practical results of any outcome that would result in a not-so-near future.

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More importantly, the call for an effect-based analysis of antitrust, if and when all the preliminary requirements of an action are proven, can be an opportunity for the edification of a real identity for the European competition policy. Faced with the Google case, Europe will have to decide whether antitrust is the name of a broader policy that encompasses several values and is responsible for their protection, including fairness among competitors, possibly consumers' interests (in a broader dimension) and, as far as the internet is concerned, search neutrality. Or, contrarily, if antitrust is a hardcore policy that relies on competition as a way to provide stimuli to innovation in view of improved consumer welfare. If this is the case, then dynamic industries will have the chance (and the duty) to corroborate the efficiency-enhancing dimension of their strategies and the corresponding responsibility to always choose in a way that is primarily consistent with consumer welfare at large.

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