

Meeting with FairSearch

Thursday, 12th September 2013, 11:30

1. Scene setter

- FairSearch is a coalition of different companies along the internet value chain (e.g. Microsoft; Nokia, Tripadvisor; Allegro; Expedia);
- the meeting is scheduled to discuss two series of concerns that FairSearch raised with the Commission: (i) anti-competitive practices in the search market by Google and (ii) anti-competitive practices in the mobile market by Google;
- the objective of FairSearch is to present their submission to the proposed commitments of Google, which were subject to Market Test Notice until end of June 2013 (following extension) and to present their concerns in relation to mobile markets.

In both cases the objective is to listen to the arguments of FairSearch in relation to two still on-going investigations of DG COMP.

2. Anti-competitive practices in search markets

Position of *FairSearch* on the proposed commitments

- FairSearch is extremely vocal in claiming that proposed commitments (see more below) are worse than doing nothing;
- Following commitments they outsourced the survey (conducted in the UK), to test the likelihood of positive effects of the main commitments.

The results of the survey showed that:

- i. the three rival links, as proposed by Google, had no significant impact on consumer behaviour. A trivial number of survey respondents clicked on the rival links when presented in the format proposed by Google; and
- ii. substantial number of survey respondents were confused or misled by the label and disclosure that Google proposes to differentiate its own search results and services from those of its rivals;

Based on this the two academics doing the survey concluded that “the proposals offered by Google in the Commitments are highly unlikely to materially increase consumer attention, offer consumers meaningful choices or improve competition.”

Commission’s preliminary conclusions

- the Commission adopted a preliminary assessment on 13th March 2013;
- main concerns expressed by the Commission:
 - i. **favourable treatment of Google’s specialized/vertical search sites** - relates to the way Google displays links to its own specialised search services in its web search results. Google namely also operates several specialised search services such as

Google Shopping, which specialises in the search for products, or Google Places, which specialises in the search for local businesses.

Google prominently displays links to its own specialised search services within its web search results and does not inform users of this favourable treatment.

Due to this favourable treatment of Google's own services, consumers are more likely to not make use of potentially more relevant competing services

- ii. **the use by Google, without consent, of original content from third party websites in its own vertical Web search services** ("scrapping") - Google uses on its own specialised search services original material taken from the websites of its competitors, such as for instance user reviews. Google thereby benefits from the investments of competitors, sometimes against their explicit will.

The concern is that the practice of using third party content to promote Google's own services may reduce competitors' incentives to invest in the creation of original content for the benefit of internet users.

NOTE: Many competition law commentators argued that this is more a copyright issue than competition law issue;

- iii. **exclusivity arrangements with third party web sites** – the concern is that these requirements oblige publishers to obtain all or most of their online search advertisements from Google; and
- iv. **portability of advertising campaigns (essentially exclusivity issue)** - relates to Google contractually restricting the possibility to transfer online search advertising campaigns away from Google's AdWords and to simultaneously manage such campaigns on competing online search advertising platforms.

The main concern is that these restrictions create artificial switching costs that discourage advertisers using Google's AdWords from running parallel online search advertising campaigns on competing platforms, thereby reducing consumer choice.

Commitments of Google

- main commitments offered by Google (by concern raised above):

- i. Google will label links to Google's own vertical Web search services that are subject to a favourable placement in Google's horizontal Web search results (issue of identification of Google's and third party's websites).

Google will also distinguish links to Google's own vertical Web search services from other horizontal Web search results.

Google will display on the horizontal Web search results page links to three relevant competing vertical Web search services and will make users clearly aware of the presence of these three rival links;

- ii. Google will offer third party websites a Web-based opt-out from the use of all content crawled from their site in Google's vertical Web search services.

Upon notification of an opt-out, Google will cease displaying the content at issue in Google's vertical Web search services.

The opt-out will however not unduly affect the ranking of third party websites in Google's horizontal Web search results.

- iii. Google will commit to no longer include in its agreements with publishers any provisions or impose any unwritten obligations that would require publishers to source their requirements for online search advertisements exclusively from Google in relation to queries from EEA users.
 - iv. Google will cease to impose any written or unwritten obligations (including in its AdWords API terms and conditions) that will prevent advertisers from porting and managing search advertising campaigns across Google's AdWords and non-Google advertising services.
- The duration of commitments proposed is 5 years and 3 months of the issue of Article 9 (commitment) decision.
 - The compliance with the commitments will be supervised by an independent trustee.

NOTE:

- The “EU competition law” approach is again significantly different from the one in the US.

There FTC accepted voluntary commitments of Google concerning “scraping” and removing exclusivity clauses in its contracts with advertisers.

It is important to outline that FTC did not find enough evidence to argue that search engine algorithm is done in a way to harm competitors and exclude them from the market.

Possible developments

- Latest interventions of Vice-President Almunia show that it is highly unlikely that the commitments as they stand will “survive” and will be the ones put in the final Article 9 (commitment) decision;
- Most of the comments to commitments released so far are more or less heavily criticizing the commitments offered by Google (e.g. FairSearch; BEUC; ICOMP).

Main point of criticism is search engine algorithm where many argue for absolute non-discrimination.

3. Anti-competitive practices in the mobile market

- On 9 April 2013 FairSearch lodged a complaint against Google concerning anticompetitive practices in mobile markets;
- The main concerns expressed are:
 - i. predatory pricing of Android OS, which is given to mobile makers for “free”;
 - ii. leverage of market power as all smartphones with Android OS have to have pre-installed Google Apps (“relative free element”);

NOTE: It is worth mentioning that Microsoft that is part of the FairSearch coalition is claiming an anti-competitive problem due to pre-installation (for which they were also condemned for IE being pre-installed on Windows OS), even though they recently announced pre-installation of Skype on all devices run by their Windows OS.

- iii. abuse of market power on mobile search advertising markets where according to some data Google has super dominant position (96% of market share).

Possible developments

- Concerning the FairSearch complaint on the mobile markets the procedure is still at the stage of investigation and not much is publicly available.

The objective of FairSearch is to speed up this process in view of possible negative effects on the market.

Additional concern – Google acquiring Waze (not raised by FairSearch in initial e-mail)

- Recently concerns were also raised in relation to Google acquiring Waze (social mapping platform) for 1 billion \$.

While FTC in the US may be for formal reason not be able to look at the acquisition from purely merger perspective (revenue threshold – Waze revenues were 70 million \$) it is considering possible effects on the market.

While the Commission is not looking at this acquisition (yet) Office of Fair Trading in the UK announced the investigation of the business transaction.