

Bloom Strategic Counsel, PLLC

Seth Bloom
President and Founder

August 20, 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave., NW, Suite CC-5610 (Annex C)
Washington, DC 20024

Re: Competition and Consumer Protection in the 21st Century Hearings, Project No. P181201

Dear Secretary –

I am writing in response to your request for comments in relation to this Fall’s hearings at the FTC on Competition and Consumer Protection in the 21st Century. This comment will address topic 2 – competition and consumer protection issues in communications, information, and media technology networks.

I am an antitrust lawyer and competition policy expert. I have my own firm, Bloom Strategic Counsel PLLC, which primarily focuses on antitrust and competition policy. From 1999 to January 2013, I served as a counsel on the staff of the Senate Antitrust Subcommittee, the last four years as General Counsel. In the interests of full disclosure, I currently represent Yelp.

My comments are addressed to what I believe is the anticompetitive conduct of Google, a division of Alphabet Inc. I strongly believe that Google’s conduct warrants antitrust scrutiny by the FTC, and an enforcement action should the FTC determine that antitrust law has been violated.

Since its creation, Google has pledged that its search engine would be unbiased and deliver accurate and honest responses to consumers’ search queries. Google has grown to become the world’s dominant Internet general search engine, with market shares of over 87% in the United States and over 95% in some foreign jurisdictions including the EU.¹ Yet—in plain contradiction of Google’s promise to run an unbiased search engine—in recent years serious allegations have emerged that Google has favored its own businesses and properties and downgraded links to competitors’ businesses on the results shown in its search engine. If these

¹ StatCounter, *Search Engine Market Share United States of America: Jan 2009 – June 2018* (last accessed July 10, 2018), found at <http://gs.statcounter.com/search-engine-market-share/all/united-states-of-america#monthly-200901-201806>.

allegations are true—and both the staff of the FTC in 2012² and the European Commission more recently³ have concluded that they are—these practices would be very harmful to competition, would deceive consumers, and could constitute conduct designed to illegally maintain its search engine monopoly in violation of section 2 of the Sherman Act and section 5 of the FTC Act. For these reasons, I believe it is essential that the FTC open a new investigation into allegations that Google has been engaged in anticompetitive practices at this time.

I. Past Antitrust Investigations of Google in the US

In September 2011, while I was General Counsel of the Senate Antitrust Subcommittee, the Antitrust Subcommittee held a hearing examining charges that Google was engaged in anticompetitive conduct titled “The Power of Google: Serving Consumers or Threatening Competition?”⁴ The hearing focused on allegations that Google had been engaged in search bias by favoring its own products and services on its search results page over independent content. Witnesses such as Yelp and the comparison shopping site NexTag presented evidence supporting this assertion. At the hearing, however, Eric Schmidt, then the Executive Chairman of Google, denied the allegation that Google was engaged in search bias.

Mr. Schmidt’s denials at our Subcommittee’s 2011 hearing have come under serious doubt in light of subsequent events. In 2011 and 2012, the FTC investigated allegations that Google had violated antitrust law by engaging in anticompetitive conduct. In August 2012, the staff of the Bureau of Competition found that Google had in fact engaged in anticompetitive conduct, and recommended bringing several antitrust claims against Google. The FTC staff concluded that Google “has strengthened its monopolies over search and search advertising through anticompetitive means, and has forestalled competitors’ and would-be competitors’ ability to challenge those monopolies, and this will have lasting negative effect on consumer welfare.”⁵

Among the FTC’s staff key factual findings were:

- “Google used the occurrence of competing vertical websites in its natural search results to automatically boost the ranking of its own vertical properties above that of competitors.”⁶
- “While Google embarked on a multi-year strategy of developing and showcasing its own vertical properties, Google simultaneously adopted a strategy of demoting, or refusing to display, links to certain vertical websites in highly commercial categories.”⁷

2 FTC Bureau of Competition staff memorandum, August 8, 2012, Subject: Google, File No. 111-0163, found at <http://graphics.wsj.com/google-ftc-report/>

3 European Comm’n Decision, Case AT.39740 Google Search (Shopping) (June 27, 2017).

4 U.S. Senate, Hearing before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary (Sept. 21, 2011), <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg71471/pdf/CHRG-112shrg71471.pdf>.

5 FTC Bureau of Competition staff memorandum, August 8, 2012, Subject: Google, File No. 111-0163, at p. 116.

6 *Id.* at p. 26

7 *Id.* at p. 28

- “Vertical websites, such as comparison shopping and local websites, are heavily dependent on Google’s web search results to reach users. Thus, Google is in the unique position of being able to ‘make or break’ any web-based business.”⁸
- “Google’s conduct has resulted in significant harm to rival vertical websites in a number of different categories. . . . Data obtained from NexTag and Shopping.com, among others, suggests that, as a result of Google’s conduct, these websites have experienced significant drops in traffic.”⁹
- “Google’s threat (and willingness) to degrade its own web search product – by banishing high-quality vertical websites from its web search results altogether – suggests that Google’s motive in scraping high-quality content from its vertical competitors was not procompetitive.”¹⁰

Despite these conclusions of the FTC Bureau of Competition staff, on January 3, 2013, the FTC voted to close the investigation with only minimal voluntary commitments by Google to cease its “scraping” of rivals’ websites and place them on Google search results. The FTC Commissioners at this time concluded that Google had engaged in design changes that “improve[d] the quality of its search product.”¹¹ However, that opinion completely ignored the conclusion of its staff that Google had “degrade[d] its own web search product.” In light of subsequent developments described below, it is clear that the closing of the investigation was a serious mistake. And these subsequent developments make clear that the threats to competition identified by the FTC staff in 2012 remain present today, and if anything, have become even worse.

II. Recent Developments

A. Empirical Research

Skeptics of an antitrust case against Google often point out the necessity of finding consumer harm, not merely injury to competitors. However, since the closing of the FTC investigation in early 2013, ample evidence of consumer harm resulting from Google’s anticompetitive conduct has been developed.

In 2015, a ground-breaking research paper was written by Profs. Michael Luca (of the Harvard Business School) and Tim Wu (of Columbia University) with the assistance of the Yelp Data Science Team (the “Luca/Wu Paper”).¹² This paper demonstrated, by the comprehensive use of empirical data, how Google has been degrading search engine results to benefit Google, causing substantial consumer harm. Professors Luca and Wu concluded that “Google is systematically making its overall product worse for users in order to provide favorable treatment

⁸ *Id.* at p. 30.

⁹ *Id.* at p. 80.

¹⁰ *Id.* at p. 92.

¹¹ Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google, Inc., FTC File No. 111-0163, at p. 4, January 3, 2013.

¹² Michael Luca, Timothy Wu, Sebastian Couvidat, Daniel Frank and William Seltzer, “Does Google Content Degrade Google Search? Experimental Evidence,” Harvard Business School Working Paper 16-035 (2015), <http://people.hbs.edu/mluca/SearchDegradation.pdf> (hereinafter “Luca/Wu Paper”).

to Google content.”¹³

The Luca/Wu Paper studied consumer preferences when presented with two alternate search results: (1) the actual Google search results for commercial searches with “local intent,” such as a search for “best pediatrician in Washington, DC”¹⁴ (what Google calls “Universal Search” results), and (2) truly neutral search results using Google’s own organic algorithm, but allowing third-party review sites (such as ZocDoc or Yelp) to appear in the results (what the authors of the study call “Focus on the User”). In Google’s actual Universal Search results, Google filters the results and gives preference to Google properties, while in the Focus on the User approach, the result is truly neutral based on which site delivers the best or most relevant information relevant to the query in question. Thousands of consumers were shown these results at random, and the study examined which results consumers preferred.

The results of this study were striking—consumers were 40% more likely to engage with local search results when presented via the unbiased “Focus on the User” model than when Google’s current universal search methodology is applied.¹⁵ Prof. Luca and Wu concluded that

[T]his study demonstrates that users would be more likely to engage with local specialized search results if Google were to replace its proprietary “answers” in universal search with results drawn from the whole web-based on the same merit based algorithm that it uses to populate organic search (as opposed to being exclusively drawn from Google+). . . . The results demonstrate that consumers vastly prefer the second version of universal search [the Focus on the User methodology]. Stated differently, consumers prefer, in effective, competitive results, as scored by Google’s own search engine, than results chosen by Google. This leads to the conclusion that Google is degrading its own search results by excluding competitors at the expense of its users.¹⁶

In sum, the Luca/Wu paper uncovered powerful evidence that Google, in excluding its competitors from “Universal Search” results, presented inferior internet search results and thereby caused, and is causing today, significant consumer harm. By receiving inferior search results in Google’s “Universal Search” results box, millions of consumers are harmed every day by having to search longer to find relevant content or being unable to find the best content to suit their needs.

B. Antitrust Enforcement by the EU

Another important recent development regarding Google’s anticompetitive search conduct was the European Commission’s (“EC”) finding that Google violated EU competition law and its assessment of a €2.4 billion fine against the company.

On June 27, 2017, after a lengthy investigation involving many different companies (including many U.S. companies), the EC found that Google had breached the EU’s antitrust rules and “abused its market dominance” by favoring its own comparison shopping services in its

13 *Id.* at p. 3.

14 Local intent searches comprise the largest single category of Internet search. *id.* at p. 4. Local intent searches are estimated to represent one-third of total desktop searches, and over one-half of mobile searches.

15 *Id.* at p. 25.

16 *Id.* at p. 5 (emphasis added).

search results. Specifically, the EC found that “Google has systematically given prominence to its own comparison shopping service” and “Google has demoted rival comparison shopping services in its search results.” In addition to the €2.4 billion fine, the EC ordered that Google give “equal treatment” to rival comparison shopping services.”¹⁷

Earlier this year, Google was again sanctioned for violating EU antitrust law, this time with respect to the Android operating system used in mobile devices. The Android operating system, which is owned by Google, operates on about 80% of the world’s mobile devices. Google engaged in several different anticompetitive practices with respect to its Android operating system, including: (1) only allowing manufacturers to pre-install critical Google apps (e.g., the Google Play Store app store) if they also pre-installed Google’s search app and browser (which has Google Search set as the default search service); (2) paying manufacturers to exclusively pre-install the Google search app on their devices; and (3) preventing manufacturers who wish to use Google apps from using alternative versions of Android, which might serve as entry points for competing search services.

The EC found Google liable of illegally tying its Google search and browser apps, engaging in anticompetitive exclusive dealing with manufacturers, and illegally obstructing the development and distribution of competing Android operating systems (and, as a consequence, competing search services). The EC concluded “Google’s practices have denied rival search engines the possibility to compete on the merits.”¹⁸ The tying practices ensured the pre-installation of Google’s search engine and browser and practically all Google Android devices and the exclusivity payments strongly reduced the incentive to pre-install competing search engines. The EC fined Google the equivalent of over €4.3 billion (over \$5 billion)—a record antitrust fine in the EU—and once again ordered Google to end its illegal practices.¹⁹

As Google operates on a global scale, there is little doubt that the same conduct that caused the EC to take action in Europe has occurred in the US. However, the EC’s actions and the US antitrust regulators’ failure to action have left consumers in an anomalous situation. Consumers and businesses in Europe stand to reap the benefits of a much more open Internet search market and ecosystem as the positive effects of the enforcement actions by the EC take effect. However, in the US, the effect of Google’s anticompetitive conduct remains uncorrected. American consumers and businesses deserve the same protection from biased search results, deception, and anticompetitive practices as do their European counterparts.

III. The Need for Renewed Antitrust Scrutiny of Google at the FTC

The need for the FTC to examine the allegations of anticompetitive conduct by Google is even greater now than when the FTC closed the investigation in January 2013. Google’s dominant position in search has proven to be remarkably durable, and market conditions appear to have deteriorated over the past five years. In 2012, the FTC staff concluded that Google controlled 71% of the US search market.²⁰ Today, its share is estimated to be 87%.²¹ When the

¹⁷ European Commission Press Release, “Antitrust: Commission fines Google € 2.42 billion for abusing dominance as search engine by giving illegal advantage to another Google product, its comparison shopping service,” 27 June 2017, http://europa.eu/rapid/press-release_IP-17-1784_en.htm

¹⁸ European Commission Press Release, “Antitrust: Commission fines Google € 4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine,” 18 July 2018, http://europa.eu/rapid/press-release_IP-18-4581_en.htm

¹⁹ *Id.*

²⁰ U.S. Federal Trade Commission, Staff Recommendation Memo regarding Google Inc., File No. 111-0163, p. 68 (Aug. 8, 2012).

FTC initiated its investigation in 2011, smartphone search was relatively new, but today it is more common than desktop search, and Google enjoys a 95% U.S. market share on internet searches done on mobile devices.²¹ The durability of Google’s position suggests that it has successfully shielded itself from competition.

Moreover, Google has established a leading—if not dominant—position in several adjacent technology markets. For example, approximately 60% of American smartphone users are now on Android devices.²² Google’s proprietary mobile applications also appear on most of Apple’s iOS devices, and it is set as the default search service for all iOS devices.²⁴ And today, the vast majority of ad-funded websites now use Google technologies to sell ads. All of this suggests that Google’s market power is growing even greater.

As noted above, more than six years ago, in August 2012, the FTC staff reached the conclusion that “[v]ertical websites, such as comparison shopping and local websites, are heavily dependent on Google’s web search results to reach users. Thus, Google is in the unique position of being able to ‘make or break’ any web-based business.” What was true in 2012 is even more certain today. Google has become a gatekeeper with the power and ability to decide whether or not businesses are seen by consumers. When these businesses compete with Google’s properties, Google has the incentive and ability to prevent them from reaching consumers, simply by disfavoring, demoting or penalizing them on Google’s search results page. And the threat has now moved the burgeoning marketplace reached by smartphones and other mobile devices. As described above, Google has now extended its anticompetitive practices to most the dominant mobile device operating system, creating a new and formidable barrier to competitors in the mobile Internet.

Beyond the harm to consumers and businesses affected by Google’s practices, this conduct has a substantial negative effect on innovation by discouraging new businesses who would compete with Google from entering the market. If new Internet products or services are downgraded on Internet search listing of the dominant Internet search engine, they will not obtain the traffic or advertising revenues necessary to survive, and will not receive funding from venture capital. If apps that compete with Google’s on mobile devices cannot get pre-installed on the vast majority of these devices because of contractual restrictions imposed by Google, we will be left with a much less diverse and competitive mobile ecosystem. If Google’s practices which violate competition law principles are not scrutinized, the ultimate result will be an online marketplace with fewer choices to consumers and businesses, higher prices, and less innovation.

Google’s conduct therefore raises the most serious antitrust policy concerns in the most vibrant and fastest growing part of the U.S. economy—the internet and e-commerce sector. Subsequent developments—especially the EC’s compelling cases brought against Google and its conclusions that Google had violated EU competition law with respect to both comparison shopping services and the Android operating system—make clear that the FTC made a serious mistake in closing the Google investigation in early 2013. The time to rectify this mistake by launching a serious antitrust investigation of Google’s conduct is now.

21 StatCounter, *Search Engine Market Share United States of America: Jan 2009 – June 2018* (last accessed July 10, 2018), found at <http://gs.statcounter.com/search-engine-market-share/all/united-states-of-america#monthly-200901-201806>.

22 Ibid. <https://www.statista.com/statistics/511358/market-share-mobile-search-usa/>

23 Rayna Hollander, “Apple has lost iOS market share in US, Europe, and Japan,” *Business Insider* (Jan. 16, 2018).

24 Abner Li, “Google pays \$3 billion for default search on iOS, estimated to be bulk of Apple services business,” *9to5Mac* (Aug. 14, 2017), <https://9to5mac.com/2017/08/14/apple-google-default-ios-search-deal/>.

Given its dominant position in the search engine market, Google has become a vital gatekeeper for businesses trying to reach consumers on the Internet and on mobile devices, and for consumers looking for businesses. Ample evidence exists that Google has been eager to use this gatekeeper power to downgrade businesses competing with Google's products and services. Just as was the case with the dominant computer operating system in the 1990s which enabled one company to control which software and computer applications reached most consumers, and led to a finding of liability for illegally maintaining a monopoly under Section 2 of the Sherman Act, the conduct alleged to have been committed by Google raises serious concerns that the most central provisions of antitrust law have been violated. Therefore, I urge that the FTC closely examine these issues for the first time in nearly six years.

Before closing these comments, I should stress that my view that Google warrants antitrust scrutiny is not based on any notion that "big is bad" or that antitrust needs new theories to deal with so-called "platform monopolies." I do not agree with such views. Instead, a possible antitrust case against Google is founded on long standing antitrust principles under monopolization law and Section 2 of the Sherman Act. It is based on specific allegations of anticompetitive behavior and consumer harm developed over the last five years, including those found by the EC. In my view, the case against Google is unique to the competitive abuses committed by Google.

Thank you for giving me the opportunity to express my views.

Sincerely,

A vertical rectangular box containing a handwritten signature in black ink, which appears to be "Seth Bloom".

Seth Bloom