

ANTITRUST IN THE NEW ECONOMY CASE  
GOOGLE INC. AGAINST ECONOMIC  
COMPETITION ON WEB

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ABSTRACT. *The American multinational company Google is one of the most important businesses in the new economy, thanks to its innovation has positioned itself as a leader in the Internet environment worldwide. One of its main products is Google Search, which has been in the public eye, because authorities in antitrust considered that search machine infringes the antitrust legal system. The company Google has faced indictments for this reason countries like the US and the EU, but in both cases it is considered that the authorities responsible for research has not given clear and sound criteria to determine the guilt or innocence of the digital enterprise, based on the actual behavior of competition in the markets for electronic commerce, which belong to the new Economy, so this article presents a brief description of both cases and proposals of the key aspects that investigations by the authorities in the field should take.*

KEY WORDS: *Antitrust, Google Inc., electronic commerce, new economy, monopoly.*

RESUMEN. *La multinacional estadounidense Google, es uno de los negocios más importantes de la nueva economía, gracias a su innovación se ha posicionado como un líder en el entorno Web en todo el mundo. Uno de sus principales productos es Google Search, el cual ha estado en el ojo público, debido a que autoridades en defensa de la competencia han considerado que la máquina de búsquedas vulnera el sistema legal de defensa de la competencia. La empresa Google ha enfrentado acusaciones formales por esta razón en Estados Unidos y la Unión Europea, pero en ambos casos se considera que las autoridades encargadas de las investigaciones no han emitido criterios claros y sólidos para determinar la culpabilidad o inocencia de la empresa digital, basado en el comportamiento real de la competencia en los mercados de comercio electrónico, que pertenecen a la Nueva Economía, por lo que este trabajo expone una breve descripción de ambos casos y las propuestas de los aspectos claves que las investigaciones de las autoridades en la materia deben tomar.*

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PALABRAS CLAVE: *Defensa de la competencia económica, empresa Google, comercio electrónico, nueva economía, monopolio.*

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### I. INTRODUCTION

One of the most important digital businesses today and one of the most profitable e-commerce worldwide, is Google, which has faced various indictments for anticompetitive practices, in the United States and in the Europe Union.

Its services and products have changed the way how it looks, uses and exploits the Web, to maintain rapid growth, increasing competition to a level of rapid progressive innovation.

Its main product is the search engine *Google Search*, and is also the reason for the demand. However other products, which the company calls applications: Gmail, Google Play, Google Maps, Google News, Google Calendar, Google Drive, You Tube, Google translator, Google Books, Blogger, the Google Chrome browser, and Android operating system, among others. It is essential to know that most of these services are free, there is a price in money which the consumer must pay to enjoy their services, so we have a clear example that the price is not decisive in the competition in the electronic commerce markets. However Google has become one of the most profitable companies in the world, with a market capitalization on Wall Street of 357.09 billion, far exceeding digital companies such as Microsoft or Facebook.<sup>2</sup>

Google's vertical competitors alleged that Google was using its dominant position in online generic search and advertising to give it an unfair advantage in these other markets,

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<sup>2</sup> Yahoo Finance, Google Inc., YAHOO FINANCE, December 2014, available at <http://finance.yahoo.com/q?s=goog> (last visited: January 1, 2015).

specifically by giving its vertical services higher and more prominent places in its generic search results, while lowering the 'Quality Score' of competitors' sponsored links.

The purpose of this study was to determine the results of investigations that antitrust authorities in the United States and the European Union have made against Google and issue an opinion on these results, suggesting some aspects of utmost importance to determine more precisely the points key that can help research and determine the guilt or innocence of Google, recalling that this is a digital company that belongs to the new economy and thus the development of competition has particular characteristics due to its nature technology, that differs from the competition in the physical markets; situation that the authorities in the matter should be taken into account for a result of more relevant research which provide greater security to both the company investigated, and their applicants.

This work is divided five parts, the first is a general description of *Google Search*. The second part analyzes and describes the fundamental aspects of economic competition in the New Economy. The fourth block sets, separately and briefly the research conducted in the United States and the European Union against Google's search engine and its results, and finally, conclusions are offered with relevant proposals.

## II. GOOGLE SEARCH

*Google Search*, formally launched the website in 1998, however, Larry Page and Sergey Brin, both students of computer science at Stanford University in 1996 worked on creating a search engine whose first name was BackRub<sup>3</sup> which was used within the university. Some time later, both consider that the name of its search engine to be modified, and takes the name "Google" arising from "a pun with the mathematical term "googol," the English pronunciation is similar to the "Google" and refers to the number one followed by 100 zeros."<sup>4</sup>

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<sup>3</sup> The story of the search engines begins in 1945, formally having a public use thanks to the Web that was created in 1990. One of the first searchers greater overall impact was Altavista, which came to light in 1995, but the innovation of Google earned him the favorite position has until today. For more information please read: <http://www.searchenginehistory.com/>

<sup>4</sup> Google Inc., *Our history in depth—Company—Google*, December 14, 2014, available at <http://www.google.com/about/company/history/>

The original idea of *Google Search*, was an engine that will achieve the organization of all existing information on the Web, without knowing the importance achieved globally and in the time for Internet users.

Like any search engine (software), *Google Search*, had the noble task of making the experience much easier access to the Web, to serve as facilitator specific information required by the user, The information circulates on Internet is very wide, we don't know how many information is produced day to day, considering the existence, according to Netcraft until the month of December 2014 exists 915,780,262 web sites in the world,<sup>5</sup> so for us it would be very difficult to find the information we need, if there were no search engines. Suppose you need to know about the consequences of global warming, but we know of a website that discusses the topic, so it is very difficult to access such information, however, thanks to search engines, is simple just write the keywords in the article you want to read and be shown a varied and extensive list of several websites that talk about it. The search engine makes it easier to use the Internet.

The power of search engines is extremely important, because this software has the information that is displayed to the user, James Grimmelmann thinks about that: "Web search is critical to our ability to use the Internet. Whoever controls search engines has enormous influence on us all. They can shape what we read, who we listen to, and who gets heard. Whoever controls the search engines, perhaps, controls the Internet itself. Today, no one comes closer to controlling search than Google does."<sup>6</sup>

If search engines have much influence on the information that is displayed to users, what we might think of a browser that dominates the market? This is one reason why Google has been criticized and has been in the public eye, Google Sites led the US explicit core search market in August With 67.3 percent market share, followed by Microsoft Sites With 19.4 percent (up 0.1 percentage points) and Yahoo Sites With 10 percent. Ask Network Accounted

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<sup>5</sup> Netcraft, *December 2014 Web Server Survey*, December 30, 2014, available at <http://news.netcraft.com/archives/category/web-server-survey/>

<sup>6</sup> James Grimmelmann, *The Google Dilema*, 53 NEW YORK LAW SCHOOL LAW REVIEW, 940 (2008).

for 2 percent of explicit core searches, followed by AOL, Inc. With 1.3 percent.<sup>7</sup> In the European Union has seen a 90% market dominance.

As we can see, *Google search* has a high market power in both the US and the European Union, however, the main concern of this power does not lie in the increased use of such mark by the users, for the damage that can cause or causes the competitive process because Google is more than a machine searches, it is actually a global advertising agency, which has generated suspicions about manipulating its search algorithm to show on the first results of search advertising customers and no general results may be more useful to the user (consumer).

About the algorithm, how it works? Google has offered users the possibility to know how works *Google search*, which divides into three different process works:<sup>8</sup>

#### 1. Tracking and Indexing:

a) Tracking: Google uses a software called “web crawler” to discover publicly available websites. The best known tracker is “Googlebot.” Trackers consult the website and follow the links on them, just as you would any user to browse the contents of the Web. Move from one link to another, and collect data on these websites providing Google's servers.

b) Indexing: The Web is like a growing public library with billions of books without a file system. In short, Google lists pages during the tracking process and then creates an index, so you know exactly where to look. As the index of the end of a book, Google index includes information about words and where they appear. When you do a search, at the most basic level, our algorithms seek the query terms in the index to find the appropriate pages.

The Google indexing systems consider many different aspects of the pages, as when they were issued, if they contain photos and videos, and so on.<sup>9</sup>

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<sup>7</sup> *ComScore Releases August 2014 U.S. Search Engine Rankings*, September 2014, available at <http://www.comscore.com/Insights/Market-Rankings/comScore-Releases-August-2014-US-Search-EngineRankings> (last visited: December 12, 2014).

<sup>8</sup> Google Inc., *Cómo funciona la búsqueda*, available at <http://www.google.com.mx/intl/es/insidesearch/howsearchworks/index.html>

<sup>9</sup> Google, *Dentro de Google. Rastro e indexación*, available at <http://www.google.com.mx/intl/es/insidesearch/howsearchworks/crawling-indexing.html> (last visited: December 22, 2014).

2. Algorithms “are computer programs that seek clues to bring you the most relevant results... are based on over 200 unique signals or “cues” that make it possible to guess what really might be looking for. These signals include elements such as the terms of websites, content now, region and PageRank.”<sup>10</sup>
3. Spam: The sought against those pages that offer no useful content to the user, or advertising, known as spam, Google notes that “This is detrimental to search for relevant websites are buried, and for owners of legitimate websites because their sites become harder to find. The good news is that Google's algorithms can detect the vast majority of spam and downgrade the position automatically. For the rest, we have equipment to manually review sites.”<sup>11</sup>

For the research object of this article, are not discussed the technical operation of the algorithm of *Google Search*, however, for more information on the operation of algorithms could see, Steven S. Skiena, *The Algorithm Design Manual* (2008), Thomas H. Cormen, Charles E. Leiserson, Ronald L. Rivest, *Introduction to Algorithms* (2009).

On the other hand, if users do not pay *Google Search* cost money to enjoy the service, how is that Google has made significant gains in revenue by product? the answer is advertising that sells. Rufus Pollock notes that: “Where then do web search engines find their revenue? In one word: advertising. When search engines provide ordinary users with a ‘free’ service they gain something very valuable in exchange: attention. Thus, while web search engines do not charge users, they can retail the attention generated by their service to those are willing to pay for access to it. In so doing such companies have built multi-billion dollar businesses.”<sup>12</sup> Meanwhile Ben Shipper says: “This service is free to Consumers. To earn revenue, Google collects data on the users search-through many repetitions, and sells advertising space using query keywords. Almost all of Google's revenue comes from search advertisement advertisement.”<sup>13</sup> Until 2014, the European Union accounts for over 31% of the nearly 112,700

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<sup>10</sup> Google, Dentro de Google. Algoritmos, available at <http://www.google.com.mx/intl/es/insidesearch/howsearchworks/algorithms.html> (last visited: December 22, 2014).

<sup>11</sup> Google, Dentro de Google. Spam, available at <http://www.google.com.mx/intl/es-419/insidesearch/howsearchworks/fighting-spam.html> (last visited: December 22, 2014).

<sup>12</sup> Rufus Pollock, *Is google the next Microsoft? Competition, Welfare and Regulation in Internet Search*, UNIVERSITY OF CAMBRIDGE, 2 (2009).

<sup>13</sup> Ben Shipper, *The Market Definition of Google Search*, SSRN-INDEPENDENT 3 (2012).

million euros spent on advertising “online” worldwide, well above Facebook (7.79%), Microsoft (2, 54%) and Yahoo (2.52%), according to eMarketer.<sup>14</sup>

This is the key point by which *Google Search* has become a sensitive issue for the EU antitrust authorities and U.S.

Necessary before proceeding, make the process of competition in the markets of the New Economy, with particular and different characteristics of the physical markets due to their technological origin.

### III. ANTITRUST IN THE NEW ECONOMY

Google is a company that belongs to the group of digital companies such as Facebook, Twitter or YouTube, among many others, that shape the Internet ecosystem and that has led to the existence of the so-called new economy.

What is the new economy? The economy over the last thirty years has seen major changes in activities worldwide; although since the late sixties with the advent of information and communication technology, the economy had shown significant changes, but it was not until the late eighties and based on the globalization process understood by the World Bank as the “international integration of markets for goods, services and capital,”<sup>15</sup> so emerging new economic activities in which the factors of production and intellectual work becomes transformed into one of the most important resources, known as the new economy.

The new economy is structured so the digital economy, the knowledge economy and information economy, contributing elements to build solidly this form of administration of economic resources, factors of production and activity of economic agents. Consolidated new economy concept emerged in the United States since the nineties, according to Bernard E. Paulré first appears in the magazine Business Week in 1994; consolidated with the emergence of the Web and the introduction of more powerful ICT in storage and processing of

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<sup>14</sup> Moncho Veloso, *El poder de Google desata una batalla entre Europa y EE.UU.*, December 9, 2014, available at <http://www.abc.es/economia/20141208/abci-poder-google-batalla-estados-201412052144.html> (last visited: December 15, 2014).

<sup>15</sup> Banco Mundial, *¿Qué es la globalización?*, April, 2000, available at <http://www.bancomundial.org/temas/globalizacion/cuestiones1.htm> (last visited: December 20, 2014).

information, which contributes mainly to the business to find an opportunity to generate higher profits, increase productivity and reduce much production costs.<sup>16</sup>

Manuel Castells is concerned about the new economy:

We are witnessing the gradual development of a global and interdependent financial market, operated by computer networks, a new set of rules for capital investment and the valuation of the shares, and financial assets generally. As information technologies are becoming more powerful and flexible time, financial markets are integrated and tend to function as a unit in real time worldwide.<sup>17</sup>

Economic activities carried out in the vicinity of the new economy have very specific driving forces; Karl Marx in the nineteenth century spoke of the traditional factors of production and classified as: land, capital and labor; in the traditional economy these factors remain in place: the land is literally the property or extent of natural resources that are available for the production of goods, capital is only recourse to exchange money in commercial transactions and work is human effort for obtaining good. Today these factors of production have been amended to take another meaning for the new economy: the earth are the networks and technology platforms on which goods or services are produced; on capital although money can still be considered as an important production factor in the new economy, information is the most valuable resource; on labor, as we saw in the section on the knowledge economy, physical exertion longer the factor of production, to make way for the mental abilities and skills for the production of translated into knowledge and information content, as drivers of the new economy and MCE also technology is another factor of production.

The New economy, is the set of theories and principles to analyze, evaluate and establish the criteria under which the economy works through the use and development of ICT, which following the foundations of classical economics, creates new paradigms and is a new area of knowledge through technology.

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<sup>16</sup> BERNARD E., PAULRÉ, *Is the New Economy a Useful Concept?* UNIVERSITÉ PARIS 1 PANTHÉON SORBONNE 3, (2000).

<sup>17</sup> MANUEL CASTELLS. LA ERA DE LA INFORMACIÓN 22 (2002).



The different categories that make up the new economy operating in different sectors. In the review of the expert Richard Posner, the new economy has been divided into three different industries and also linked:<sup>18</sup>

1. Manufacture of computer software.
2. Businesses based on Internet.
3. Computer communication services designed to support the above two markets.

The second category mentioned by Richard Posner: Businesses based on Internet, are e-commerce activities, according to David VanHoose in his book e-commerce economics, the electronic commerce is "any process involving the exchange of property usage rights or for goods and services electronically and communicating interactively linking devices within the network."<sup>19</sup>

In the Internet environment in the context of the new economy, there are principles of the classical economic theory such as: applicants, bidders, goods exchange and a determined price on money, these elements enable the existence of the process of economic competition on Internet markets.

#### *Economic Competition in the New Economy*

Economic competition is the market process in which the various economic agents use their skills and abilities seek to maximize profits through the sale of goods and services, under equilibrium conditions.

Marcelo Resico notes that: "the economic competition is one of the factors, like private property, currency and regulation; that give sustenance to commercial markets."<sup>20</sup> The market as an institution depends largely on the behavior of firms competing in the daily battle of supply and demand.

Companies have the common goal of maximizing profits. This impels companies making decisions that directly affect the price, costs, and other tools on the market, directly

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<sup>18</sup> Richard A. Posner, *Antitrust in the New Economy*, UNIVERSITY OF CHICAGO LAW & ECONOMICS, 2 (2000). MANUEL CASTELLS. LA ERA DE LA INFORMACIÓN 22.

<sup>19</sup> DAVID, VANHOOSE, E.COMMERCE ECONOMICS, 3 (2003).

<sup>20</sup> MARCELO F, RESICO, INTRODUCCIÓN A LA ECONOMÍA SOCIAL DE MERCADO, 57 (2010).

influencing overall economic stability with an impact at the micro level, in the long run tend to affect a scale macroeconomic influence the welfare of the society and the country as a whole.

The properly understood and implemented economic competition, according to economic theory, can guarantee stability for buyers and sellers, and in turn create favorable economic conditions for the consumer and the economy in general, promoting economic development, in a legal sense equivalent in conditions of freedom, economic democracy and economic justice.

The elements that shaped the competition in the physical markets, moving into e-commerce markets, these are operators by the side of supply and demand, a price and a good that is offered or demanded; however, the nature of this parallel trade, there are specific factors of the technology platform, which have been analyzed in the light of the theory of the new economy, which determine the competition in these markets and the authorities in defense of economic competition should be particularly cautious when making an investigation into allegations of monopolistic or anti-competitive practices, these are:

1. Plaintiffs and Bidders: As in the physical markets, e-commerce markets are economic agent by the supply side and the demand side, according to Donald R. Davis, economic agents involved in economic competition are individuals, businesses and governments:<sup>21</sup>
  - a) Individuals are part of the private sector of the economy and these according to economic theory are assumed profit maximizers, from two perspectives: as consumers of final goods and factors of production as through their work.
  - b) Companies are part of the private sector of the economy. They are seen as maximizing profits.
  - c) Government: Considered a national welfare maximizer, so that their decisions are broad in the sense of quality in public finances and the equitable distribution of wealth.<sup>22</sup>

The global market of electronic commerce makes the number of potential consumers increases, in contrast to the limited number of customers a business of physical markets may have to be reduced to a certain territorial space, this benefits companies, especially to

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<sup>21</sup> Donald R., Davis, *Notes on Competitive Trade Theory*, COLUMBIA UNIVERSITY, 4 (2001).

<sup>22</sup> Wealth: defined by Alvin and Heidi Toffler as "any possession, shared or not, which is what economists call *utility*, to provide some form of welfare itself or by exchanging with some other form of wealth that satisfies that welfare," ALVIN TOFFLER & HEIDI TOFFLER, *REVOLUTIONARY WEALTH*, (2006).

SMEs, which have greater opportunities to increase their chances of success, to get their products or services to a greater number of customers.

2. Information: The FTC notes that from the view of the consumer the most important aspect of e-commerce is the increased choice and especially the information about the products and services you want.<sup>23</sup> The information on goods or services is essential to determine the efficiency of the result of the digital market as prices and the balancing process. Through the Internet there is a massive data flow, which helps dealers to make the best decisions to improve market outcomes. In economic theory it is assumed that consumers have an unlimited capacity to process information so that more information improves decision making and market efficiency. In traditional markets, information collection and processing of data is a costly task.
3. Search engines: Is related to the previous point, this software reduces the costs of searching for information. Compared to the physical markets, the number of sellers is larger and leads to more varied choices of consumption, reducing costs of research, has provided the consumer experience. Search engines help consumers to understand the operation, characteristics and experiences of other various products or services. Consumers avoid transportation costs, phone calls, etc., so that the consumer can cleave all sufficient elements of information and compare the prices offered in physical markets for prices shown online, and also between the various competitors online, so you can make a balance between the various options to make a decision to purchase.
4. The effects or network externalities are conditions in the physical markets, however in e-commerce markets take a much more delicate sense in the case of research in defense of economic competition. The determination of network effects in e-commerce markets allows us to understand the actions of both competition as anticompetitive actions. David Evans, Richard Schmalensee, Franklin M. Fisher, Daniel L. Rubinfeld, Michael L. Katz and Carl Shapiro agree that a market with network effects occurs "when consumers value the more a product is used by other consumers."<sup>24</sup> Enrico Coiera network externalities defined as:

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<sup>23</sup> David A., Balto, *Emerging Antitrust Issues in Electronic Commerce*, Bureau of Competition, November 1999, available at <http://www.ftc.gov/public-statements/1999/11/emerging-antitrust-issues-electronic-commerce> (last visited: December 20, 2014).

<sup>24</sup> Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 THE AMERICAN ECONOMIC REVIEW, 1 (1985). David, S. Evans & Richard Schmalensee, *A guide to the Antitrust Economics of Networks*, *Antitrust*, 2

A cost or benefit that falls on people who are not directly involved in an activity. A positive externality on the Internet, or also known as network effect, defines it as one in which the value of a good depends on the number of other people who use it; on the other hand a negative externality explains how the cost imposed on individual users because of congestion on the Internet or delays in information exchange.<sup>25</sup>

Network externalities, found a strong theoretical foundation in the Coase theorem, which states: "For the negotiation produce viable solutions, property rights must be well defined, negotiation costs should be low and there can be uncertainty or asymmetric information (ie, no participant in the transaction may have more information than the other)."<sup>26</sup>

Evans and Schmalensee posit direct and indirect network effects: the first refers to a consumer appreciates a well because another have purchased it. The latter refers to a product valued more because their purchase means that demand for complementary products is higher and the supply of complementary products will be beneficial.<sup>27</sup>

5. Price. In the New Economy, economic competition in markets for goods or services can be based on the price, or take other aspects different; Carl Shapiro and Hal Varian explain about this that: "the production of information goods, then costs based on the price is inappropriate; because the marginal cost per unit approaches zero, the price can not be based on a margin percentage since the marginal cost as prescribed methods for traditional prices."<sup>28</sup>

Many of the products that are offered in the markets for electronic commerce, have a zero price, ie, that can be obtained without making a payment in currency, however this does not mean that a zero price is the same as getting something for free. In e-commerce markets, as already noted, money is not the only good that can be valuable for the exchange of goods or services, David Evans exemplifies: "When we enter a web page can access the contents of the

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(1996). Franklin M. Fisher & Daniel L. Rubinfeld, *United States vs. Microsoft: An Economic Analysis*, 30 UC BERKELEY SCHOOL OF LAW PUBLIC AND LEGAL THEORY, 3 (2000).

<sup>25</sup> Enrico Coiera, *Information Economics and the Internet*, 7 JOURNAL OF THE AMERICAN MEDICAL INFORMATICS ASSOCIATION, 216 (2000) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC61423/>

<sup>26</sup> *Id.* at 1.

<sup>27</sup> EVANS & SCHMALENSEE, *supra* note 24, at 1.

<sup>28</sup> Carl Shapiro & Hal R. Varian, *Information Rules, A Strategic Guide to the Network Economy*, CAMBRIDGE, HARVARD BUSINESS SCHOOL PRESS, 3 (1999).

site and not pay a weight advantage of it, however, the site may place cookies in the browser so that consumers can raise the price of your advertising, or where appropriate, information then sell it,"<sup>29</sup> so the markets of electronic commerce, information has value. This is the performance of companies like Google Inc.<sup>30</sup>

The competitive process of the New Economy is dynamic and versatile, unlike physical markets, that mainly base their price, the competition in industries of the new economy does not rotate, principally price, also on information and innovation, which emerges through the creation of products or services that come from the human mind, defined like the knowledge economy.

In this approach not only based on price, the competition goes beyond wanting to preserve perfect competition, it searches provide, establish and maintain conditions that challenge the power of competitors in the market, such as the rivalry between competitors fixed on the market, and for new rivals.

The key over the competition in the New Economy, has a fundamental difference in relation to the analysis of economic competition protection compared to the physical markets. The United Nations Economic Commission for Latin America and the Caribbean says, it is "of the dynamics of growth and innovation activity,"<sup>31</sup> in markets where innovation is a pillar for support, which is why competition is an struggle "for" the market itself and not a race "in" the market.<sup>32</sup>

In the new economy, competition is essential to their development; Carl Shapiro sets out six principles of growth for companies in the electronic commerce markets:

1. Innovation is the key. The success of companies that get into the electronic commerce markets, depends on the seriousness and speed with which consider innovation. The yields of the companies are managed by innovation, not for money. Shapiro explains that the competition is typically Schumpeterian in character, with a fierce fight for to be the following temporary monopoly.

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<sup>29</sup> David Evans, *The Antitrust Economics of Free*, UNIVERSITY OF CHICAGO, 2 (2011).

<sup>30</sup> Like a Facebook, Youtube or Twitter, and others.

<sup>31</sup> Marcelo Celani, & Leonardo E Stanley, *Una introducción a la política de competencia en la nueva economía*, ORGANIZACIÓN DE LAS NACIONES UNIDAS-CEPAL, 10 (2005).

<sup>32</sup> *Id.* at 8.

Innovation is a key issue for companies competing in the new economy, if the fight is for the market, as tough for companies to achieve success and remain scenario, it is necessary to have better opportunities in competition, is the main motivation adoption of technology companies, claiming to innovation as an essential prerequisite for success.

ICTs are closely linked to the ability of firms to innovate, introduce new products, services, business processes and applications. The innovation lies in managing information, allowing work with a larger number of data more accessible and constantly updated, so ICTs have become a basic tool for the proper development of corporate activity, influencing in the various existing production systems.<sup>33</sup>

The adoption of ICT, particularly the Internet, provides the opportunity to maximize profits through improved two essential processes for business:

- A. Improved customer relations through: *a)* advertising and marketing; *b)* operational Data exchange with customers; *c)* service and customer support, and *d)* Sales Online.
- B. Reduced costs through the integration of the supply chain, through *a)* online Shopping; *b)* operational Data exchange with suppliers, and *c)* Business Process Integration.<sup>34</sup>
2. Intellectual property: The intellectual property rights play a deeper role than in any other competitive strategy, both copyright and patents are critical shields in the ecosystem of the Web, given the greater propensity to theft of intellectual creations that are shared on the network.
3. Free access to contents. Information products exhibit very strong economies of scale, many of the costs are "first copy costs" increase the cost of additional copies being much lower. This pattern is reinforced thanks to the Internet, physical replication is no longer necessary and distribution costs are minimal.
4. Partners complementary and not substitutes: Many products in the new economy, are marketed through the electronic commerce markets, are closely linked through interfaces. Computers are a good example of this, as they are armed with various accessories made by

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<sup>33</sup> Blanca Hernández, *Aceptación empresarial de las tecnologías de la información y de la comunicación: un análisis del sector servicios*, 4 (1) JOURNAL OF INFORMATION SYSTEMS AND TECHNOLOGY MANAGEMENT, (2007) available at [http://www.scielo.br/scielo.php?pid=S1807-17752007000100002&script=sci\\_arttext](http://www.scielo.br/scielo.php?pid=S1807-17752007000100002&script=sci_arttext)

<sup>34</sup> Jonathan, Whitaker, *Internet Business Practices Across the Globe: Lessons from Emerging Economies*, 1113 UNIVERSITY OF MICHIGAN ROSS SCHOOL OF BUSINESS WORKING PAPER, (2008).

different companies. In these cases, companies invest time in negotiations to form alliances, establishing standards, and work competitors to ensure that their products work together effectively to compromise a whole system. Carl Shapiro notes that “the antitrust thinking on substitutes (competitors) is much more advanced than thinking about supplements (partners). Which must change. Cooperation between completer is generally pro-competitive.”<sup>35</sup>

5. Standards red. In the new economy, the networks have grown in importance, supported standards and control over interfaces has been central to the rivalry. Some of the most insistent on competition policy issues revolve around the control of bottlenecks<sup>36</sup> and interfaces.<sup>37</sup>
6. Monopoly power prevails: Clearly, there are strong forces in the information economy favoring network effects. On the supply side, the creation of information involves strong network effects, and design new products that involves substantial fixed costs. Clearly, there are strong economic forces favoring information network effects. On the supply side, the creation of information involves strong network effects, and design new products that involves substantial fixed costs. On the demand side, network effects favor the popular products and establish networks. Carl Shapiro states his opposition that the monopoly power can not persist in the new economy, as many of the leading companies today must continue to improve the quality and reduce the price to protect their present positions.

For some authors as Nicholas Economides, competition in the electronic commerce markets, does not mean a greater number of competitors, because in these markets, “network effects” play a fundamental role, explains that the imposition of a market structure “competitive” is likely to be counterproductive. One consequence of network effects is that interventions of competition may be useless. Because “the winner takes most,”<sup>38</sup> economides says this is the natural balance in these markets, trying to superimpose a different market

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<sup>35</sup> Carl Shapiro, *Competition Policy Analysis, Competition Policy in the Information Economy*, Routledge, 1-13 (2000).

<sup>36</sup> Bottlenecks in an organization consisting of different activities that slow processes, increase waiting times and reduce productivity, bringing as final consequence the increase in costs.

<sup>37</sup> Device capable of transforming the signals generated by an apparatus other signals understandable.

<sup>38</sup> Nicholas, Economides, *Competition Policy in Network Industries: An introduction*, STERN SCHOOL OF BUSINESS, NEW YORK UNIVERSITY, 15 (2004).

structure (eg, one in which all companies have roughly equal market shares) can be both futile and counterproductive time.

The issue of network effects is, undoubtedly, one of the most sensitive in antitrust in the new economy, as resizes the known parameters for investigations, since, although a network externality leads to create a monopoly power, the companies should not be considered guilty because, market dominance stems from the popularity that plaintiffs give thanks to innovation, however, to determine whether or not guilty of monopoly power, despite the network externality, it would be necessary know if the companies make use of intellectual property about the product innovated, and this is used to restrict competition and maintain monopoly power

After analyzing some key aspects of economic competition in the new economy, in subsequent lines, is exposed the analysis of the specific case of the prosecution against the digital company Google.

#### **IV. ANTITRUST LEGAL SYSTEM AGAINST GOOGLE INC**

Google is a company that has made a special place on the Internet, thanks to its focus on innovation, offering more and better products to users (customers) facilitating much experience in the network, including improving the quality of life of people in many respects, however, the network effects of *Google Search*, have made her the dominant position in the market for machines searches, with the consequence that in countries like the United States or the European Union, is designated as a company that has violated antitrust laws and is therefore subject to investigation by the antitrust enforcement legal system.

Parenthetically, it is significant to note that the antitrust legal system is critical to the maintenance and development of markets, considering its functionality that promotes wealth, with significant benefits at all levels of the population economy. The purposes of the law of economic competition are defined in the application of economic principles that underpin the success of the market, one of those principles is maximizing market efficiency, as stated Nicholas Economides: "maximizing efficiency (allocative, productive, and dynamic), is the desired result of competition laws competition."<sup>39</sup>

The issues of competition in electronic commerce markets, have their own characteristics, and different from the principles and rules that have governed competition issues in the

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<sup>39</sup> ECONOMIDES, *supra* note 38, at 5.



traditional market, Robert Pitofsky said the “more subtle problems of antitrust must adapt to the special circumstances of high-tech industries,”<sup>40</sup> these differences are primarily in technology, which determines the way in anti-competitive practices are performed, on the other hand, authors like Daniel L. Rubinfeld, note that: regulation in the area high technology should be guaranteed, because the market dominance arises more naturally and more necessary for regulators to protect against abuse of power by dominant undertakings.<sup>41</sup> While the antitrust rules must conform to the trends set by the new economy, it is also a fact that the existing legal systems antitrust, are applicable to defend the process of competition in the markets for electronic commerce, this is due to a reason, such systems are based on the principles and theories of classical economics, principles which also govern the process of competition on the Internet, however, it is essential that the antitrust authorities take into account as particular aspects of these markets due to their technological nature, due to ICT as its backbone.

The case Google is undoubtedly one of the companies in the new economy in recent years<sup>42</sup> has faced severe accusations about violations of antitrust legal system, which critics say has damaged the process of competition and consumers. In this article the analysis of the processes that this digital company has faced in the United States and the European Union, the indictment are very similar in both cases, however the results are different, the criteria issued in research in these countries have been different, leaving little clarity about the real existence of anti competitive practices by Google, we analyzed.

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<sup>40</sup> Robert, Pitofsky, *Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems*, AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW'S ANTITRUST ISSUES IN HIGH-TECH INDUSTRIES WORKSHOP, 1999, available at <http://www.ftc.gov/public-statements/1999/02/antitrust-analysis-high-tech-industries-19th-century-discipline-addresses>

<sup>41</sup> Daniel L. Rubinfeld, *Competition, Innovation, and Antitrust Enforcement in Dynamic Network Industries*, ADDRESS BEFORE THE SOFTWARE PUBLISHERS ASSOCIATION, 2 (1998).

<sup>42</sup> The Google case is the most relevant in 1998 the company Microsoft, starred in one of the most important antitrust cases in the United States, its transcendence lies in two main aspects, first reactivated the antitrust legal system in this country. Second, was the first company that belongs to the new global economy, faced a process for anticompetitive allegations, the United States Department of Justice, found the company guilty of anticompetitive practices and was sanctioned repairing the damage caused to the competitive process and consumers. See The United States Department of Justice, *United States v. Microsoft Corporation*, [http://www.justice.gov/atr/cases/ms\\_index.htm](http://www.justice.gov/atr/cases/ms_index.htm), and Nicholas Economides, *The Microsoft Antitrust Case*, (2001).

a) *Case: United States against Google Inc*

In 2010, the Federal Trade Commission of the United States, launched an investigation against Google, on charges of abuse of its monopoly power with the machine searches, *Google Search*. The research was based on the Sherman Act (legislated in 1890) in their following sections:<sup>43</sup>

15 US Code § 1 - Trusts, etc., in restraint of trade illegal; penalty: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Any person who does any contract or engage in any combination or conspiracy is declared illegal and shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by fine not exceeding \$ 100 million in case of a corporation, or if any another person, \$ 1,000,000, or by imprisonment not exceeding 10 years, or both penalties, he said, at the discretion of the court.

15 U.S. Code § 2 - monopolizing trade a felony; penalty Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by fine not exceeding \$ 100 million in case of a corporation, or, if any other person, \$ 1,000,000, or with imprisonment of up to 10 years, or by both said punishments, in discretion of the court.

The research was conducted in response to various allegations made by competitors, primarily, Microsoft, Yelp and TripAdvisor, who accused Google of anticompetitive practices; such as the abuse of its dominant position in the Internet search market to favor its own products and services or those of their advertisers advertising service, at the expense of their rivals. The commission investigated further accusations that Google wrongfully appropriated without the consent or compensation of the content of Web pages rivals to improve their own products and then move this content to consumers as his own.<sup>44</sup>

The indictment alleges that Google did a “search bias” in your engine *Google Search*, the FTC said that the core of the research was the vertical integration of its own content (eg maps, comparison shopping, search results flight, etc.), so the user access for competitors is

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<sup>43</sup> Google was not investigated only for its search engine, also for alleged breach of the fair, reasonable and non-discriminatory terms of licensing patents in its Android operating system.

<sup>44</sup> John Leibowitz, *Google Press Conference*, Federal Trade Commission, January 2013, available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/opening-remarks-federal-trade-commission-chairman-jon-leibowitz-prepared-delivery/130103googleleibowitzremarks.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/opening-remarks-federal-trade-commission-chairman-jon-leibowitz-prepared-delivery/130103googleleibowitzremarks.pdf)

excluded, which is harmful to competition. The focus of the FTC investigation focused on the effect on consumers and the market as a whole, leaving aside the impact on individual competitors.<sup>45</sup>

*Google Search* results generate two types of results: 1) organic or natural results, and 2) sponsored or paid links.<sup>46</sup> In the first case, the search engine throws a list of links to the most relevant results requested by the user. In the second case the bonds are produced by companies interested and willing to pay Google when users click through your ads.<sup>47</sup>

The FTC investigation could be carried out, should be divided in two senses: first, in relation to the effectiveness of search machine has to offer better customer service and secondly biases that favor, according to his accusers, to their own products and services and their advertisers. Google has generated significant revenue by selling advertising, most of Google's revenue comes from the sale of sponsored links and other similar searches generated by advertising.<sup>48</sup>

The amount that Google indictment for sponsored links is calculated according to a keyword auction conducted through the *Google AdWords* platform.<sup>49</sup>

In the first case, the efficiency of the search machine does not cause harm to consumers, Sterk Bork and indicate that:

The display of *Google search* results pages specializing in General search is on your machine improved general search product, Google does not have the ability to reduce competition from machine market... The specialized vertical search results ranking search in the same way that general search results are placed, destroy the value associated with specialized searches.<sup>50</sup>

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<sup>45</sup> Geoffrey A. Manne & William Rinehart, *The Market Realities that Undermined the FTC's Antitrust Case Against Google*, HARVARD JOURNAL OF LAW AND TECHNOLOGY OCCASIONAL PAPER SERIES-JULY 3 (2013).

<sup>46</sup> Google Inc., *Google Search*, GOOGLE GUIDE, available at [http://www.googleguide.com/results\\_page.html](http://www.googleguide.com/results_page.html) (last visited: May 2014).

<sup>47</sup> *Id.* at [http://www.googleguide.com/results\\_page.html](http://www.googleguide.com/results_page.html)

<sup>48</sup> VIRGINIA SCOTT, COMPANIES THAT CHANGED THE WORLD: GOOGLE, (2008).

<sup>49</sup> JACOBSON HOWIE, GOOGLE ADWORDS FOR DUMMIES, (2 ed., 2009).

<sup>50</sup> Robert H. Bork, & Gregory J. Sidak, *What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google*, 8(4) JOURNAL OF COMPETITION LAW & ECONOMICS, 663-700, (2012).

So the accusation that the specialized search results harms competition has insufficient basis for antitrust theory, so that did not prosper, besides Google that this improved service benefits the consumer. It is important to mention that Google, as part of a bilateral market, the advertising industry competes with many companies such as Microsoft, Facebook or Twitter.<sup>51</sup> The University of Chicago insists that if Google does not comply with the requests of its users traffic is reduced and hence advertising revenue decrease, plus it is laudable that Google displays search results of specialized only to foreclose its competitors vertical and increase their advertising because the costs of this strategy outweigh its benefits.<sup>52</sup>

In the second case, it has been claimed that Google is the gateway to the Web, argument Bork and Sidak refuse and offer two reasons: the first is that the user can switch to another search engine of equal zero price and navigate Web sites that desired, on the other hand the nature of the market both sides constrains the ability of Google to act anticompetitive.<sup>53</sup>

Also this is false for two reasons, the first is that Internet users can directly navigate to websites thanks to the open architecture of the Internet, using the skills and frequency of use of Web browsers using the uniform resource locators (Uniform Resource Locators) URLs, search methods that can vary depending on the technique with which the URL page is written to the positioning rod browser and selecting a web site or search engine.<sup>54</sup> Second, because there are many search engines on the Internet, for example, YahooSearch:<http://mx.search.yahoo.com/>; DuckDuckGo:<https://duckduckgo.com/>; Bing, <http://www.bing.com/>; among many others.

Dynamic competition generates innovation and therefore an important point in favor of Google is that the placing on the market of specialized search algorithms that benefit consumers, has encouraged other competitors such as Bing, to create similar algorithms for their machines search.

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<sup>51</sup> Proceeds from Twitter in 2011 were \$ 139.5 million dollars, in the case of Facebook for 85% percent of their profits with one equivalent of \$ 3.2 billion in both cases derived from the sale of advertising on their websites.

<sup>52</sup> BORK & SIDAK, *supra* note 50, at 10.

<sup>53</sup> *Id.* at 10.

<sup>54</sup> Alexander J.A.M van Deursen, *Rethinking Internet Skills: The Contribution of Gender, Age, Education, Internet Experience, and Hours Online to Medium- and Content-Related Internet Skills*, ELSEVIER-POETICS, 3 (2011).

Bork and Sidak explained on bilateral markets for Internet searches, that the free search creates immense benefits for consumers and advertisers, the consumers value the free information available and the advertisers, value access to consumers of the searches. So we are facing a bilateral market as Internet search engines are considered an intermediary platform that connects two parts, search users and advertisers, for an exchange that occurs over the Internet.<sup>55</sup> Google sells highly targeted advertising that serves the interests disclosed by requests for searches of Internet users. These revenues subsidize the cost of providing free searches to consumers.<sup>56</sup>

Furthermore the University of Chicago also argues that if Google will only show the results according to pay its advertisers, run several risks losing users who do not find the desired results and secondly Google's competitors could offer better results and win easily more advertisers, causing in Google lost in their income. So that both sides of the market could decline.<sup>57</sup>

Google ranks search results unpaid using algorithms that put the most accurate and relevant at the top of the page results.<sup>58</sup>

To tell Mark R. Patterson, to define the market power of Google is necessary not only to inquire into the conduct of distortion search results.<sup>59</sup>

The accusation of excluding competitors by manipulating the *Google Search* engine, requires a comprehensive analysis to identify the relevant market, the correct definition can issue a resolution favoring the process of competition.

To determine the relevant market first service search engine is determined, and it is important to identify potential competitors like Bing, Yahoo Search, HAKIA, Blekko, Yandex, Accona, among many others.

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<sup>55</sup> *Id.* at 3.

<sup>56</sup> Google Inc., *Facts About Google and Competition, About Ads*, available at <http://www.google.com/competition/howgoogleleadwork.html> (last visited: May, 2014).

<sup>57</sup> BORK & SIDAK, *supra* note 49, at. 5.

<sup>58</sup> Google Inc., *Webmaster Tools, Ranking*, September 2012, available at <http://support.google.com/webmasters/bin/answer.py?hl=en&answer=34432> (last visited: May, 2014).

<sup>59</sup> Mark R. Patterson, *Google and Search-Engine Market Power*, FORDHAM UNIVERSITY SCHOOL OF LAW, 7 (2012).

The search engine Google is not the only way to find the information sought, for example, the purchase of music, many consumers are addressed directly to iTunes, or for the purchase of books search directly off Amazon.com, among other clear examples, however we should not ignore the power that Google has to issue its first search results to specific companies.

Although competitors might prefer Google products work differently, these desires are not a sound basis for antitrust liability, as the FTC was warned. The recent literature supports this argument and emphasizes the importance for antitrust jurisprudence to avoid the costly mistake discourage excess product innovations that improve welfare.<sup>60</sup>

After 19 months of work, interviews with industry participants and declarations of the key executives of Google, in a press conference the President of the Commission, John Leibowitz, was the spokesman of the agreed resolution the five commissioners investigating the case Google, which in short, it was decided not to file with the Department of Justice demands whatsoever against the company, instead signed an agreement in which Google voluntarily decided change some practices identified as anticompetitive.<sup>61</sup>

The conference Leibowitz said that no evidence showing that a bias in the machine searches Google also states that the investigation was inclined to the potential harm to consumers and the market as a whole is found, he quoted the statement, Earl Warren of the Supreme Court 50 years ago, which is the maximum of the FTC: "The aim of the law is to protect competition not competitors." Finally Leibowitz said that probably many think they should have done more for the case, but argued that it was sufficient and that "it is good for consumers, good for competition, is good for innovation and is what do."<sup>62</sup>

The FTC acknowledged that the regulation of antitrust issues in e-commerce markets can be a difficult task, however clarifies that monopolies analysis provides a framework for prudent application of competition, no matter the market that is in question.

Some experts argue that vertical integration of Google tends to be competitive and pro-competitive, since the law does not require the forced vertically integrated resource access.<sup>63</sup>

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<sup>60</sup> MANNE & RINEHART, *supra* note 45, at 12.

<sup>61</sup> LEIBOWITZ, *supra* note 43, at 1.

<sup>62</sup> *Id.* at 6.

<sup>63</sup> MANNE & RINEHART, *supra* note 44, at 3.

Given the seriousness of the indictment against Google, the previous voluntary agreement and the refusal by the FTC to apply a sanction on Google for “not find any evidence to prove his guilt” leaves many questions, the main if the Commission really he's protecting competition and even more if it really is looking out for consumers, leaving the FTC in an unfavorable role in the conclusion to which arrived on research but more because it accepted that Google would make voluntary changes.

These changes are to changes in the search engine. First, rival companies now have the ability to remove content pieces known as “fragments” of *Google Search* results, pages that refer to areas such as travel and shopping. Second, Google is giving advertisers more flexibility to manage their data for use in rival search engines like Bing of Microsoft.<sup>64</sup>

On the other hand, Google allow Web sites the ability to opt out of appearing in their searches, not being penalized or degraded in the general search results of *Google Search*, which seeks a competitive Internet.<sup>65</sup>

A key point in the decision of the FTC is “supporting argument” of benefit to the consumer, Timber Craig qualifies to establish the benefit or harm to the consumer has been the quicksand in the middle of antitrust cases in the United States and in fact been the subject in the system of competition that has had to face since 1890; William Kovacic, former chairman of the FTC, “The speed of change has challenged Washington's ability to act forcefully against technology companies increasingly fighting each other in overlapping markets.”<sup>66</sup> One of the maxims governing decisions on competition matters is that the law protects consumers not competitors, therefore, explain Robert H. Bork and J. Gregory Sidak of the University of Chicago that “practices penalize Google anticompetitive violate this principle, restricting

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<sup>64</sup> Grant Gross, *Google, FTC Settle Antitrust Case*, PC WORLD LEGAL ISSUES, January 2013, available at <http://www.pcworld.com/article/2023662/google-ftc-settle-antitrust-case.html> (last visited, May, 2014).

<sup>65</sup> Sam Gustin, *Google's Federal Antitrust Deal Cheered by Some, Jeered by Others*, TIME BUSINESS AND MONEY, January 2013, available at <http://business.time.com/2013/01/04/googles-federal-antitrust-deal-cheered-by-some-jeered-by-others/> (last visited: May 2014).

<sup>66</sup> Timber Craig, *FTC: Google Did not Break Antitrust Law with Search Practices*, THE WASHINGTON POST, 2013, May 2014, available at [http://www.washingtonpost.com/business/technology/ftc-to-announce-google-settlementday/2013/01/03/ecb599f0-55c6-11e2-bf3e-76c0a789346f\\_story.html](http://www.washingtonpost.com/business/technology/ftc-to-announce-google-settlementday/2013/01/03/ecb599f0-55c6-11e2-bf3e-76c0a789346f_story.html) (last visited: May 2014).

dynamic competition and thereby harm consumers, being the subject of the federal competition Act.”<sup>67</sup>

According to the Wall Street Journal, commissioners of the FTC if they mentioned that “did not like who was doing Google, but concluded that the tactics not necessarily violated antitrust law,”<sup>68</sup> also the Wall Street Journal, reveals various actions against the intent of the FTC to punish Google for anticompetitive practices “earlier-chairman of the FTC received a letter from US Senator Mark Udall inviting the agency to proceed with” caution in their investigation of Internet companies mainly to those “who have the highest rates of satisfaction consumers in the country and have also created millions of jobs,”<sup>69</sup> however, was not the only political pressure, reveals the US newspaper.

Even J. Thomas Rosch, FTC Commissioner in the research, told the Wall Street Journal that the decision the commission had set a bad precedent for future negotiations with other companies, because “might demand similar treatment, and not favor them imply that Google has received preferential treatment in the investigation.”<sup>70</sup>

Meanwhile, other arguments against the decision of the FTC, state that: “Google clearly skews search results to favor its own products and services, while portraying the results impartially,” said John M. Simpson, director of the Project Privacy consumer Watchdog said in a statement: “That undermines competition and harm consumers, the FTC favored Google.”<sup>71</sup>

They say that doing so is acting as Microsoft did in the 1990s when PC makers were forced to preinstall software Internet Explorer with Windows operating system at the expense of rivals like Netscape, as described above.

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<sup>67</sup> BORK & SIDAK, *supra* note 50, at 1.

<sup>68</sup> Kendall Brent, *Behind Google's Antitrust Escape*, WALL STREET JOURNAL, June 2013, available at <http://online.wsj.com/article/SB10001424127887323689604578221971197494496.html#> (last visited, May 2014).

<sup>69</sup> *Id.* <http://online.wsj.com/article/SB10001424127887323689604578221971197494496.html>

<sup>70</sup> BRENT, *supra* note 68, available at <http://online.wsj.com/article/SB10001424127887323689604578221971197494496.html>

<sup>71</sup> *Id.* <http://online.wsj.com/article/SB10001424127887323689604578221971197494496.html>



To Gal and Weber, actually accusing Google only companies sought to use the law of competition to protect their own market positions, at the expense of punishing Google to be a successful competitor and stifle innovation and dynamic competition.<sup>72</sup>

So that Robert H. J. Gregory Sidak Bork and indicate that:

... Punish Google for being a more effective search engine could harm consumers and thus contradict the avowed purpose of the antitrust laws... the antitrust intervention that would prohibit or circumscribe the practices of Google punished and then deter the same innovations that improve welfare, he has done an effective competitor of Google. So use the antitrust laws may damage the dynamics of competition, such that only successful companies need to worry about being penalized for being winners.<sup>73</sup>

As we can see the views are much divided, however, the opinion decisive is issued by the FTC, which has been erroneously or not, he finally felt that there was no evidence to accuse Google to exercise monopoly power over your machine searches. What remains in the pipeline are the tools used by the Commission to reach such a conclusion, it actually reinforces the idea that the problem is not in the legislation, but the analysis methods and tools used by the authorities for the investigation of these cases, whose research lies mainly in obtaining evidence in an environment of ICTs involved the need for technical and professional knowledge of the subject.

#### b) *Case: European Union against Google Inc*

In the European Union, the issue of Google as an economic agent that damages the competitive process, arises because of allegations reported by the British site Foundem, which in November 2009 filed a complaint with the European Commission arguing that Google exploited its dominance in the market for machines search in Europe, in detriment of competitors and consumers.<sup>74</sup> It is argued that to date *Google Search* accounts for roughly

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<sup>72</sup> Michael S. Gal, & Spencer Weber Waller, *Antitrust in High Technology industries: A Symposium Introduction*, 8(3) OXFORD JOURNALS, JOURNAL OF COMPETITION LAW & ECONOMICS, 449-457, (2012).

<sup>73</sup> BORK & SIDAK, *supra* note 50, at 3.

<sup>74</sup> The Economist, *Google, the EU and antitrust Search over*, February 2014, available at <http://www.economist.com/news/business/21595966-third-attempt-settlement-likely-be-last-search-over> (last visited: December 20, 2014).

95% of the search market.<sup>75</sup> In 2010 the European Commission launched a formal investigation against the company, although in February 2010 joined the French protests eJustice.fr web and portal Ciao, owned by Microsoft.<sup>76</sup>

The legal basis for the Commission for the investigation is as follows:

1. Article 11(6) of Council Regulation No 1/2003 and article 2(1) of Commission Regulation No 773/2004.
2. Article 11(6) of Regulation No 1/2003 provides that the initiation of proceedings relieves the competition authorities of the Member States of their authority to apply the competition rules laid down in Articles 101 and 102 of the Treaty.
3. Article 2 of Regulation No 773/2004 provides that the Commission can initiate proceedings with a view to adopting at a later stage a decision on substance according to Articles 7-10 of Regulation No 1/2003.

The accusations are similar to those identified in the United States, however, the main concern of the EU is to say Ramon Tremosa (MEP): "The problem with *Google Search* is to divert traffic from rivals links. European companies are losing revenue and redundancies. European consumers are not receiving the most appropriate option, due to the preferential treatment of its own services Google."<sup>77</sup>

Joaquin Almunia, European Commissioner for Competition, until November 2014, was one of the main speakers in the case, made several agreements with the company. In 2012, as part of the research conducted, Almunia pointed to four points on which could be considered to Google as a company with dominant position in the market for search engines:<sup>78</sup>

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<sup>75</sup> Arthur Charles, *European Commission Reopens Google Antitrust Investigation*, THE GUARDIAN, September 2014, available at <http://www.theguardian.com/technology/2014/sep/08/european-commission-reopens-google-antitrust-investigationafterpolitical-storm-over-proposed-settlement> (last visited: December 20, 2014).

<sup>76</sup> Pablo G. Bejerano & Marilín Gonzalo, *La batalla interminable de Google y Bruselas*, ELDIARIO.ES, December 2014, available at [http://www.eldiario.es/turing/propiedad\\_intelectual/Google-UE-presion-antitrust\\_0\\_331417659.html](http://www.eldiario.es/turing/propiedad_intelectual/Google-UE-presion-antitrust_0_331417659.html) (last visited: December 20, 2014).

<sup>77</sup> MONCHO, *supra* note 14, at <http://www.abc.es/economia/20141208/abci-poder-google-batalla-estados-201412052144.html>

<sup>78</sup> Joaquin Almunia, *Statement of VP Almunia on the Google Antitrust Investigation*, SPEECH EUROPEAN COMMISSION, (2012) available at [http://europa.eu/rapid/press-release\\_SPEECH-12-372\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm)

- I. In its general search results on the web, Google displays links to its own vertical search services. Vertical search services are specialised search engines which focus on specific topics, such as for example restaurants, news or products. Alongside its general search service, Google also operates several vertical search services of this kind in competition with other players.
- II. The second point relates to the way Google copies content from competing vertical search services and uses it in its own offerings.
- III. The third point, relates to agreements between Google and partners on the websites of which Google delivers search advertisements.
- IV. The fourth point, relates to restrictions that Google puts to the portability of online search advertising campaigns from its platform *AdWords* to the platforms of competitors.

The Commission considers that these practices can harm consumers by reducing choice and stifling innovation in the fields of specialised search services and online search advertising.<sup>79</sup>

In 2013, Google agreed to adopt a series of measures to contrarrest allegations against the company, these are:<sup>80</sup>

- a) Google will give content providers an extensive opt-out from the use of their content in Google's specialised search services if they so wish, without being penalised by Google.
- b) Google will remove exclusivity requirements in its agreements with publishers for the provision of search advertisements; and
- c) Google will remove restrictions on the ability for search advertising campaigns to be run on competing search advertising platforms.
- d) An important aspect of the proposal is that Google's compliance with these commitments would be supervised by an independent monitoring trustee. The commitments would cover the European Economic Area (EEA) for 5 years.

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<sup>79</sup> European Commission, *Antitrust: Commission Obtains from Google Comparable Display of Specialised Search Rivals*, (2014) available at [http://europa.eu/rapid/press-release\\_IP-14-116\\_en.htm](http://europa.eu/rapid/press-release_IP-14-116_en.htm)

<sup>80</sup> *Id.* [http://europa.eu/rapid/press-release\\_IP-14-116\\_en.htm](http://europa.eu/rapid/press-release_IP-14-116_en.htm)

However, this concession from Google fu not sufficient for the Commission, so that the investigation against Google continued.

Later in February 2014, Google decided to negotiate again before being sanctioned by the European authorities, and agreed to: "Google agreed to tweak the way it presents search results in Europe to address concerns that it is abusing its dominance in online search to favor its own services at the expense of rivals... futhermore, Google agreed to reserve space near the top of its European search pages for competitors to serve specialized search results for things like hotel rooms alongside Google services that do the same thing."<sup>81</sup> The New York Times defined that "Google agreed to the harshest penalties it has yet received in an antitrust inquiry anywhere. But it escaped a fine and a finding of wrongdoing. And it protected its crown jewel —its secret algorithm— from oversight by regulators, and avoided a court battle or potential consequences like a \$5 billion fine or a ruling to make major changes to its company structure or its products."<sup>82</sup>

There have been many speculations about the hardness that the European Union has had against Google, even been accused of xenophobia against the American search engine, which in the Wall Street Journal opinion, "That Could chase away foreign investment."<sup>83</sup> A Tremosa say, is not "of being against Google or any other US company. We are against monopolies, we want equal in the European digital market. We want fair and neutral searched interests of consumers."<sup>84</sup> Arnaud Monteburg, French Economy Minister said "It is Necessary, indeed urgent, to put in place a framework That Guarantees a level playing field."<sup>85</sup>

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<sup>81</sup> Vanessa Mock, Sam Schechner and Rolfe Winkler, *Google Reaches Settlement in EU Antitrust Probe*, THE WALL STREET JOURNAL, February 2014, available at <http://www.wsj.com/articles/SB10001424052702304450904579364330663366784> (last visited: December 15, 2014).

<sup>82</sup> Claire Cain Miller & Mark Scott, *Google Settles Its European Antitrust Case; Critics Remain*, February 2014, THE NEW YORK TIMES, available at [http://www.nytimes.com/2014/02/06/technology/google-reaches-tentative-antitrust-settlement-with-european-union.html?\\_r=0](http://www.nytimes.com/2014/02/06/technology/google-reaches-tentative-antitrust-settlement-with-european-union.html?_r=0) (last visited: December 15, 2014).

<sup>83</sup> *Id.* [http://www.nytimes.com/2014/02/06/technology/google-reaches-tentative-antitrust-settlement-with-europeanunion.html?\\_r=0](http://www.nytimes.com/2014/02/06/technology/google-reaches-tentative-antitrust-settlement-with-europeanunion.html?_r=0)

<sup>84</sup> MONCHO, *supra* note 14, at <http://www.abc.es/economia/20141208/abci-poder-google-batalla-estados-201412052144.html>

<sup>85</sup> SCHECHNER & Mock, *supra* note 81, at <http://www.wsj.com/articles/SB10001424052702303480304579579791562483218>

Tim Worstall says, "However, we've a serious problem here: no one has yet managed to show as Google whos That deserves a fine of anything. Not only That no one has as yet managed to show That Google has done anything wrong at all. Our collective problem here Is That the EU itself does not seem to be sure about what monopolies are and why they're Generally undesirable things."<sup>86</sup> But in reality the European Union can not take any steps until such time as there are no real evidence "that consumer welfare is being damaged by the exercise of that dominance before we get to that stage. That's something we don't have as yet, may never have, and so there's not any justification for the EU's current threats."<sup>87</sup>

Facing accusations Eric Schmidt (Google chairman until 2011) sent a letter to the Financial Times, to defend the position of the company, in Which Said: "Google is not The gataway to the Internet... Nor is it true that we promote our own products at the expense of competitors. We aim to show results that answer the user's queries directly (after all we built Google for users, not websites)... That's more relevant than a link to a specialised search engine, where you have to repeat your query. And if you need directions to a pharmacy, you get a Google Map with the closest stores. We think that is a great result for users."<sup>88</sup>

After four years of research, and now being spokeswoman case, Margrethe Vestager, expressed his intention to meet with those companies more critical of the dominance of the browser. The European Commissioner noted that to complete the case requires further information, so decided a meeting with the detractors of Google in the European Union.<sup>89</sup>

The rules in the European Union, will be much tougher for digital businesses, for the protection of consumer rights, as the European Parliament has called as a digital single market,

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<sup>86</sup> Tim Worstall, *The Problem with Google's Potential \$6 Billion European Union Fine*, FORBES, September 2014, available at <http://www.forbes.com/sites/timworstall/2014/09/24/the-problem-with-googles-potential-6-billion-european-union-fine/> (last visited: December 15, 2014).

<sup>87</sup> WORSTALL, *supra* note 86, at <http://www.forbes.com/sites/timworstall/2014/09/24/the-problem-with-googles-potential-6-billion-european-union-fine/> (last visited: December 15, 2014).

<sup>88</sup> Mr Eric Schmidt, *Regulators Have not Objected to Google's Answers*, FINANCIAL TIMES, September 2014, available at <http://www.ft.com/intl/cms/s/0/ee8da9ea-334e-11e4-85f1-00144feabdc0.html?siteedition=uk#axzz3LtEFT4fd> (last visited: December 15, 2014).

<sup>89</sup> Foo Yun Chee, *EU's Vestager to Meet Google Complainants in Coming Weeks*, REUTERS, December 2014, available at <http://www.reuters.com/article/2014/12/11/us-eu-google-antitrust-idUSKBN0JP1CE20141211> (last visited: December 20, 2014).

this due to the adoption on 24 November 2014 different rules, among which directly affect the functioning of Google. This document, called “on supporting consumer rights in the digital single market (2014/2973 (RSP))”<sup>90</sup> reveals the view that Parliament has on digital markets and electronic commerce, considering it as a source of economic benefits, says:

whereas the digital single market is one of the area of progress which, though entailing challenges, offers potential for high-efficiency gains that could amount to EUR 260 billion per year, thereby contributing to Europe’s recovery from the crisis; además considera que “whereas the digital single market is one of the most innovative sectors of the economy and is therefore playing a major role in the competitiveness of the European economy and contributing to economic growth through the development of e-commerce, while also facilitating the administrative and financial compliance of businesses and presenting consumers with a wider choice of goods and services.”<sup>91</sup>

The resolution calls on Member States and the Commission, implement and enforce existing rules to address “barriers to the development of the digital single market.”<sup>92</sup> The parliament, consensus application of existing rules or create new rules to protect consumers in e-commerce markets, including recommendations to be observed, have highlighted the performance of search engines,<sup>93</sup> a situation that points directly to regulate the operation of

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<sup>90</sup> See:<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2014-0286+0+DOC+XML+V0//EN>

<sup>91</sup> European Parliament, *Resolution on Supporting Consumer Rights in the Digital Single Market (2014/2973(RSP))*, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2014-0286+0+DOC+XML+V0//EN>

<sup>92</sup> EUROPEAN PARLIAMENT, *supra* note 90, at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2014-0286+0+DOC+XML+V0//EN>

<sup>93</sup> Resolution points that focus on the search engines are:

“10. Notes that the online search market is of particular importance in ensuring competitive conditions within the digital single market, given the potential development of search engines into gatekeepers and the possibility they have of commercialising secondary exploitation of information obtained; calls, therefore, on the Commission to enforce EU competition rules decisively, based on input from all relevant stakeholders and taking into account the entire structure of the digital single market in order to ensure remedies that truly benefit consumers, internet users and online businesses; calls, furthermore, on the Commission to consider proposals aimed at unbundling search engines from other commercial services as one potential long-term means of achieving the aforementioned aims;

11. Stresses that, when using search engines, the search process and results should be unbiased in order to keep internet searches non-discriminatory, to ensure more competition and choice for users and consumers and to

*Google Search*, a blow is the resolution to harmonize legislation so that search engines separate their search business from the rest of their business,<sup>94</sup> This arrangement becoming binding force Google to unlink your business advertise your services web searches.

This document undoubtedly put a stop to practices which Google has been accused as harmful to the process of competition in the markets for electronic commerce in Europe; the authorities have greater legal resources to fight the American company and say the same European authorities, to generate more equal for operators of digital markets in Europe.

So far, it is not possible to assess the results of the resolution, this will take time, but it is real that this document is unprecedented in the world, and puts the EU at the forefront of the legislation on e-commerce markets as it seeks to adjust their existing laws to the physical market e-commerce markets, which every day becomes more economic agents who rely on this type of digital markets and despite criticism from those who advocate freedom of Internet regulation, responsibility and limited intervention of the state is necessary to create conditions of legal certainty of the online world.

## V. CONCLUSION

In the analysis of the research that both the US and the European Union have made against the company Google about your product *Google Search*, due to accusations that the company uses its dominant position to benefit its customers advertising, detriment of competitors and consumers on the Web, we can see the following:

In both cases is possible see weakness of the antitrust authorities in investigations, it is suggested to be due to two reasons, the first is the lack of rules clarifying precisely how how to carry out investigations in the environment the web, which differs greatly from what is known in the physical world, and the second reason ignorance of the technical aspects of Google Search and behavior of competition in the electronic commerce markets, which inhibits the

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maintain the diversity of sources of information; notes, therefore, that indexation, evaluation, presentation and ranking by search engines must be unbiased and transparent, and that, for interlinked services, search engines must guarantee full transparency when showing search results; calls on the Commission to prevent any abuse in the marketing of interlinked services by search engine operators;

12. Welcomes the announcement of further investigations by the Commission into search engine practices and the digital market in general..."

<sup>94</sup> *Id.* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2014-0286+0+DOC+XML+V0//EN>



possibility of research clearer that emit strong results on the violation of companies like Google to antitrust laws, which inhibits the possibility of much clearer research that emit strong results on the violation of companies like Google to antitrust laws.

Proof of this was the decision of the FTC in 2013, which offered no convincing, specific and transparent statements to explain the reasons why Google was not identified guilty of violating antitrust laws, and let the good will of the business changes that deemed necessary to soften their practices against competitors, Google knows it is a monopoly and its employees have openly recognized as Vicent Cerf said "if we are a monopoly, what is the problem with it."<sup>95</sup>

Another reason is the procedure shown so far in the European Union in the investigation of the European Competition Commission for more than four years to determine that Google has violated the competition in the european electronic markets. The investigations have been so deficient that Joaquín Almunia accepted various agreements that Google provided, to change their practices in the European Union and pretend to leave satisfied the European authorities, with the objective to finish the investigations against him, however, the European authorities do not have been satisfied and have worsened their position on search engines and e-commerce companies in the European Union with the rules that are stated in the resolution on supporting consumer rights in the digital single market (2014/2973 (RSP), argued, of course, encourage the interests of consumers.

However, as in investigations of physical markets, both the European Union and the United States, have explored what is called "market share," nevertheless, in the specific case of *Google Search*, and many companies digital with relevant market of digital products, this can not be the measure to determine market power,<sup>96</sup> as this is applicable to markets with a certain price in money for the service or product is offered, in the case of products like *Google Search* their price is zero, so that innovation plays a fundamental role in market power that acquires, here is the key point of the investigation.

It is important to clarify that this consideration does not put innovation as the enemy of competition in the markets for electronic commerce, on the contrary, as in the physical markets, is essential for surviving the competitive process, and benefit consumers; as in most

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<sup>95</sup> Moises Naim, *El evangelio según Vint Cerf*, Entrevista, November 2014, available at <http://efectonaim.net/el-evangelio-segun-vint-cerf/> (last visited: December 28, 2014).

<sup>96</sup> If Google charge a certain price for access to its service, the business of *Google Search* just end.



of the companies in the new economy, the innovation of its products, such as *Google Search*, has generated positive network externalities that have given a market dominance of search engines and this could be the reason for rejecting the guilty of such companies as violating antitrust laws.

Considering that innovations are protected by copyright, then it would be necessary to review the laws on the subject in order to determine whether those provisions should be reassessed in the market environment of electronic commerce, in the case that they may hinder the competitive process.

But beyond all this, we must remember that the economy is governed by decisions of economic agents, therefore, will play an important role; if profit maximization is the main goal of every business, this objective should never be achieved at the expense of other economic agents involved in the market in question, so that the ethics of competition is vital for the existence fair competition, all companies have the right and obligation to offer innovative products and services to consumers, and it's not their fault if this affects their competitors, the problem is that the controls of the companies, make decisions to use their innovations in order to eliminate, under pressure, to competitors abusing market power they have acquired, even causing collateral damage to third parties.

In particular, it should occupy in the investigations in the case of companies in the New Economy is not the way in which they acquired their market power, but their use that power to follow preserving, creating unnatural barriers competition.

In the case of *Google Search*, is shown to be a company with monopolistic power, so that research should not focus on as acquired that power to then find guilt or otherwise of Google, as we saw network externalities play a key role in that market dominance, but this does not make you guilty.

Actually to determine that truly Google are violating the laws antitrust, with its product, Google Search, the analysis should be in two ways, a) damage to competition, and b) The existence of harm to consumers.

In the first case, it is essential that the authorities thoroughly understand how works the technology used by *Google Search*, including the algorithm and traces of spam, which may be discriminating divers Websites that truly provide valuable information and do not belong to the category of spam. In addition, rigorous analysis of the behavior of the searches machine, taking a particular sample of different markets is required, and analyze the possible exclusions

searching various websites perform competitors, checking the extent in that the links benefit to advertisers and create no natural barriers to competition.

It is important to note that the analysis should not only focus on competition in the market for search engines, also on the possible involvement of many other markets that exist in the environment of the Web, because if we consider that Google decides which links show consumers, and whether they benefit their advertisers, then perhaps many companies could simply be out of the competition in the environment of the web, they are not shown in the top search results, but this is really relative, because that do not appear in the top search results do not mean that Google does not allow them to appear on your ranking, depends on the willingness of the user to search all the pages of the search results shed.

However, we must note that Google is a private company that has the right to make decisions that benefit your company and give preferential treatment to their customers, the problem here is that Google Search has information that is not private, information is a human right, which makes it a matter of public character, so the commercial implications are uncomfortable and even dangerous for the right to information, so that the decision that the European Union has issued for search engines dissociate their activities in trade issues is quite relevant to eliminate the problem decision, however, it is estimated that this will harm the economic interests of Google, so it will be very interesting to know the decision the company will take to prevent impacts. We have the hypothesis that not being a way to generate income for Google, then, is uncertain the position that the digital enterprise will continue to support the service for consumers in Europe, the picture is viewed from three angles, 1) remove the service of Europe, 2) perform charges for using the service search machine, and 3) consider Google Search as a public interest resource and continue to benefit consumers, either option must be careful because it could generate global consequences.

Moreover, in relation to the possible existence of harm to the consumer, we must not lose sight of the antitrust laws safeguarding the process of competition, not competitors and not directly to consumers, for that there are specialized consumer protection laws; therefore, the damage should be investigated as affected consumers, ranging from an indirect appearance in the sense of showing that Google, through the use of Google Search, harm the competitive process and this reduces the economic benefits that are produced by competition in the market, these are: the growth of the overall economy depending, for example, the contribution of e-commerce activities to GDP and income rates microeconomic caused by digital business.

If one tries to analyze the damage to consumers directly can be in both directions in relation to the protection of personal data and direct consumer services, stipulated in the respetivas laws, but this is beyond the antitrust limits.

The end result of research in Europe, will be a precedent in antitrust investigations in the New Economy; America lost a valuable opportunity in the subject, so it will be important the final decision of the European Commission, which will be a future reference for other countries and will determine a starting point for commanding operation of competition in various markets e-commerce, and leading the way for other companies of the digital environment.