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Preferring One's Own Vertical Search Service: Potential Anticompetitive Aspects under U.S. Law

การให้ความสำคัญบริการค้นหาเฉพาะด้านของตนเอง: มุมมองด้านการต่อต้านการแข่งขันที่เป็นไปได้ ภายใต้กฎหมายสหรัฐอเมริกา

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ผู้พิพากษาประจำสำนักงานศาลยุติธรรม ช่วยทำงานชั่วคราวในตำแหน่งผู้พิพากษาศาลจังหวัดเวียงสระ

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Abstract

One major trend of current market strategies is leaping toward online advertisement which may bring a great fortune to the advertising sellers and may create efficiency on the informed buyers' part at the same time. However, when an Organic Search Service (OSS) provider decides to expand its service to include Vertical Search Service (VSS), an OSS provider may prefer and firstly display its own VSS on top of its page to searching consumers instead of displaying any other more relevant products or services set up by other advertising sellers or any other more relevant

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vertical search services in relevant order. This may be viewed as on viable business strategy or vicious scheme to shield out other competitors from the VSS market. This hypothetical concerning conduct will be the main subject of the analysis. In this article, first, the three ways for consumers to obtain information pertaining relevant products or services will be presented. The discussion will, then, lead to one of the most efficient ways of obtaining information – online search and advertising. After that, the hypothetical concerning conduct – an organic search provider expanding its service to include the vertical search service market and putting its own integrated vertical search service before the other vertical search services when consumers enter the search keywords on certain conditions will be explored. Then, the real cost of using such services will be explained with an aim to understand the real cost of zero or near-zero monetary charge of most organic search services currently available. Further, potential cognizable U.S. antitrust claims will be discussed. The main discussion will be toward the selected potential cognizable U.S. antitrust claims namely potential predatory pricing claim, potential monopolization claim, potential tying claim, and potential refusal to deal claim. After that, the possible anticompetitive effects from these possible cognizable U.S. antitrust claims discussed will be elaborated. These include deprivation of information, coercion of demand, unreasonable price increases, lower quality service, barriers to entry, exclusion of competitors, upward pricing pressure, and increase in bargaining power. However, as explicitly illustrated in the title of this article, no procompetitive justification, business justification, or the weighting between procompetitive and anticompetitive effects will be elaborated in this article. This article offers only possible anticompetitive effects and analysis of possible cognizable U.S. antitrust claims of the hypothetical concerning conduct upon certain conditions.

Keywords: antitrust, competition, vertical search, organic search, anticompetitive effects

บทคัดย่อ

กลยุทธ์การตลาดปัจจุบันประการหนึ่งกำลังมุ่งไปสู่การโฆษณาออนไลน์ซึ่งอาจนำไปสู่ผลประโยชน์จำนวนมากสำหรับผู้ขายที่ทำการโฆษณาและอาจก่อให้เกิดประสิทธิภาพสำหรับในส่วนของผู้ซื้อที่ได้รับข้อมูลครบถ้วนในเวลาเดียวกัน อย่างไรก็ตาม เมื่อผู้ให้บริการค้นหาทั่วไปตัดสินใจที่จะขยายบริการให้รวมไปถึงบริการค้นหาเฉพาะด้าน ผู้ให้บริการค้นหาทั่วไปอาจเลือกแสดงบริการค้นหา

เฉพาะด้านของตนในอันดับต้นของหน้าการค้นหาให้แก่ผู้บริโภคแทนที่จะแสดงผลิตภัณฑ์หรือบริการของผู้ขายซึ่งโฆษณาอื่นหรือบริการค้นหาเฉพาะด้านอื่นที่เกี่ยวข้องกับคำสำคัญมากกว่าตามลำดับความเกี่ยวข้อง การกระทำลักษณะนี้อาจถูกมองเป็นกลยุทธ์ทางธุรกิจหรือแผนการที่จะกันผู้แข่งขันรายอื่นออกจากตลาดการค้นหาเฉพาะด้าน ในเบื้องต้น บทความนี้จะกล่าวถึงแนวทางสามประการสำหรับผู้บริโภคในอันที่จะได้รับข้อมูลเกี่ยวกับสินค้าหรือบริการ ซึ่งรวมไปถึงการค้นหาและโฆษณาออนไลน์อันเป็นหนึ่งในแนวทางที่มีประสิทธิภาพที่สุดในการรับข้อมูล บทความนี้จะกล่าวอธิบายถึงต้นทุนที่แท้จริงของการใช้บริการค้นหาและโฆษณาออนไลน์เพื่อให้ผู้อ่านเข้าใจถึงต้นทุนที่แท้จริงของการคิดราคาเป็นศูนย์หรือเกือบจะศูนย์ของบริการค้นหาทั่วไปส่วนมากในปัจจุบัน บทความนี้จะกล่าวต่อไปถึงข้อกล่าวหาต่อต้านการแข่งขันทางการค้าภายใต้กฎหมายสหรัฐอเมริกาที่เป็นไปได้ อันได้แก่ ข้อกล่าวหาการตั้งราคาเพื่อกำจัดคู่แข่งขัน ข้อกล่าวหาการผูกขาด ข้อกล่าวหาการพ่วงผลิตภัณฑ์ ข้อกล่าวหาการปฏิเสธที่จะทำธุรกรรมด้วย บทความนี้จะกล่าวต่อไปถึงผลกระทบต่อต้านการแข่งขันทางการค้าที่เป็นไปได้จากข้อกล่าวหาดังกล่าว อันได้แก่ การจำกัดข้อมูล การบีบบังคับความต้องการ การขึ้นราคาอย่างไม่สมเหตุผล คุณภาพการบริการที่ลดลง อุปสรรคในการเข้าสู่ตลาด การกีดกันคู่แข่งทางการค้า แรงกดดันให้ราคาเพิ่มขึ้น และการเพิ่มอำนาจการต่อรอง อย่างไรก็ตาม บทความนี้จะไม่กล่าวถึงข้อกล่าวอ้างส่งเสริมการแข่งขันทางการค้า ข้อกล่าวอ้างทางธุรกิจ หรือการชั่งน้ำหนักระหว่างผลกระทบต่อต้านการแข่งขันทางการค้าและผลกระทบส่งเสริมการแข่งขันทางการค้า บทความนี้นำเสนอเฉพาะแต่เพียงผลกระทบต่อต้านการแข่งขันทางการค้าที่เป็นไปได้และบทวิเคราะห์ของข้อกล่าวหาต่อต้านการแข่งขันทางการค้าภายใต้กฎหมายสหรัฐอเมริกาที่เป็นไปได้ของการกระทำสมมุติที่ศึกษาบนเงื่อนไขบางประการเท่านั้น

คำสำคัญ: กฎหมายป้องกันการผูกขาด การแข่งขันทางการค้า การค้นหาเฉพาะด้าน การค้นหาทั่วไป ผลต่อต้านการแข่งขันทางการค้า

I. Introduction

There are many important considerations in order to create a successful business. One of which is advertising[1]. In a homogenous market[2], among other things equal, advertising is the key to being able to sell more, especially in the industrialized markets which, upon some exceptions, the producers produce and supply their products to various distributors who, then, resell the products to the end consumers in long vertical supply chains. In this market relationship, without an exclusive dealing agreement, each distributor will be able to sell the same products as other distributors. This simulates the market in which all distributors are selling the same products to the consumers. When customers choose from whom to buy, it may depend on various factors ranging from rational to irrational, but for the purposes of this article will be limited to the rational. Consumers may choose to buy the products from one distributor because of the lower price, the higher quality, or the renowned reputation of the distributors. However, they first have to acquire the information regarding these distributors and their products, even though the products are the same. There also are many ways that customers can obtain such information. For example, they may get the information from their own experience, the experience of their friends and family, or advertisements. In order for the customers to be able to make the most profit-maximizing decision, the customers will have to be adequately informed of the relevant information about the products they are demanding for,

[1] One possible source of barriers to entry is the high cost of advertising. Since in order to establish a business as known to customers, one may have to spend a lot of money on advertising to make its existence known to its customers. If the customers do not know of its products, it is unlikely that the customers will buy its products other than the already established products that the customers have already known. The United States District Court for the District of Columbia has stated in ruling the merger between Staple and Office Depot unlawful that "Economies of scale at the local level, such as in the costs of advertising and distribution, would also be difficult for a new superstore entrant to achieve since the three existing firms have saturated many important local markets.". See *FTC v. Staples*, 970 F. Supp. 1066, 1087 (D.D.C. 1997).

[2] The Supreme Court once stated that "Since all liquid bleach is chemically identical, advertising and sales promotion are vital." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, (1967), and in finding the merger between Procter & Gamble Co. and Clorox Chemical Co. unlawful, among other reasons, the Supreme Court reasoned that "the major competitive weapon in the successful marketing of bleach is advertising." and "Procter would be able to use its volume discounts to advantage in advertising Clorox. Thus, a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox.". See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, (1967).

including the price of the products, the quality of the products, or the availability of the products. For the purpose of this article, the focus will be toward the one that may be the easiest controllable mode of information distribution by the distributors – the advertisements.

Information is very important for customers to determine whether they will buy the products or from whom they will buy the products. The more the information is available to the customers, the more the customers can efficiently decide on an adequate basis. Without it, the customers will not likely be able to make the profit-maximizing decision. Therefore, it is very important to make information readily available to the customers.

One of the most efficient ways for the sellers to inform their customers is through advertising, and with the help of nowadays technology, online advertising business has emerged. The general organic search and the specialized vertical search are two general types of today's search engines. However, since an organic search provider may also engage in a vertical search business, there is a possibility that a big, famous, and powerful organic search provider may attempt to utilize its power over the organic search market to make its way into the vertical search market simply by putting its own integrated vertical search service before the other vertical search services when consumers enter the search keywords. This concerning conduct may affect consumers' choices and costs, and will be the conduct to be further analyzed in this article.

In this article, first, the three ways that consumers may obtain information will be presented in Section II. The discussion will, then, lead to one of the most efficient ways of obtaining information – online search and advertising. At the end of Section II, the hypothetical concerning conduct – an organic search provider expanding to include the vertical search service market and putting its own integrated vertical search service before the other vertical search services when consumers enter the search keywords on certain conditions will be explored. Then, because most organic search services available are free of monetary charge, the real cost of using such services will be explained in Section III, and in Section IV, potential cognizable antitrust claims will be discussed. These include potential predatory pricing claim, potential monopolization claim, potential tying claim, and potential refusal to deal claim. After that, in Section V, the possible anticompetitive effects from the possible cognizable anticompetitive claims will be elaborated. These are deprivation of

information, coercion of demand, unreasonable price increases, lower quality service, barriers to entry, exclusion of competitors, upward pricing pressure, and increase in bargaining power. As explicitly illustrated in the title of this article, no procompetitive justification, business justification, or the weighting between procompetitive and anticompetitive effects will be elaborated in this article. This article offers only the analysis of the hypothetical concerning conduct upon certain conditions, which may or may not accurately characterize the actual conduct of any particular corporation or organization.

II. Ways to Obtain Information: Advertisements

There are many ways for the consumers to be informed. One way to categorize them is through their initiation focusing on the relationship between consumers and distributors or producers. From this perspective, there are 3 possible ways to convey information from distributors or producers to consumers, which can be categorized as (i) initiated by distributors or producers, (ii) initiated by consumers, and (iii) initiated jointly by both consumers and distributors or producers.

(i) Initiated by Distributors or Producers

This may be the most common way of thinking about the information distribution. Because the distributors and producers want to sell their products to the greatest extent as possible in order to maximize their profits, they have every incentive to inform customers of their attractiveness. They can achieve this by many means, i.e. direct mail, television or newspaper advertising, or advertising on their own websites.

More advertising will increase sales and revenues for the distributors and producers, and the correct decision for them is to increase advertising until marginal revenue equals marginal cost of advertising.[3] Therefore it is profitable and reasonable for the distributors and producers to do so. Distributors and producers can communicate the existence of their products and prices directly to the customers. If they match the demand of the consumers, the consumers will buy them. If the advertised products are priced less or offer more utilization, consumer surplus will

[3] Daniel L. Rubinfeld and Robert S. Pyndyck, Microeconomics, 9th edition (global edition), (Malaysia: Vivar (Pearson Education Limited), 2018), pp.443–447.

increase. And, if the price is less, the degree of deadweight loss will decrease because more consumers will be able to afford the products.[4] Moreover, through advertising, the distributors and producers may be able to shift consumer demand by persuading new consumers to buy the products based on products' characteristics, not by reducing transaction costs.[5] If they are successfully persuaded, they will move out of the deadweight loss. Therefore, the overall social welfare will increase.

However, the problem of this kind of information distribution is that not all efforts to distribute information will be responded by the consumers. Some efforts will be lost in vein. It may be hard for consumers to reach these advertising methods. Some consumers may consider shifting to the distributors or producers' products, while some may not. This may depend on various factors including switching costs which are the monetary and time costs incurred when consumers switch from one supplier to another.[6] And, the number of customers shifting to the distributors or producers' products may hardly be expected or calculated, thus in some cases, costs may exceed benefits gained. Still, distributors and producers will have incentive to conduct this form of advertising because they can pass through all the costs from their advertising to their end consumers. This can be evidenced in the premium for the branded products, which may be understandable as the pass-through of marketing costs.[7] Therefore, in the end, if they have done excessive advertising, the excessive costs of advertising will be reflected in the price of their products, which the consumers will have to pay. But, then, their price may be higher than their rivals, and consumers will shift to the other products, thus, the benefits of increasing consumer surplus and total social welfare may not happen. Also, due to the limited resource or budget of advertising, distributors and producers will have to choose the most potential customers to receive their product advertisement and may leave some customers uninformed. To conform with limited budget, due to the low costs

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[4] *Ibid*, pp.329–331.

[5] Katherine J. Strandburg, "Free Fall: The Online Market's Consumer Preference Disconnect," The University of Chicago Legal Forum, Vol. 93, 95, p.110 (2013).

[6] Aaron S. Edlin and Robert G. Harris, "The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google," Yale Journal of Law and Technology, Vol. 15, 169, pp.176–177 (2012–2013).

[7] Jeremy N. Sheff, "Biasing Brands," Cardozo Law Review and De Novo, Vol. 32, No. 4, 1245, pp.1258–1259 (2011).

of internet advertising,[8] it is rational for distributors or producers to use online advertisement, like those offered by search service providers, to minimize their costs and maximize the range for consumers receiving advertisement. Should this process be disrupted, for an example, by the concerning conduct, the efficiencies of online advertising may be disturbed and the benefits of both consumers and distributors or producers may be affected.

(ii) Initiated by Consumers themselves

The next way to get necessary information is for the customers to put their efforts to seek such information themselves. As one might expect, there are numerous ways one can find the information for it is of his interest to find what he wants. If consumers have their demand for something, in order to maximize their gain by buying the right products at the right price, they will have to reach out for it. Most modern contracts involve consumer searching for the products, not negotiating the terms of contracts.[9] They may do a manual search in the newspapers or televisions, walk around the street to various shops, or visit the websites of the distributors or producers.

While in this case, the effort may not be usually lost since the consumers that invest or spend some time searching for the products will have incentive to purchase the products to offset the searching cost – such as the transportation cost or the opportunity cost of the time spent searching for the products – that the consumers invest in finding the products. Therefore, with high search costs, consumers may have to establish a stopping rule by examining their alternatives until reaching an alternative minimally fitted with their requirement,[10] and ending up in buying the products. And since low-search-cost consumers tend to be more price sensitive[11] high-search-cost consumers, on the contrary, may be less reluctant to buy the products at higher prices to offset their search costs. Or, they may alternatively deduct the search costs from their budget, and are willing to spend less.

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[8] Scott R. Peppet, "Prostitution 3.0?," Iowa Law Review, Vol. 98, 1989, pp.2009–2010 (2013).

[9] Joshua A. T. Fairfield, "The Search Interest in Contract," Iowa Law Review, Vol. 92, 1237, p.1243 (2007).

[10] Lauren E. Willis, "Decision making and the Limits of Disclosure: The Problem of Predatory Lending: Price," Maryland Law Review, Vol. 65, 707, p.742 (2006).

[11] Thomas K. Cheng, "A Consumer Behavioral Approach to Resale Price Maintenance," Virginia Law and Business Review, Vol. 12, 1, pp.53–54 (2017).

Because the information may be too massive, without the help of technologies, even systematical search may not render all necessary information for consumers. It is possible that some information may be unintentionally excluded. Still, if this is the only way to obtain information, the cost of advertising of the distributors or producers may be zero because all the effort to obtain information is done by the customers. If this is the case, there will be no advertising-related cost being diverted to the end consumers, and the main competitive features to gain profitable margins will be back to the lower costs and prices of the products. However, this may not be the case since distributors or producers will need to maximize their profits by extending their range of customers. Also, consumers may be reluctant to spend costly time and money on searches, and may construct preferences and strategies based on their limited effort for a search.[12] And, as search service reduces search costs for customers[13] and the invention of internet tremendously reducing search costs,[14] it is rational for customers to use online search service. Therefore, should this search process be intervened, for an example, by the concerning conduct, there may be undesirable consequences affecting both consumers and distributors or producers.

(iii) Initiated jointly by Consumers and Distributors or Producers

The last way to gain information is by the joint efforts between consumers and distributors or producers. This way of gaining and distributing information can be achieved by the use of intermediate platforms between consumers and distributors or producers like the use of intermediate search platforms, in which distributors or producers provide their information to the intermediate platform providers, which then collect the information and provide that information systematically to the consumers who search for the products. The information provided will be thorough and relevant to the search keywords that consumers input to the search service.

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[12] Mark S. Nadel, "The Consumer Product Selection Process in an Internet Age: Obstacles to Maximum Effectiveness and Policy Options," Harvard Journal of Law and Technology, Vol. 14, 183, pp.198–199 (2000).

[13] James Grimmelmann, "The Structure of Search Engine Law," Iowa Law Review, Vol. 93, 1, p.52 (2007).

[14] Michael R. Baye, et al, "The Evolution of Product Search," Journal of Law, Economics, and Policy, Vol. 9, 201, pp.204–205 (2013).

Unlike the other two ways of obtaining information, this is two-way communication between consumers and distributors or producers. One possible effect, similar to the information search initiated by consumers themselves, is higher incentive of consumers or searchers to buy the products as they are the one reaching out for the products, and the tendency of the consumers ending up buying the products is likely to be higher. An example of this method is the use of search engine, which literally reduces transactional costs,[15] and altogether with internet technology, the search costs are low due to the unnecessity for consumers to travel to find out the prices.[16] Thus, online search service may be an appealing option for both consumers and distributors or producers.

Although not all the consumers may be able to access the search platforms, the easy accessibility to the platforms may encourage consumers to use the platform, and if the platforms are of high quality and cover most of the contents available, the consumers may be even more motivated to use these platforms which, in turn, will make such platforms being able to capture more consumers. This may contribute to either direct or indirect network effects,[17] especially when search service is combined with advertising.[18] Nonetheless, should more consumers be captured by these platforms, a greater number of consumers will be informed, and the efficient market will follow. Therefore, efficient online search services are desirable and can be a powerful factor towards informed consumers and efficient search and advertisement.

Consider this hypothetical illustration, an organic search service (herein after abbreviated as "OSS") provider providing an online search service, which is the service for ordinary search that users may search for any information or website on the internet relevant to the keywords that users input into the search service, decides to expand its business to the vertical search service (herein after abbreviated as "VSS"), which is a specialized online search service on particular types of products. Suppose in this scenario that on VSS platform, a VSS provider will let producers or distributors

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[15] *Ibid*, p.52.

[16] Sandra Marco Colino, "On the Road to Perdition? The Future of the European Car Industry and Its Implications for EC Competition Policy," Northwestern Journal of International Law and Business, Vol. 28, 35, pp.56–57 (2007).

[17] Maurice E. Stucke and Ariel Ezrachi, "When Competition Fails to Optimize Quality: A Look at Search Engine," Yale Journal of Law and Technology, Vol. 18, 70, pp.81–82 (2016).

[18] Kristine Laudadio Devine, "Preserving Competition in Multi-Sided Innovative Markets: How Do You Solve a Problem Like Google?," North Carolina Journal of Law and Technology, Vol. 10, 59, pp.81–82 (2008).

(herein after abbreviated as "Advertising Sellers") advertise or put their products on the VSS platform in exchange for the advertising fees. Then, a VSS provider will promote its VSS, and invite consumers to search for the products or services of the Advertising Sellers by inputting the keywords, and the VSS algorithm will show up the most relevant products or services of the Advertising Sellers that match the keywords. As OSS may include everything on the internet, VSS will likely be included in the OSS results too, and when searching consumers may search for the VSSs from the OSS first, and then they will, again, search for the products or services that they are interested in from the VSS of their choice.

Suppose that in the process of promoting its own VSS, an OSS provider with monopoly power over the OSS market decides that it is best for its business to override its OSS algorithm, which is used to show the URLs to the best matching websites orderly – in this case showing the most relevant VSSs in order, and show its own VSS on top of the other VSSs. This is the hypothetical concerning conduct (herein after referred to as "concerning conduct") that will be discussed and analyzed in this article. However, it should be noted that the scenario analyzed in this article includes only the situation when the consumers want to purchase homogeneous products or services and use the OSS to find the VSS that will show the information of the most relevant products and services that are best suited for the consumers. The scenario does not include any situation when the OSS users are searching for anything or any information other than shopping for products and services.

III. The Real Cost of using Search Service and Possible Antitrust Claim for No Monetary Charge

The OSS and VSS providers charge no monetary fee from their users. Therefore, it is possible for one to argue, on one hand, that they may possibly be entitled to do anything they want with their free services. And even if they simply refuse to list their competitors' VSSs in their OSSs, there is no need to consider any antitrust implication of their conducts because the only impact will be depriving their competitors of a particular source of free promotion.[19] On the other hand, there may

[19] Pinar Akman, "The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law," University of Illinois Journal of Law, Technology and Policy, Vol. 2017, No. 2, 301, p.317 (2017).

be no possible way for the management of a corporation, with its fiduciary duty to act for the best interest of its main constituencies – its shareholders,[20] to act for the benefits of its customers or consumers on the expense of the corporation since it will violate its fiduciary duty. Therefore, it may be impossible that the customers or consumers will actually be paying nothing for the use of the products or services of a corporation. Their users will have to pay something in some forms, possibly apart from direct monetary payment. In this case, customers pay them in forms of their attention, information, and indirect monetary fees through the Advertising Sellers.

The search and advertising model can possibly be considered as a two-sided market, in which the provider is the middle operating platform linking each market side together. On one side, the provider provides general search service to its customers who normally search for everything they want. Sometimes, the customers search for general information. Sometimes, they search for some products that they are interested in buying. Thus, in this side of the market, the consumers will use the search service, but will not have to pay any money directly to the provider. However, the price that the customers pay will be in form of information that the provider collects from them. This information, alone, may not be of very high value, but combined together, it can possibly be used in various ways to generate income like using it as a criterion to choose which advertising information will be presented to the

[20] There is a debate on whether a corporation can act only for the benefits of only its shareholders, or for the benefits of its other constituencies like its customers, creditors, employees or neighborhoods. In *Unocal Corp. v. Mesa Petroleum Co.*, the Supreme Court of Delaware, when reaching out for what directors of Unocal can regard as Unocal concern in assessing whether the defensive measure against Mesa's hostile takeover bid, provided examples of such concerns, which "may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.". *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985). This means that the directors, when considering the companies course of action, may consider the benefits of other constituencies, one of which is the customers – or the consumers. However, a year later, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Supreme Court of Delaware stated in its opinion that "while concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders.", *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986).* Then, the Supreme Court of Delaware held that, in the particular circumstance in the case, the directors should not concern over the noteholders than the shareholders. This can be interpreted that the main constituency that the management of the corporation should concern is only its shareholders, not other constituencies such as its customers or consumers.

customers to ensure the highest possibility that customers will buy the advertised products. On the other side, the search service provider provides advertising service to Advertising Sellers who seeks to promote their products by collecting monetary fees from them. Therefore, it may be understood that the information that customers provide or pay to the provider will, in turn, be turned to part of its advertising model that it provides to the Advertising Sellers in exchange for the advertising fees. As illustrated in Michal S. Gal and Daniel L. Rubinfeld's article, "Google serves as an example: data on consumer preferences gained through the provision of free search services serve as inputs in the market for information on consumer preferences. The increase in the value of these data is directly correlated to the advantage Google gains from combining this information with other sources of information. This allows Google to achieve a comparative advantage in the market for information-on-information."[21] Therefore, in this way, the search service provider is selling the information that it collects from its customers on one side of the market to the Advertising Sellers, who are their customers on the other side of the market. In this scenario, the Advertising Sellers will sell their products to the consumers, who are the search service users.

In order for this model, which the search service providers provide free service for the buyers, to work, they must have collected enough advertising fees from the Advertising Sellers to make the overall services profitable to them. In this respect, although their consumers actually pay no real monetary fee directly to the search service providers, apart from the information that they pay directly by letting the search service providers collect their information for their commercial use, the users pay some money indirectly to the search service providers. This can be illustrated by looking at the Advertising Seller's side of the market. In this side, Advertising Sellers pay the search service providers for their advertising service, and that payment becomes a part of the cost of their products sold to their customers. Thus, such cost will be accrued to the total cost of the products and will affect the way in which the Advertising Sellers impose their products' prices which customers pay. This is no different than any other cost of advertisement that a company has to pay to advertise its products, and this cost will, one way or another, heighten the prices that are going to be charged to all buyers. Therefore, a part of the prices that customers pay to the

[21] Michal S. Gal and Daniel L. Rubinfeld, "The Hidden Costs of Free Goods: Implications for Antitrust Enforcement," Antitrust Law Journal, Vol. 80, No. 3, 521, p.527 (2016).

Advertising Sellers will goes to the search service providers. This is also the price that the users in this shopping scheme will have to pay.

Another price that customers have to pay is their attention, which the search service providers, in turn, commercializes it by reselling it to the Advertising Sellers. As in any advertising model, customers spend considerable time to pay attention into the products of the Advertising Sellers. Such time is arguably not free because there can be many ways to allocate it to gain more efficiencies. And, each time customers spend their time doing something, they lose their opportunities to do something else. Therefore, in this aspect, the use of the search service may not be totally free at all, and the advertisers are also competing for customers' valuable time.

The costs of attention and information are hard to measure. Moreover, consumers may systematically underestimate the cost of attention and information they give in exchange of the free products, and while they may be able to comprehend and assess the price-based costs, they have some difficulties assessing the non-price-based costs.[22] Therefore, it will be a challenge to measure the effect of the change of free platform operators' course of actions. Because no monetary price is observable or hard to be observed, there may possibly be idea that antitrust law does not apply to these free platform operators due to its no monetary cost of obtaining such free products. However, as customers may overlook the non-monetary price of such free products, there may be other costs, and "conduct that raises costs or restricts output of zero-price products can harm welfare just as seriously as conduct that raises price or reduces output in other markets."[23]

As the search services incurs no monetary price, if only the search service side is targeted and focused as a sole market definition of these free service providers, there can arise the claim that these free service providers may be providing their services at the price below their costs. Under *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, to satisfy the predatory pricing claim, one prong that the plaintiff will have to prove is that the price is below the cost. The cost that was used in *Brooke Group* was average variable cost which is the representative of actual marginal cost that may be harder to observed.[24] In an attempt to persuade the United

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[22] John M. Newman, "The Myth of Free," George Washington Law Review, Vol. 86, No. 2, 513, pp.562–563 (2018).

[23] John M. Newman, "Antitrust in Zero-Price Markets: Foundations," University of Pennsylvania Law Review, Vol. 164, No. 1, 149, pp.173–174 (2015).

[24] *Brook Group Limited v. Brown & Williamson Tobacco Corporation*, 509 U.S. 209 (1993).

States Court of Appeals, Tenth Circuit, to use other cost, in *United States v. AMR Corp.*, the profit sacrifice test was proposed and rejected,[25] and the Tenth Circuit went back and used average variable cost in applying the first prong of Brooke Group predatory pricing test.

The marginal costs of these free search services are like other intellectual property, which has high fixed costs compared to its marginal costs because of its difficulty to create, but its easiness to duplicate, and the marginal costs may be almost zero.[26] Applying the first prong of Brooke Group test to the concerning conduct, if we regard the marginal cost as zero, setting the price at zero may not be below the marginal cost, and the predatory pricing claim may fail. However, as Posner noted in his first footnote that this is "still an overstatement, because there are selling and servicing costs associated with each sale or rental of software."[27] For free search services, there also may be some costs – for example, the cost of maintaining the system for higher number of users that may increase as the number of its users increases – which may possibly be considered as marginal costs, and therefore, the marginal costs of these free search services may not be actually zero.

Even if we regard such marginal costs as zero or near zero, there may be the question as to whether average variable cost should be used in this particular case because of the uniqueness of having zero or near-zero marginal costs. This is because normally, the reason for the use of marginal cost is that the company will still be profitable after selling higher than its marginal costs since the higher revenue from the higher volume of its sales will, in the end, makes up for the lower profits of its low prices. This will let the corporation recoup both its fixed and marginal costs that it invests in its projects creating the products. Otherwise no rational firm will have chosen to invest in these self-destructive projects in the first place, and in doctrinal aspects, the directors or officers approving such projects also may have been held in breach of their fiduciary duties for doing so.

In the scenario where the firms charge no monetary price, without considering other prices like information or attention that consumers actually pay, no price may mean no income, which may mean no profit to the firms. With no profit, there may

[25] *United States v. AMR Corporation*, 335 F.3d 1109 (2003).

[26] Richard A. Posner, "Antitrust in the New Economy," Antitrust Law Journal, Vol. 68, No. 3, 925, pp.926–927 (2001).

[27] *Ibid,* p.943.

be no chance for the firms to recoup its investment, and no reasonable management of the firms will choose to pursue this sort of projects. Hence, considering over only the average variable costs of the firm in applying the first prong of Brooke Group test may be inappropriate in this particular circumstance, and may have the false positive result, which may possibly be the reason the First Circuit of the United States Courts of Appeals chose not to follow the Ninth Circuit's approach and imposed the price below cost test in *Barry Wright Corp. v. ITT Grinnell Corp.* as the First Circuit stated that "Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."[28] Although the false positive that the First Circuit was trying to avoid in *ITT Grinnell* may be to avoid over-inclusivity of condemnable conducts, the under-inclusivity should also be considered because if the criteria is under-inclusive, it is possible that some conducts that should be condemned may slip out of the scope of antitrust scrutiny, and may cause harm to the public welfare or the society. Therefore, for the products or services with no monetary price and with zero or near zero marginal cost, which may easily slip out of the scope of antitrust scrutiny, average variable costs or marginal costs may not be the best costs that should be used in assessing the first prong of Brooke Group predatory pricing test, and other costs – for example, fixed costs – should also be considered. This means that when the monetary price and cost is near zero, the Brooke Group test with the currently accepted average variable cost standard is unlikely to work. But if the test is to work, the use of average variable cost will have to be abandoned, and the use of other costs, like fixed costs, will have to be accepted instead.

However, the above analysis applies only on the assumption that there is only one concerning market, in which there will be no other way for the free service providers to receive monetary remuneration from the free services provided to consumers. It means that if the two sides of the market are considered together, the analysis may be changed to reflect the costs and profits gain from both sides of the market. This is because, when dealing with two-sided market, it may be necessary to consider both sides of the market. An example of this consideration is evidenced in *Ohio v. Am. Express Co.* where Supreme Court of the United States includes "both sides of the platform—merchants and cardholders—when defining the credit-card

[28] *Barry Wright Corporation v. ITT Grinnell Corporation*, 724 F.2d 227, 234 (1st Cir. 1983).

market." [29] Even though it may possibly be argued that this consideration of two-sidedness is applied only to the two-sided transaction platforms, in which the "platforms facilitate a single, simultaneous transaction between participants" [30] because most of the times the Supreme Court uses the words "two-sided," it comes right before "transaction platforms." The Supreme Court may intentionally join these words together to signal that this precedent only applies to the two-sided transaction platforms, or it may possibly be just a mere coincident.

Although search service and Advertising Sellers' advertisement may be considered as two-sided market, it may possibly not be considered as transaction platform because the search service platforms do not process any transaction between buyers and Advertising Sellers. Instead, the platforms only connect both sides of the markets by referring them to each other and let them do the transaction themselves. Nevertheless, no matter what it may be, for the search service and advertising on the search service markets, if each market is considered separately, the model for each side of the market, especially on the search service side, may not make any business sense without the present of the other side of the market. Therefore, it may be more logical to evaluate both sides of the market altogether. In this respect, the advertising fees charged from the Advertising Sellers may possibly be considered as the monetary prices for its overall services. This means that the prices that search service providers charge their customers are not exactly zero, and when considering the first prong of the Brooke Group predatory pricing test, if the prices charged are not exactly zero, the need to consider other costs than average variable costs or marginal costs may be lessen because if the search service providers gain profits from the overall business activities, imposing low or no price on one side of the market may make business sense. As a consequence, even if the standard applied for the first prong of Brooke Group test is the price below average marginal or marginal costs, the prices charged may possibly be not below such costs, and it may not be considered as price below marginal costs after all. If the price is not below costs, it may escape the liability for predatory pricing.

[29] *Ohio v. American Express Company*, 138 S. Ct. 2274, 2286 (2018).

[30] *Ibid.*

IV. Potential Cognizable Antitrust Claims

Before considering potential cognizable antitrust claims, it is noteworthy to address the applicable statutes for these claims. As the concerning conduct does not relate to any agreement between two separate entities, there is no need to consider whether the concerning conduct breaches §1 of the Sherman Act.[31] Because the concerning conduct is an independent and unilateral action of one single entity, the focus will be on cognizable monopolization claims based on §2 of the Sherman Act.[32] A monopolization claim has twofold; first (i) "the possession of monopoly power in the relevant market," and (ii) "the willful acquisition or maintenance of that power" through means that are anticompetitive,[33] or monopolizing conducts to gain or extend monopoly power not because of "a superior product, business acumen, or historic accident."[34] Also, the rule of reason, as used in some analysis of §1 Claims, has been used by courts to analyze §2 cases too.[35] As evidenced through the precedents, to determine whether the concerning conduct violates the rule of reason, the three-step, burden-shifting framework applies.[36] First, the plaintiff has to initially prove the concerning conduct has a substantial anticompetitive effects, and after the plaintiff has successfully carried its burden, the defendant will have to show a procompetitive

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[31] Sherman Act 1980, 15 U.S.C.S. § 1 (1980) provides that "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 hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

[32] Sherman Act 1980, 15 U.S.C. §2 (1980) provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

[33] Stefan Caris Love, "Monopolizing Trade: Airline Ticket Change Policies and the Thwarted Secondary Market," UCLA Law Review & Discourse, Vol. 66, 576, p.589 (2019).

[34] Diana De Leon, "Developments in The Law: The Judicial Contraction of Section 2 Doctrine," Loyola of Los Angeles Law Review, Vol. 45, 1105, p.1116–1117 (2012).

[35] *Ibid,* p.1123.

[36] *Supra note* 29, p.2284.

rationale or justification of the concerning conduct.[37] And if the defendant has successfully done so, the burden will then be shifted back to "the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[38] However, as stated in the title and introduction of this article, no procompetitive justification, business justification, or the weighting between procompetitive and anticompetitive effects will be elaborated in this article. Therefore, this article offers only the possibility of the plaintiff in successfully proving anticompetitive effects of the concerning conducts under three different claims –monopolistic leveraging, tying, and refusal to deal.

(i) Potential Monopolistic Leveraging Claim

As the concerning conduct here is that an OSS provider with monopoly power over the OSS market promotes its own VSS on its OSS by showing its VSS in the organic search results before starting to show the other search results, this conduct may possibly be considered under monopolistic leveraging framework.

Although Chicago School may assert that "a monopolist cannot reap additional monopoly profit from a second market"[39] and this may not be reasonably actually happening, other scholars argue that leveraging actually happens, for example, a very famous case for leveraging is *United States v. Microsoft Corp.*[40] In the case, although the attempted monopolization claim was rejected by the D.C. Circuit Court, Microsoft was alleged that it was potentially trying to extend its power over operating system market to acquire internet browser market in defense of Netscape and Java potential development into operating system substitutes. The purpose of Microsoft was to protect its operating system monopoly.[41] In *United States v. Griffith,* the downstream theatres joined together to contract with their distributor to exclude their rivals by using their powers in the market that they did not face competition as their bargaining leverage.[42] This is also considered as leveraging. Another example is

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[37] *Ibid.*

[38] *Ibid.*

[39] Robin Cooper Feldman, "Defensive Leveraging in Antitrust," Georgetown Law Journal, Vol. 87, 2079, p.2081 (1999).

[40] *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001).

[41] Heather Schneider, "An Antitrust Tying Analysis of Microsoft's Security Software Products," Columbia Science and Technology Law Review, Vol. 7, 3, p.66 (2006).

[42] *United States v. Griffith*, 334 U.S. 100 (1948).

the action of a brand drug seller appointing its authorized generic to compete in generic market, which may be considered as defensive leveraging, and one purpose, inter alia, is to prevent other generics from obtaining the Paragraph IV entry privilege[43] of the Hatch-Waxman Act that grants the exclusive right to market its generic drugs for 180 days.[44] Likewise, the concerning conduct of an OSS provider may also be considered as leveraging because, in a way, it may be alleged that the OSS provider is using its monopoly power in the OSS market to gain leverage over the other VSS market by forcing its users to pay attention and look through all the contents of its own VSS, or by forcing the users to use its VSS regardless of whether the users want to use such service. Therefore, it is possible that the concerning conduct will satisfy monopolistic leveraging claim.

(ii) Potential Tying Claim

Another potential antitrust claim for the concerning conduct is tying. Under *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, the Supreme Court of the United States announced four tests for "per se" tying liability, which are (i) the defendant must have market power in tying product, (ii) the defendant must force buyers to do things that they will not, otherwise, do, (iii) there must be two separate products, and (iv) the action must affect commerce. [45] Therefore, if the claim against an OSS provider will be brought under this rule, an OSS provider will have to possess and use its high market power, which is enough to coerce or force buyers to use its second product because the leverage it has over the first product. Thus, if the OSS is essential to its users, an OSS provider may be able to tie its other products – in this scenario, the VSS – with its first product. Then, the OSS will be technically inseparable from its VSS, and its users who may wish to use only its OSS will be deprived of their ability to choose to use only its OSS. Although consumers may be able to pick whichever the result they want, "as an empirical matter, it is clear that consumers overwhelmingly choose results near the top of the list."[46] Thus, upon the conditions that the concerning

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[43] Thomas Chen, "Authorized Generics: A Prescription for Hatch-Waxman Reform," Virginia Law Review, Vol. 93, No. 2, 459, p.493 (2007).

[44] *Ibid,* p.461.

[45] *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

[46] Florian Wagner-von Papp, "Should Google's Secret Sauce Be Organic?," Melbourne Journal of International Law, Vol. 16, No. 2, 609, p.643 (2015).

conduct involves an OSS provider with monopoly power in the OSS market – the tying product market, which is separable from the tied product market (the VSS market) – if the concerning conduct force the users to do things they would not do, and such conduct affects commerce, the concerning conduct will automatically be ruled as per se tying. Here, the concerning conduct is very likely to affect some, if not all, choices of its users. They will have to use both services simultaneously in order to be able to use the OSS. If this scenario happens, it means that the demand of the users for the integrated VSS may be coerced to be more than it would normally be in the competitive market. And, it is very likely that the concerning conduct will affect commerce as it may affect the ability to compete of other VSS providers. Therefore, there is a possibility that the concerning conduct will be considered as per se tying. Also, there is the view of another scholar that the OSS provider – like Google – has tied the use of its multiple products with its generic search service using different methods from the previous cases that the courts have already discussed, but the same dynamic effects of enforcing its monopoly power.[47]

The concerning conduct may reduce the quality of the VSS of the OSS provider because the consumers will be deprived of the opportunity to use only the OSS, but will have to use both OSS and VSS. Therefore, the consumers will have to spend more resources – directly like time and attention that the customers will have to put more into the VSS of the OSS provider or indirectly like the money that they will have to pay more to the advertising sellers whether with or without noticing and realizing that such additional prices originate from the concerning conduct. This will be further discussed in Section V. Possible anticompetitive effects from possible cognizable anticompetitive claims, subsection iv. lower quality service.

Besides per se tying under the test in *Jefferson Par. Hosp. Dist. No. 2 v. Hyde,* this concerning conduct may be comparable to one of the conducts in *Microsoft*.[48] In *Microsoft*, one alleged antitrust action was technical tie by making Internet Explorer a default in Windows 98 operating system and removing Internet Explorer from the add/remove program command box. These actions are possibly to tie Internet Explorer in the Windows 98 operating system with the result that Windows users will have no choice but to have Internet Explorer as a default internet browser readily

[47] Nathan Newman, "Search, Antitrust, and the Economics of the Control of User Data," Yale Journal on Regulation, Vol. 31, No. 2, 401, p.432 (2014).

[48] Heather Schneider*, supra note* 41.

installed in each computer, and will finally use only Internet Explorer when surfing through the internet. In this scheme, even though the users may choose to install other internet browser, the users will possibly be coerced to use Internet Explorer regardless of what their choices may be. The ultimate intended result of this conduct will probably be Internet Explorer ending up tied with Windows operating system, and the users ending up being deprived the choice to freely choose other internet browsers. For the concerning conduct, since after putting keywords in organic search box, the results will automatically come out with the OSS provider's VSS on top regardless of the relevancy or its users' choice, the users will not be able to separate the OSS provider's VSS from its OSS. Thus, the users will have to technically use the two products altogether. Also, the end result may be very similar to the end result of the concerning conduct as aforementioned – tying the VSS with the original OSS to deprive the consumers of their choice to choose other the VSSs. Thus, the concerning conduct also will probably be considered as tying.

(iii) Potential Refusal to Deal Claim

Another possible respect that the concerning conduct may be alleged to be is refusal to deal with the other VSS providers. Under *United States v. Colgate & Co.*, everyone is free "to exercise his own independent discretion as to parties with whom he will deal."[49] This means that, under no particular circumstance, no one has any duty to deal with anyone. However, under some exceptions, the duty to deal may be established. Such circumstances may arise from variation of alleged party's conduct across customers – like discriminatory activity involving inconsistent dealing in the same market in *Otter Tail Power Co. v. United States*[50]– or variation across markets – like discriminatory activity involving doing the same business conduct in other comparable market in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*.[51] – or variation across time – like the cessation of prior business cooperation without reasonable cause in *Aspen Skiing*.[52]

In assessing this refusal to deal claim, it may be assessed under balancing standard, which the court will have to weigh between procompetitive and

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[49] *United States v. Colgate & Company*, 250 U.S. 300, 307 (1919).

[50] *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973).

[51] *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985).

[52] *Ibid.*

anticompetitive effects like in *Microsoft*,[53] or under business sacrifice test or no business sense test, which asks whether the conduct could be explained other than anticompetitive intent like in *Aspen Skiing*.[54] On one hand, under balancing standard, the court will have to consider and assess the weight of both anticompetitive and procompetitive effects of the alleged conducts in order to figure out whether the alleged conduct has more or less anticompetitive effects. If procompetitive effects weigh more than anticompetitive effects, the alleged conduct will not be considered as illegal conduct under antitrust law. But if the result is in the contrary, it will be considered as illegal antitrust conduct. Nonetheless, in practice, the court seldom reach this balancing step and this balancing "is regarded as rare, even a myth."[55] On the other hand, under the business sacrifice test, the court will have to consider and assess only if there is any possible explanation of the alleged conduct other than with anticompetitive intent. The court may look for inference to no business sense to create arguable assumption of anticompetitive intent and effect – like the aforementioned discriminatory inconsistent behavior or unreasonable cessation – which infers the sacrifice of profits and does not make any business sense other than the exclusion of its rivals. While the criticism of a balancing test relates to hard-to-be-administered calculation of costs, innovation incentives, and dynamic efficiency, the profit sacrifice test incorporates "the presumption that the dynamic benefits of encouraging innovation outweigh the costs of permitting firms to charge monopoly prices for their lawfully obtained monopolies."[56] However, it may be difficult to establish a universal standard for the conduct and some commentators even abandon "the quest for a single definition of unreasonable exclusionariness - a 'holy grail' that may never be precisely located,"[57] and there is no clear bright line, condition, or test on whether which standard will be the prevailing standard that the courts will use to assess the refusal to deal claim.

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[53] Heather Schneider, *supra note* 41.

[54] *Supra note* 51.

[55] C. Scott Hemphill, "Less Restrictive Alternatives in Antitrust Law," Columbia Law Review Forum, Vol. 116, 927, pp.928–929 (2016).

[56] A. Douglas Melamed, "Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal," Berkeley Technology Law Journal, Vol. 20, 1247, p.1267 (2005).

[57] Thomas A. Lambert, "Defining Unreasonably Exclusionary Conduct: The "Exclusion of a Competitive Rival" Approach," North Carolina Law Review, Vol. 92, 1175, pp.1199–1200 (2014).

The concerning conduct is not exactly the typical refusal to deal because an OSS provider does not completely deny its service to its competitors. This is because no other VSS provider has ever had any prior course of dealing with an OSS provider, and the fact that an OSS provider is used to provide the results containing other VSS may goes beyond the concept of prior business dealing.[58] And, because an OSS provider may not charge other VSS providers any fee, under Aspen skiing profit sacrifice test, stopping to display other VSS providers at their correct relevant places may not cost the OSS provider any profit loss.[59]

However, the aforementioned application is only based on the assumption that cessation is necessary for the conduct to be considered as refusal to deal and the assumption that no business sense is the only applicable standard in the case. If cessation and discriminatory inconsistent dealing are viewed only as the two examples of inference to no business sense, there can also be other inference. Or, if the standard is not necessary only limited to profit sacrifice test like in *Aspen Skiing* – meaning balancing standard is used like in *Microsoft* – the fact that an OSS provider will not lose its profits from its action is likely to be weighted less in the analysis because it will not be the deciding factor for the alleged action. Instead, it will likely be considered as part of procompetitive effects in the sense that it will improve a chance for the OSS provider to enter into the VSS market. However, this possible procompetitive effect will have to be assessed whether it is reasonable and can become legit justification or not. Also, the procompetitive effects of its action will need to be assessed and weighted against its anticompetitive effects, and if anticompetitive effects are more heavily weighted than procompetitive effects, the concerning conduct will possibly be anticompetitive refusal to deal. Nonetheless, procompetitive justification and the balancing of anticompetitive and procompetitive effects are outside the scope of this article and will not be further discussed.

Apart from its possible procompetitive effects, the result of this self-favoring action – like that of Google – may be to divert some traffic that may be of other VSS providers to its own VSS.[60] This result does not necessarily evidence to only anticompetitive effects, but it can be interpreted in various manners – like the

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[58] Marina Lao, "Search, Essential Facilities, and the Antitrust Duty to Deal," Northwestern Journal of Technology and Intellectual Property, Vol. 11, No. 5, 275, p.306 (2013).

[59] *Ibid.*

[60] Nathan Newman, *supra note* 47, pp.642–643.

integrated VSS are superior or it is customer choice, without any coercion or forcing, to use the integrated VSS. However, it may also be interpreted in an anticompetitive aspect as it may possibly be the evidence that the consumers are actually deprived of their choices and have to use the integrated VSS.

Within the scope of this subsection of potential refusal to deal claim, essential facility doctrine is worth mentioning. Essential facility doctrine arises from the concerted refusal to deal case, *Associated Press v. United States*, which a group of newspapers operators joined together to share news they gathered but refused to share such gathered news with their competitors.[61] In order to invoke essential facility claim, the defendant's output will have to be so critical to the other firms' need to succeed in their business, and the defendant denies them the access to such essential facility depriving them of the reasonable opportunities to triumph and being successful. There is an idea that, on the search service side, due to the search service low cost and the "habituated to using Google shopping, Gmail, YouTube, and Google Maps, one would face significant costs in changing one's habits-costs that might be greater than the benefits derived from using different search engines," and "a search engine could become an essential facility and thus raise potential antitrust concerns."[62] Some even reach the conclusion that "governments should impose restrictions on Google designed to benefit its rivals."[63]

On the contrary, there is also an idea that because the competitors' VSSs still appear in Google organic search result, thus, Google does not exclude its competitors and "Google search does not fit the definition of an essential facility."[64] In the opposite view, although when the users enter the key words in the OSS, the competitors' VSSs also come up under the integrated VSS, the change of status quo of the competitors' VSSs by moving them down the bottom of the page or even on the latter page does not come without any consequence. It is possible that the users may prefer to click on the results that come first in hope that they will be the most relevant results that the users are looking for. Moreover, if the users do not have so much time to spare, it is likely that the users may only click into the first few results

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[61] *Associated Press v. United States*, 326 U.S. 1 (1945).

[62] Adam Candeub, "Behavioral Economics, Internet Search, and Antitrust," I/S: A Journal of Law and Policy for Information Society, Vol. 9, 407, p.420 (2014).

[63] Mark A. Jamison, "Should Google Be Regulated As A Public Utility?," Journal of Law, Economics and Policy, Vol. 9, No. 4, 223, p.224 (2013).

[64] *Ibid,* p.238.

showing up in order not to spend too much time on the search. Although with rational-choice economic theory, "advertising can promote efficiency by informing the consumer about the product's attributes and prices as well as alternatives to the product,"[65] if the matter is observed in view of behavioral economics – with some deviations by replacing rational action assumption with a more realistic assumption such as mistakes in judgment and perception or troubles following rational plans[66] – advertising could potentially exploit consumers' behavioral biases such as underestimating the cost or overestimating the value of the product, and commentary even "suggests that manipulative advertising is a justification for policymakers to regulate specific markets."[67] Ergo, it is also possible that in this view, consumers may mistakenly overlook the bottom of the page or the latter pages, which may contain more relevant VSSs, instead of rationally looking at all available VSSs which could be too many. In this respect, if the organic search provider favors its own VSS, and displays its own service before the competing VSS, consumers may be deprived of the choices which may possibly be more suited for the consumers' demand for more relevant search results. Therefore, even though it may not be a typical complete exclusion of its competitors, it can have exclusionary effects against its competitors to some extents, and when weighting the effects of the concerning conduct, it should also be counted against such conduct.

There is also the idea that search services "are not essential portals from the perspective of any side in the multi-sided search engine platform" because albeit its usefulness, users can directly type in its uniform resource locator (URL).[68] However, although it is possible for internet users to type in the exact URL of the website that they want to be directed to, sometimes, they may not know the exactly full URL of such website, and may need the search service to direct them to the website. Also, in case that the users only have some vague idea of the products they want in their mind, they may just want to find the best VSS that will direct them to the wide variety of products that match their demand the most with the lowest price possible. In this way, if the organic search provider overrides the search algorithm and come straight forward to the front line of the search results, if the users are not complicated

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[65] Jim Hawkins, "Exploiting Advertising," Law and Contemporary Problems, Vol. 80, 43, p.46 (2017).

[66] Ryan Bubb and Richard H. Pildes, "How Behavioral Economics Trims its Sales and Why," Harvard Law Review, Vol. 127, 1593, p.1603 (2014).

[67] Jim Hawkins, *supra note* 65, pp.44–46.

[68] Marina Lao, *supra note* 58, pp.299–300.

enough to notice the different or if the users do not have enough time to look through all the search result, it is very likely that they will be deprived of the useful information that they might be seeking for. Moreover, because of the fact that it may not be so practical for every internet users to remember all the URLs on the internet, it may be very difficult, without any search service, to reach the websites that the users are searching for, especially if such website is the VSS that will best correspond to the users' vague demand on the products that even the users may be unsure of. Therefore, an OSS is crucial to some extent that, without it, customers will have to find other way to get to the products that they desire. In this respect, an OSS may possibly become essential facility with the duty to deal with its competitors.

However, the likelihood of success of this essential facility clam may be questioned as the Supreme Court has yet to apply this essential facility doctrine directly to any case. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Supreme Court stated that it has "never recognized" the essential facility doctrine, and it "find no need either to recognize it or to repudiate it" in its opinion.[69] The comments of the Supreme Court made it clear that it does not favor the doctrine.[70] And, even the essential facility doctrine is recognized, it may have some limitations as illustrated by Professor Phillip Areeda. In his article, some of professor Areeda's conclusions are that there is no duty to share in general, and no one should be forced to deal unless to substantially improve competition, and even when the conditions for essential facility are satisfied, it is not unlawful per se.[71] Therefore, it is still skeptical whether the essential facility doctrine will be upheld by the Supreme Court, and even so, whether the proven fact from the concerning conduct will satisfy the conditions of the essential facility doctrine.[72]

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[69] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 410–411 (2004).

[70] Marina Lao, "Networks, Access, and "Essential Facilities": From Terminal Railroad to Microsoft," SMU Law Review, Vol. 62, No. 2, 557, p.565 (2009).

[71] Phillip Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," Antitrust Law Journal, Vol. 58, No. 3, 841, pp.852–853 (1989).

[72] However, there is also the idea that essential facility doctrine can be used as a tool by the courts "to effectuate a balance between granting an inventor any intellectual property rights they deserve, ensuring that competition remains present, and ensuring that the proper combination of incentive and protection is present in order to promote innovation." Armando A. Ortiz, "Old Lessons Die Hard: Why the Essential Facilities Doctrine Provides Courts the Ability to Effectuate Competitive Balance in High Technology Markets," Journal of High Technology Law, Vol. 13, 170, pp.213-214 (2012).

V. Possible anticompetitive effects from the Concerning Conduct

(i) Deprivation of Information

The use of online advertisement by Advertising Sellers and the use of search service to find the products by consumers may be collectively considered as the advertisement initiated jointly by both consumers and Advertising Sellers. It is one of the most effective means among the advertising means illustrated at the beginning of the article. The ultimate objective of the use of search service by consumers and online advertising by Advertising Sellers, as same as the objective of ordinary truthful advertisements,[73] is for the consumers to be informed of the Advertising Sellers' products, and by the whole information possessed by the consumers, the consumers will be able to choose the products that are best suited to the consumers' demand. If the consumers are informed, the competition between the Advertising Sellers will drive the market to be competitive[74] and the price will be driven to competitive price upon the assumption that the lower-cost sellers will prevail, and the higher-cost sellers will adapt themselves to become lower-cost sellers, making them use less social resource to produce and distribute their products, which is the goal of competitive market. This is due to the need to lower their prices to meet others or to differentiate the products from other providers in a competitive market.[75]

Having the consumers informed is the foundation assumption of standard asset pricing model.[76] This is basically the same idea when the Security Exchange Commission implement the securities legislation – to protect the investors "by making certain that all investors trade on the basis of equal information."[77] Although the

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[73] Deseriee A. Kennedy, "Marketing Goods, Marketing Images: The Impact of Advertising on Race," Arizona State Law Journal, Vol. 32, 615, pp.624–625 (2000).

[74] Katherine J. Strandburg, *supra note* 5, p.109.

[75] Elisabeth Graffy, "Does Disruptive Competition Mean A Death Spiral for Electric Utilities?," Energy Law Journal, Vol. 35, 1, p.25 (2014).

[76] Frederick C. Dunbar & Dana Heller, "Fraud on the Market Meets Behavioral Finance," Delaware Journal of Corporate Law, Vol. 31, 455, p.474 (2006) ("In a standard asset pricing model, all agents are rational and fully informed about prices. As a result, equilibrium prices must reflect the true risk-adjusted value.").

[77] Christopher Paul Saari, "The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry," Stanford Law Review, Vol. 29, 1031, pp.1032–1033 (1977).

asset pricing model may be the model made for investment asset pricing, the idea behind it is intuitive and may also arguably be applied to the consumers outside securities markets. Efficient Market Hypothesis stands on the assumption that (i) investors will make rational decision, (ii) even if they do not make such rational decision, their deviation from the rational decision will cancel out each other making market efficient, and (iii) even if such deviations do not cancel out each other perfectly, the arbitrager will help bringing the price back to the efficient level again.[78]

However, even if this Efficient Market Hypothesis applies with the consumers outside securities markets and it brings out the efficient market price – price that is not more or less than what the price should be in accordance with the available information, which may be comparable to competitive price[79] – it only assures that the price of the products will arrive at the competitive price in the end. It does assure the price in between the process of transition from the anticompetitive price to competitive price, and the uninformed consumers in the interim will likely to be taken advantage of. Therefore, without adequate information practically available to the consumers, the consumers are vulnerable to the chance of being exploited. For example, suppose that a consumer wants to buy a specific camera. He uses the search service to search for the specific camera that he wants. If such search service is efficient and provides him with adequate information on the camera he seeks, he will probably be able to buy the product that matches his demand at the price most profitable to him. However, if the search service that he uses is not so efficient, and it shows only the products that do not meet his demand or shows the products that meet his demand but have higher price than the price of the same products in the market, the consumer, deprived of the information about the existence of the product that meet his demand or the lower-priced product, may coercively choose to buy either presented products by the search service provider without having any chance of choosing other products, all because of the lack of information. Thus, having adequate information is important to the consumers, and being deprived of such information is likely to make the consumers worse off.

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[78] Stephen A. Ross et al, Corporate Finance, 11th Edition, (New York: Mc Graw Hill, 2016), pp.435–436.

[79] William O. Fisher, "Does The Efficient Market Theory Help Us Do Justice in A Time of Madness?," Emory Law Journal, Vol. 54, 843, p.848 (2005).

As search service, altogether with the internet, may act as "the modern gatekeeper of information,"[80] the concerning conduct of putting its own VSS before the competitors' VSSs when consumers uses its OSS regardless of whether its own VSS actually matches what the consumers are really search for or not is likely to deprive consumers of the options to gain more accurate information on the products. The reason that consumers are using the search service, as same as any ordinary search,[81] is to gain truthful information about the products, and they are trying to achieve this by searching for the VSSs that may provide them with thorough information on the specific product. If the enormous OSS provider with monopoly power or very high market power in OSS market uses its power to coerce or force the consumers to use its VSS, what consumers will possibly be deprived of is the opportunity to spend their time more efficiently to look for the products they are searching for instead of having to look through the VSS of the OSS provider first.[82] Therefore, it is possible that the concerning conduct will make the consumers uninformed or not as informed as they should be, and will possibly be taken advantage of due to the lack of essential information as in the aforementioned example.

The concerning conduct may also lead to less incentive of other vertical search providers to compete, which will result in the reduction of competition in VSS market. This lower competition may deprive the consumers of the information they seek too. The competition between VSS providers facilitates the scheme by providing the consumers with the most thorough information as practically available. The basic economics of the competition between VSS providers is no different than of any other horizontal competition. Antitrust law benefits consumers and economy because competition reduces prices,[83] and improves quality.[84] The more they compete, the

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[80] Geoffrey A. Manne and Joshua D. Wright, "If Search Neutrality is The Answer, What's the Question?," Columbia Business Law Review, Vol. 2012, 151, pp.160–161 (2012).

[81] David Adam Friedman, ""Dishonest Search Disruption": Taking Deceptive-Pricing Tactics Seriously," UC Davis Law Review, Vol. 50, 121, pp.123–125 (2018).

[82] For the arguments that the concerning conduct does not deprive of all consumers' choices because the consumers will still be able to choose other vertical search services listed after the integrated vertical search service of the organic search provider. See Section IV Potential Cognizable Antitrust Claims, subsection ii. Potential Tying Claim, and subsection iii. Potential Refusal to Deal Claim.

[83] Christopher R. Leslie, "Trust, Distrust, and Antitrust," Texas Law Review, Vol. 82, 515 p.525 (2004).

more quality that consumers will get, and the less price that consumers will have to pay. This is because when the search providers compete, they will innovatively think of the way in which their services can be improved to meet the consumers' demand. And, the more the service meets the consumers' demand, the more the consumers will be better off. One prospective is because, with competition, in order to maintain or acquire more users, each VSS provider will have to continuously develop the way "to organize and index a great deal of content on the internet"[85] to give the consumers thorough and comprehensive information as practically possible to attract more consumers and to hold on the current consumers, not letting them be attracted by the other service providers who may also be developing the more efficient VSS. In this way, the VSS is likely to be improved, and the consumers are likely to gain adequate information for their shopping purposes. Thus, the competition between the VSS providers is desirable for the consumers.

On the other hand, if there is only one major VSS provider in the VSS market, almost all aspects of the VSS will be mandated by such powerful VSS provider. Such monopolization would harm innovation as it reduces competition and incentive to improve product quality.[86] Such major VSS provider will have low, if not none, incentive to improve its service. And, the consumers may not be so beneficial from the information gain through the VSS as when there are many VSS providers competing. Therefore, it is possible that the concerning conduct will produce these anticompetitive effects.

(ii) Coercion of Demand

As illustrated in Section IV Potential Cognizable Antitrust Claims, subsection ii. Potential tying claim, it is possible that the demand of the consumers be coerced, and the consumers may be forced to stay with only one VSS operated by the same OSS provider as in typical effects of tying.

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[84] Caitlyn Cullen, "Nipped in the Bud: How Legal Disparities Create Financial Growth Hurdles in the State-Sanctioned Marijuana Industry and Why Bankruptcy Courts Can Provide a Remedy," University of Miami Law Review, Vol. 74, 310, p.350 (2019).

[85] Frank Pasquale, "Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries," Northwestern University Law Review & NULR Online, Vol. 104, 105, p.138 (2010).

[86] Max Miroff, "Tiebreaker: An Antitrust Analysis of Esports," Columbia Journal of Law and Social Problems, Vol. 52, 177, p.215 (2019).

This potential effect can be achieved in 2 different ways. One of which is from the direct effect of eradicating the likelihood that the consumers will choose other VSSs by overriding the algorithm and making its own VSS comes up as the first search result. Although Federal Trade Commission concluded that "the firm's practice of often favoring its own content in the presentation of search results, sometimes referred to as search 'bias' did not violate U.S. antitrust law,[87] this manipulative search results can "significantly decrease the traffic to that website and has the potential to force the website operator to shut down."[88] If this is the result of the fair competition between the OSS provider and the other VSS providers, there may arise no antitrust scrutiny because it will be duly to the consumers' choice, which may mean that its service is superior than the services of other VSS providers. Or, even if it is due to natural monopoly markets which monopolists do not take any step to exclude competitors, even though barriers to entry may exist, there is nothing antitrust law can do.[89] However, if this is the result of the use of monopoly power, it should be scrutinized under antitrust law to identify whether there are anticompetitive effects.

Another way is not directly happening right after the concerning conduct, but will happen after the other VSS providers fail to compete with the OSS provider and exit the market. If it happens, the consumers will be deprived of any other choice but to use the VSS of the OSS provider. This can also be viewed as a coercion by eradicating the other possible choice. Therefore, it is possible for the concerning conduct to produce these anticompetitive effects.

(iii) Unreasonable Price Increase

There may be a question on how a free search service provider can increase the price of its service without collecting any money from its customers on the search service side. Since this service involves two sides of the market, one easy way of increasing the price is to increase the advertising fees collectable from the Advertising Sellers. This effect may happen as a result of no competition because "as a matter of

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[87] Marina Lao*, supra note* 58, p.276.

[88] Tansy Woan, "Searching for an Answer: Can Google Legally Manipulate Search Engine Results?," University of Pennsylvania Journal of Business Law, Vol. 16, 294, p.303 (2013).

[89] Ramsi A. Woodcock, "Inconsistency in Antitrust," University of Miami Law Review, Vol. 68, 105, p.117 (2013).

economic theory, a firm will ordinarily charge supracompetitive prices when it has no competition."[90] If the major OSS is tied with the VSS, and the result of such action is that the major search service provider also gains monopoly power in the VSS as well. The other VSS providers may not be able to compete, and may have to exit the market. With lack of competition, as same as in a merger case, there may be incentives to raise price – called upward pricing pressure[91] as will be later discussed in (vii). Possibly, the price increase may be the increased fees collectable from the Advertising Sellers,[92]not the collection of fees from the customers from the search side because it may decrease the demand of the search service customers.

These increased fees will indirectly affect the customers buying products from the Advertising Sellers because the increased fees will be counted as the costs of the products, and will be reflected in the increased price of the products sold to the customers. Ultimately, the customers will be the one paying for the increased price because it is very possible that the Advertising Sellers will not absorb the increasing fees, but will pass them through the customers via the price increase. However, it may be fair, to some extents, that the customers buying the products through the use of search service pay for the increased fees since they are the ones who benefits from the online and search advertising service. Nevertheless, they are not the only ones buying the products from the Advertising Sellers. Instead, there are other customers who know about and buy the products through other channels than through the use of online advertising and search service, but they will also have to bear the increase in price of the same products without gaining any benefits from the service. The question here will be whether it is fair for them to have to bear the passthrough costs in the form of increased price, or whether it is just a standard consequence that all

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[90] Paul Stephen Dempsey, "Predatory Practices & Monopolization in the Airline Industry: A Case Study of Minneapolis/St. Paul," Transportation Law Journal, Vol. 29, 129, p.135 (2002).

[91] Lydia Cheung, "An Empirical Comparison Between the Upward Pricing Pressure Test and Merger Simulation in Differentiated Product Markets," Journal of Competition Law and Economics (UK), Vol. 12, No. 4, 701, p.702 (2016).

[92] Ioannis Lianos, "Market Dominance and Search Quality in the Search Engine Market," Journal of Competition Law and Economics (UK), Vol. 9, No. 2, 419, p.423 (2013) ("The threat of domination and exclusionary conduct by dominant firms becomes even stronger in the search engine market, since it can result not only in excessive pricing for advertisers, but also in reduction of quality of search results, which harms both advertisers and users. Another concern is that excessive dominance in the search engine markets can harm competition in the upstream markets that are the main source of quality-improving innovations in the search engine market itself.").

buyers will have to share the costs of any mean of advertising that the Advertising Sellers have chosen to some degree. The question here is controversial.

The effect here is not so different than the effect from the increase of credit card fees by American Express Co. in *Ohio v. Am. Express Co.* that is illustrated in the dissenting opinion of Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN joined. In the dissenting opinion, the effects of the antisteering provision – the provision to prevent merchants from dissuading customers from using Amex card – which is alleged to lessen the competition between credit card companies, is that it will result in "higher profit-maximizing prices across the network services market" and "Consumers throughout the economy paid higher retail prices."[93] Also, "merchants generally spread the costs of credit-card acceptance across all their customers (whatever payment method they may use), while the benefits of card use go only to the cardholders."[94] This may be comparable to the concerning conduct in a sense that the benefits from the online advertising and search service only benefits the buyers using such service, and sometimes they may get certain discount or special benefits that the buyers using other means of purchase do not get. Nonetheless, there may be some different between this concerning conduct and the antisteering provision because no competition is projected as direct effect from the antisteering provision, which will happen immediately after the enforcement of the provision while the result of no competition for the concerning conduct will take time to happen after the concerning conduct has occurred. Also, it should be noted that for *American Express*, this effect is projected in the dissenting opinion, not in the opinion of the majority of the Supreme Court of the United States. Therefore, it may not be so clear whether this may be accepted as the likely effect of the antisteering provision.

The possibility of increase in advertising fees is not the only way that the price can be increased without collecting service fees from the customers on the search service side. As aforementioned in section III Real Cost of using Search Service and Possible Antitrust Claim for No Monetary Charge, the cost of using search service is not actually zero. Although there may be no monetary fees collectable from the search service users, besides indirect cost that users who buy products from Advertising Sellers will have to pay, the users also pay with their information and attention. In this

[93] *Supra note* 29, p.2294.

[94] *Ibid,* p.2302.

respect, the amount of information and attention that users pay to a search service provider is the price. As a search engine creates more advertising revenue, it induces consumers to spend more time on its platform in order to gather more data on consumer behavior.[95] Under normal circumstance, if the price is to be higher, the service that the users get should be improved, upgraded, or more. If the price increases without any improvement or upgrade on the service, it may be an indication that something wrong possibly happens. One result of concerning conduct is that because the integrated VSS has overridden the OSS algorithm and has come on top of every search results regardless of whether a competitors' VSSs might be more relevant,[96] as illustrated in the previous sections, consumers will likely to incur more search costs due to the need to spend more time[97] and attention to it. Thus, in a sense, the price that consumers will have to pay will be increased without gaining anything in returned. This is based on the assumption that the integrated VSS may not be as related to the keywords that consumers input into the search box, otherwise such integrated service must have already appeared on top of the search results without having to override the search service algorithm. For the same reason, it is also assumed that other VSSs are better suited for the consumers as they may come before the integrated VSS absent the override. Upon this assumption, in order for the consumers to get to the other search services they desire, they will have to spend more attention through the integrated search service. In this respect, it may possibly be concluded that consumers have to pay higher prices through higher attention in order to get the same search service without any reasonable equivalent value gain in exchange, and this may be considered as undue or unreasonable price increase. This is another possible anticompetitive result of the concerning conduct.

(iv) Lower Quality Service

Another possible anticompetitive effect is the lower quality service. As users desire useful search results, one possible harm to users is "by providing low-quality or

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[95] Maurice E. Stucke and Ariel Ezrachi, *supra note* 17, p.88.

[96] This is as same as Google's action demonstrated by Joshua G. Hazan in Joshua G. Hazan, "Stop Being Evil: A Proposal for Unbiased Google Search," Michigan Law Review, Vol. 111, 789, p.803 (2013) ("By guiding users to Google's own content regardless of whether a competitor's content might be more relevant, Google meets the second requirement for a § 2 violation: anticompetitive conduct.").

[97] Maurice E. Stucke and Ariel Ezrachi, *supra note* 17, p.92.

deliberately biased results."[98] As a consequence, the deprivation of information will make the OSS worse. Before the implementation of the concerning conduct, the OSS was a search service which will provide the results relating to the consumers keywords with the priority of the search results dependent on the level of relativity of each result to the keywords. Those results are likely to be the best ones that correspond with the actual intention of the consumers because they come without any override or coercion from the OSS provider. Thus, such service is very likely to have the most desired quality for the consumers. However, after the implementation of the concerning conduct, such results, which are used to be presented on top of the search results due to their relativity with the key words, are put after the integrated VSS. This reduction in the relevance of results could be seen as a potential exploitation of users, and may lead users to conduct fewer searches on the OSS or to switch to another search engine[99] if the OSS provider does not have enough market power to maintain its users. Therefore, the OSS is downgraded in term of its quality, and it does not correspond only with the best suited results for the consumers.

Another effect that may possibly come from the tying of the organic and VSSs is the decrease in incentive to improve the service. Because the integrated VSS may divert the traffic from other VSSs to it, other VSS providers will have less incentive to improve their services since although they may be able to improve their service, as long as the integrated VSS can keep up, it will possibly still be in possession of more market share even though the quality is the same. This means that the integrated VSS is likely to exclude the slightly or evenly efficient VSSs from the market. Thus, the other VSS providers are likely to have less incentive to invest more in their service, and the consumers will be deprived of the opportunity to gain more efficient services. This is also contributed to the incentives "to degrade quality on the free side of the market below levels that consumers prefer, if doing so increases its profitability, or market power, among the paying participants."[100]

In case that the concerning conduct induces the other VSS providers to exit the market, and the OSS provider becomes the sole major VSS provider, it will have less incentive to improve its services because there is no competition and there may be very unlikely that it will lose its market share. This threat of excessive market

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[98] James Grimmelmann, *supra note* 13, p.16.

[99] Pinar Akman, *supra note* 19, p.362.

[100] Maurice E. Stucke and Ariel Ezrachi, *supra note* 17, p.72.

power could harm competition in upstream markets which are "the main source of quality-improving innovations in the search engine market itself."[101] This is the normal likely consequence of the market with no competition.

Another possible argument is that if the concerning conduct is likely to create a lower quality service, the number of its consumers may decrease[102] due to the lower attractiveness of its services. Therefore, in this perspective, the OSS provider may choose not to lower the quality of its services because if it lowers its service quality, it will risk losing customers. However, in the extreme case, if the concerning conduct makes all major VSS providers out of the market, the OSS provider will have no competitor. If the consumers still want to use the service, they will have no choice but to use the OSS provider's VSS even though it is not as efficient as it can be. If this is the case, the number of consumers diverted to other services will be small since there is no major service to divert to. This is contributed to the OSS provider's high market power and the lack of competition.

Moreover, because the OSS and the VSS are offered with no monetary fee, there can be psychological effect to the consumers. It is possible to think that since these are free services, which consumers may switch to alternative search services with one click, no coherent monopolization case[103] or anticompetitive effects can be resulted from the concerning conduct. It may be alleged that if no monetary fee means zero cost, consumer welfare cannot be harmed by the overcharges and output restrictions.[104] However, as the markets are two-sided with a probable strategy of charging advertising sellers to subsidize consumer uses of its search engine,[105] combined with the costs of personal information and attention,[106] the real costs of using OSS and VSS services may not be zero and defending it with only zero-price defense may not be logical. Also, because, no-monetary-fee products create high degree of consumer demand for the products,[107] the consumers may be less selective

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[101] Ioannis Lianos, *supra note* 92.

[102] Pinar Akman, *supra note* 19, p.362.

[103] Nathan Newman, *supra note* 47, p.405.

[104] John M. Newman, *supra note* 23, pp.151–152.

[105] C. Scott Hemphill, "Network Neutrality and The False Promise of Zero-Price Regulation," Yale Journal on Regulation Bulletin, Vol. 25, 135, pp.172–173 (2008).

[106] John M. Newman, *supra note* 22, p.552.

[107] John M. Newman, "Antitrust in Zero-Price Market: Application," Washington University Law Review, Vol. 94, 49, p.74 (2016).

because they may think that since the service is free, they should not care so much about the quality of the service. The consumers may choose to use the OSS's VSS even if it is less efficient than those of the other VSS providers provided that it is not too far less efficient. Or, the consumers may think of it as if they lose nothing to change from their current VSS to the OSS's VSS. Either way, the consumers may switch to the OSS's VSS regardless of the other equally or more efficient competitors. If the equally or more efficient competitors are excluded, the competition and innovation will be less. Such result is contrary to the objective of the antitrust laws and regulations.

However, the above analysis only applies when after the OSS provider has already driven the other VSS providers out of the market. The process in between may be questioned. Before the other major VSS providers are driven out, it is also possible that there will be some competition between them, although the OSS provider will have its advantages as the major and well-known OSS platform. It is very likely that in the short run, some reasonable consumers may shift to the other VSSs should the OSS provider's VSS is less efficient. But in the long run, if the consumers are indifferent about the no-so-far more or less effectiveness of the services, the advantageous scale will be weighted toward the OSS provider. If the other major VSS providers cannot come up with something far more efficient than that of the OSS provider, the likelihood that they will prevail is low. Therefore, in light of the idea discussed earlier that the innovation of the VSS may be stopped, there is the possibility that the concerning conduct will exclude the equally or more efficient competitors while remaining almost the same number of customers in the long run. Although this is just the probability, it should be regarded as possible anticompetitive effect of the concerning conduct and should be counted against its antitrust validity when being assessed.

(v) Barriers to Entry

There are many ways that the concerning conduct can create the barriers to entry depressing competition. Without considering sunk costs of infrastructure investment and product development, which is another barrier of entry that any potential VSS competitor will have to endure,[108] as aforementioned, due to its

[108] Andrew Langford, "gMonopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention?," Indiana Law Journal & Supplement, Vol. 88, 1559, p.1575 (2013).

negative effects of making its competitors have less incentive to compete, it induces its competitor to exit the market and decreases the likelihood of new entrants. An entrenched OSS provider with monopoly power is likely to have necessary resources to preserve its dominance, and "new entrants and smaller competitors may find themselves excluded or unable to reach public consciousness."[109] And, even if the major OSS provider raises its price either by raising the advertising fees or by requiring more attention toward its VSS, the supply respond is unlikely to happen due to the lack of opportunity to gain profitable market share. From this perspective, small VSS providers will be unlikely to be successful and may disappear from the market. Even the small providers, which may not be very efficient today may become more efficient in the future, and because they may all be eliminated from the market, the consumers may possibly be deprived of the opportunity to have a more efficient VSS provider in the future.

Another reason is because of the indirect network effect. Network effects happen when the value of a product to a user increases with the number of users using the product, and it can be direct – meaning its value to the consumers will increase if there are more consumers using the product, or it can be indirect – meaning its value to one group – like the software developers – will increase if there are more consumers using the product.[110] For VSS market, if there are many users, it will be more profitable for Advertising Sellers to advertise, and the more Advertising Sellers use the advertising service, the more will the search service be valuable to the consumers since there will be much more information that consumers can obtain from the VSS. If the concerning conduct coerces or forces the consumers to use the integrated VSS, the Advertising Sellers will have more incentive to advertise in the integrated VSS, and will have less incentive to advertise in the other VSS. Thus, it will be harder for the other VSS providers to expand or for the new VSS providers to enter the market. This can be considered as a barrier to entry arising from the concerning conduct.

Again, if this effect arises from the fair or natural competition, it may not incur any antitrust scrutiny, but the effects here occur from the concerning conduct, which

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[109] Oren Bracha and Frank Pasquale, "Federal Search Commission? Access, Fairness, and Accountability in the Law of Search," Cornell Law Review Online, Vol. 93, 1149, pp.1174–1175 (2008).

[110] Catherine Tucker and Alexander Marthews, "Social Networks, Advertising, and Antitrust," George Mason Law Review, Vol. 19, No. 5, 1211, pp.1217–1218 (2012).

uses its monopoly power over the OSS market to gain market power in the VSS market. Therefore, the concerning conduct should be scrutinized under antitrust law.

Another barrier to entry which may be natural for search service is the big data barrier to entry. As Daniel L. Rubinfeld & Michal S. Gal illustrated, "the collection and analysis of big data has undoubtedly increased social welfare. However, big-data markets are also often characterized by entry barriers, which, in turn, have the potential to create durable market power in data-related markets or to serve as a basis for anticompetitive conduct."[111] Because OSS and VSS providers will collect and store information from their users for commercial use, it may be hard for a new entrant that have no initial collected consumer data base to compete with the incumbent OSS or VSS firms. This is also another possible barrier to entry.

(vi) Exclusion of Competitors

If the OSS is considered as a bottleneck to the Internet invoking essential facility doctrine, one may advocate the claim that the OSS provider excludes its competitors from access to user and from advertising revenue and consumer sales[112] in order to exclude competitors from meaningfully competing.[113] This is because the concerning conduct excludes its competitors in the VSS market from showing up in the sequence they should be in the major OSS. Although it is not a complete exclusion as its competitors' VSSs are displayed after the OSS's VSS or lower in the ranking or are not shown at all,[114] as already discussed, the competing VSSs may be considered as excluded in a certain degree. Thus, in this aspect, the other VSSs, which are its substitutes are partly excluded from the fair competition in the market.

Also, it may be preferable for the market to have different search service providers in each level because the possibility that they will compete with one another and bring about the better-quality services will be higher. Moreover, if there are a lot of search service providers in each search level, there may be a likelihood that the VSS will grow and expand to the OSS in the future. There can even be a

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[111] Daniel L. Rubinfeld and Michal S. Gal, "Access Barriers to Big Data," Arizona Law Review, Vol. 59, No. 2, 339, p.381 (2017).

[112] Geoffrey A. Manne and Joshua D. Wright, *supra note* 80, p.158.

[113] Lisa Mays, "The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe," The George Washington Law Review & Arguendo, Vol. 83, 721, p.749 (2015).

[114] Marina Lao, *supra note* 58, p.301.

potential that those VSS providers may grow into a maverick – a "firm with low costs, high excess or divertible capacity, superior innovation, an ability to disguise output increases, or other factors that make it a 'disruptive' or competitive influence in the market"[115] or as described in the Horizontal Merger Guidelines of U.S. Department of Justice and the Federal Trade Commission as "a firm that plays disruptive role in the market to the benefit of customers"[116] – in their own VSS market or even the OSS market. Having a maverick firm would prevent the other incumbent firms from reaching a higher-than-competitive price and prevent or limit coordination among other firms in the market.[117] Also, this will be advantageous for the OSS market because it means that there will be more choice for the consumers to choose. The concerning conduct prevent this result by tying the OSS with the integrated VSS to exclude its nowadays competitors in vertical search market and its possible future competitors in the OSS market.

(vii) Upward Pricing Pressure

As the effect of the concerning conduct is possibly directed toward the major or sole proprietorship of the market share in the VSS, if such effect actually happens, the integrated VSS provider is likely to have to face the pressure to raise its price due to the absent of competition. This upward pricing pressure is as same as the result of the reduction of competition from a merger of two competing competitors in the same product market.[118] Thus, the prices of the VSS may rise. As a reminder, the way in which the price of the VSS may rise is not restricted only to the collection of service fees from the consumers. Instead, it may come in the form of higher advertising fees collectable from the Advertising Sellers, which will, in turn, be passed through to the consumers. Or, it may be in the form of requiring more information or attention from the customers. This upward pricing pressure will likely happen especially in the absent of readily supply respond. And as discussed above that the

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[115] Joseph F. Brodley, "Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals," Michigan Law Review, Vol. 94, 1, p.52 (1995).

[116] U.S. Department of Justice and the Federal Trade Commission, "2010 Horizontal Merger Guidelines §2.1.5," accessed 20 February 2020, from https://www.justice.gov/atr/horizontal-merger-guidelines-08192010/.

[117] Courtney D. Lang, "The Maverick Theory: Creating Turbulence for Mergers," Saint Louis University Law Journal, Vol. 59, 257, p.264 (2014).

[118] C. Scott Hemphill and Nancy L. Rose, "Mergers that Harm Sellers," Yale Law Journal, Vol. 127, 2078, p.2086 (2018).

supply respond is unlikely to happen, this upward pricing pressure may be more powerful.

Although the present of upward pricing pressure may result in the actual increase in prices, it is doubtful whether upward pricing pressure alone can render an antitrust violation. As the upward pricing pressure test was tried and rejected as the United States Court of Appeals, Second Circuit found "no error or abuse of discretion in the district court's rejection of the Upward Pricing Pressure test."[119] However, in issuing permanent injunction against the merger, the United States Court of Appeals, District of Columbia recognized the upward pricing pressure created by elimination of competitors.[120] And, in Fed. Trade Comm'n v. Wilh. Wilhelmsen Holding ASA, in granting a preliminary injunction, United States District Court, District of Columbia also accepted the analysis concerning upward pricing pressure.[121] Although all the aforementioned cases involve the attempts to enjoin the merger, and the upward pricing pressure presented in those cases is the result of the absence of face-to-face competition, the upward pricing pressure discussed in the analysis of the concerning conduct is not very different. The cause of the upward pricing pressure in the case of the concerning conduct is the absence of competition, which is considerably similar to the absence of face-to-face competition in the aforementioned cases.

Nonetheless, it should be noted that none of the opinions cited above is the opinion of the Supreme Court, and it may still be controversial whether the upward pricing pressure will be accepted as anticompetitive effect, which may create antitrust liability. Upward pricing pressure, alone, may possibly be considered as just the potential to increase prices. But it does not mean that the prices will actually increase. There can be so many factors to be considered in increasing the prices of the products or services, not limited only to the lack of competition. And, even without other competitors, the prices may or may not actually increase. Also, upward pricing pressure analysis may just try to capture the direction of a price change, not the magnitude of price changes.[122] Upward pricing pressure may be just one of many

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[119] *City of New York v. Group Health Inc.*, 649 F.3d 151, 158 (2d Cir. 2011).

[120] *United States v. Anthem, Inc.*, 855 F.3d 345, 356 (D.C. Cir.), cert. dismissed, 137 S. Ct. 2250, (2017).

[121] *Federal Trade Commission v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 64–66 (D.D.C. 2018).

[122] Andrew P. Vassallo, "The Use of Proportional Market Shares as Estimates of Diversion Ratios in Merger Analysis," Journal of Competition Law and Economics (UK), Vol. 9, No. 1, 231, p.234 (2013).

factors that contribute to the price increase. And, it will possibly have to be considered with other factors to create antitrust liability.

However, looking at the antitrust laws and regulations, it is hard to deny that one of the objectives of antitrust regulations is to prevent unreasonable price increases. One reason that agreements to fix price, limit output, or allocate the market, and the practices like refusal to deal, predatory pricing, tying or bundling violate antitrust laws is that these conducts have a substantial potential to raise prices. Upward pricing pressure is no different. It creates the possibility that the price will increase, although in a lower degree. Thus, upward pricing pressure created from the concerning conduct should be considered as one factor against the antitrust validity of the concerning conduct.

(viii) Increase in Bargaining Power

Another possible effect is the effect that may happen from any vertical integration or merger – increase in the market share of the merged entity which will result in the increase in bargaining power.[123] It may be intuitive to find that a vertical integration or merger will provide the company or the merging partners with the more bargaining power because they will gain leverage when dealing with other competitors of their downstream businesses knowing that even if they cannot make a deal, they can always count on their downstream businesses to purchase their outputs.[124] This could also involve an informal or MFN-plus agreement, or could lead to more incentives of an upstream firm to increase prices imposed on other downstream firms or rivals.[125] This also applies here because the tying between the OSS with the VSS may possibly be considered the integration between the VSS and the OSS. This will provide the OSS provider with the leverage and bargaining power when dealing with the other VSS providers.

It may be argued that even though the OSS provider gains more leverage and bargaining power, there is no anticompetitive effect because the OSS provider does not deal or contract with other vertical search providers. This is not incorrect, but in a

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[123] Erin C. Fuse Brown and James S. King, "The Double-Edged Sword of Health Care Integration: Consolidation and Cost Control," Indiana Law Journal & Supplement, Vol. 92, 55, p.69 (2016).

[124] Steven C. Salop, "Invigorating Vertical Merger Enforcement," Yale Law Journal, Vol. 127, 1962, p.1981 (2018).

[125] *Ibid.*

sense, if the course of dealing is not limited to the contractual interaction between the parties, the OSS provider may be dealing with the other VSS providers by displaying their services, even not according to the correct relevant results due to its override for its own VSS, in its OSS results. While this may not be contractual, it may be considered as actual or de facto dealing with the VSS providers' implied consents because this is mutually beneficial to both the OSS provider and the VSS providers.

There may be a question whether the VSS providers are eligible to request the OSS provider to exclude them from the OSS or not. This may be similar to the idea of the right to be forgotten, which is the right to delete one's own information that one posts oneself, that is reposted by others, or that is available online regardless of the origin.[126] Although the right to be forgotten may not be currently recognized in the United States, the right to privacy, which may be referred to as an individual's "right of determining ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others," is well-established.[127] Nonetheless, if such right is legally upheld, it may mean that the VSS providers have the right to request their removal from the OSS, and in order for the OSS to still be able to display them on its search results, it may have to contractually deal with them explicitly or impliedly. And, the lack of delete button may be the next issue[128] for the OSS provider to deal with. In this scenario, the gaining of leverage or bargaining power will be affecting the dealing between the organic search provider and the other vertical search providers. And, the increase in bargaining power may be counted as one of anticompetitive effects when weighting between anticompetitive and procompetitive effects of the concerning conduct. However, this scenario is only a hypothetical scenario, and in reality, there may not be any VSS provider that does not want its vertical search to be advertised since it may be on the contrary to its interest to be disconnected from the OSS.

The more fundamental question in this respect would be whether an increase in bargaining power can create an antitrust violation. The approach to assess this question is quite similar to those discussed in upward pricing pressure – due to the

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[126] Ignacio Cofone, "Google v. Spain: A Right to Be Forgotten?," Chicago-Kent Journal of International and Comparative Law, Vol. 15, No. 1, 1, p.2 (2015).

[127] May Crockett, "The Internet (Never) Forgets," SMU Science and Technology Law Review, Vol. 19, 151, p.168 (2016).

[128] Allyson Haynes Stuart, "Google Search Results: Buried if not Forgotten," North Carolina Journal of Law and Technology, Vol. 15, 463, pp.506–507 (2014).

potential to use this bargaining power to increase price, it is possible that the consumers will be worse off by the increase in bargaining power of the OSS provider. Without considering any beneficial effect of the concerning conduct, if OSS provider gains more bargaining power, it can impose higher prices to its counterparts – like other VSSs or advertising sellers. Such higher prices, as aforementioned, will be reflected back to the consumers in form of higher prices of the products or services. Especially if the products or services of the OSS provider have not improved, the end consumers, whose prices are the collection of all pass-through costs and mark-ups, are very likely to be worse off since they will have to pay more without getting anything more in return. This will increase the OSS provider surplus at the expense of the consumers – because the end consumer surplus will be lessened, and the deadweight loss will increase since there will be more consumers who cannot afford the higher prices. This may lead to lower social welfare. As same as upward pricing pressure, increase in bargaining power created from the concerning conduct should also be considered as one factor against the antitrust validity of the concerning conduct.

VI. Conclusion

As illustrated in the title of this article, this article elaborates only the anticompetitive effects of the concerning conduct. This article is also based on the assumption that the concerning conduct is approached under the balancing approach, which enable both procompetitive and anticompetitive effects of the concerning conduct to be evaluated. If the concerning conduct is, otherwise, evaluated under the no business sense test, there may be no need to consider these anticompetitive effects illustrated in this article if the OSS provider can prove that there is business justification for the concerning conduct.

This article is based on the assumption that the balancing approach is used and there is the need to assess the anticompetitive and procompetitive effects of the concerning conduct. After the real costs of using search service are identified – as directly paid information and attention and indirectly paid advertising fee – the potential predatory pricing claim is first assessed in the same section. If the market is looked at only as a one-sided market, under the traditional Brooke Group test with average variable cost comparison, the claim is unlikely to succeed due to its special characteristic of near zero pricing and marginal cost. Thus, if the same test is to be

applied, it may be more suitable to use other costs, like fixed costs, to assess the claim. Moreover, if the two-sidedness of the market is assessed thoroughly, the prices charged may not be zero any more, and it is uncertain whether the real marginal cost is more or less than the prices. However, it will be challenging to assess the value of the price since it will involve the value of information, attention, and pass-through advertising fees. If the plaintiff cannot correctly estimate those prices, the plaintiff is likely to fail the predatory pricing test.

For the potential monopolistic leveraging, the concerning conduct may satisfy the claim if the plaintiff can prove that the OSS provider intentionally uses its monopoly power in its major OSS market to obtain market power in the VSS market. Therefore, since the concerning conduct concerns the use of the power in the OSS market to gain more market share in the VSS market, it is possible that it will satisfy the claim. In the potential tying claim, the result of the concerning conduct is that the consumers will not be able to use each service separately. So, the concerning conduct take away the consumers' choice to use individual service and is possible to be considered as a tying.

For potential refusal to deal claim, under the current standard, since the concerning conduct does not completely deny its service to its competitors, it may survive the refusal to deal claim. But, looking at its economics of depriving its competitors of their opportunity (to compete) they once possess, the result of the concerning conduct may be no different than the traditional refusal to deal. Looking more on essential facility doctrine, although the validity of the doctrine is still in questioned, OSS is crucial to the extent that consumers will be worse off without it. So, though not much, there is still some possibility that the concerning conduct may be considered as refusal to deal.

After exposing the concerning conduct to the potential cognizable antitrust claims, the anticompetitive effects of the concerning conduct are assessed. Considering only anticompetitive effects – deprivation of information, coercion of demand, unreasonable price increase, lower quality service, higher barriers to entry, exclusion of competitors, upward pricing pressure, and increase in bargaining power – the concerning conduct is likely to produce many anticompetitive effects and make the consumers worse off. Although some anticompetitive effects, like upward pricing pressure and increase in bargaining power, are questioned should they be considered as anticompetitive effects, suppose that they cannot be use as cognizable

anticompetitive effects, they may be considered as anticompetitive factors that count against the concerning conduct. And, after considering all anticompetitive effects as priory discussed, the concerning conduct is very likely to produce many anticompetitive effects, which are possible to render its antitrust illegality.

However, as aforementioned that this analysis only deals with anticompetitive effects, the result may be different if procompetitive justification is considered and weighted. In fact, there is opinion that there is also procompetitive justification – like that if the OSS provider does not provide superior VSS to the consumers, they will likely to divert from the OSS's VSS and it will automatically lead to competition itself, or that this is the result of innovation to improve its product to attract more customers, and customers already know that it is the OSS's VSS comes up not because of its relevance but because of the promotion by the OSS, or that although it may harm the competitor to some extent, it may be acceptable because it does not harm competition, but it just removes the "free promotion" from its competition, and its competitions can always use other platform of advertising.[129] Therefore, like the anticompetitive effects, there may also be procompetitive effects as well as the business justification to earn more profits from the concerning conduct. It is also possible that the procompetitive effects will be weighted more than the anticompetitive effects, which will make the concerning conduct survive the antitrust scrutiny in the end. And, if the scrutiny of the concerning conduct is not cut short by its business justification, it will be very interesting to see how the weighting between the procompetitive effects and anticompetitive effects will be.

[129] James Ratliff and Daniel L. Rubinfeld, "Is There a Market for Organic Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability," Journal of Competition Law and Economics, Vol. 10, 517, pp.540-541 (2014).