A few thoughts on the European Commission decision against Google
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Regardless of the merits and soundness (or lack thereof) of this week’s European Commission Decision in the Google Shopping case — one cannot assess this until we have the text of the decision — two comments really struck me during the press conference.

First, it was said that Google’s conduct had essentially reduced innovation. If I heard correctly, this is a formidable statement. In 2016, another official EU service published stats that described Alphabet as increasing its R&D by 22% and ranked it as the world’s 4th top R&D investor. Sure it can always be better. And sure this does not excuse everything. But still. The press conference language on incentives to innovate was a bit of an oversell, to say the least.

Second, the Commission views this decision as a “precedent” or as a “framework” that will inform the way dominant Internet platforms should display, intermediate and market their services and those of their competitors. This may fuel additional complaints by other vertical search rivals against (i) Google in relation to other product lines, but also against (ii) other large platform players.

Beyond this, the Commission’s approach raises a gazillion questions of law and economics. Pending the disclosure of the economic evidence in the published decision, let me share some thoughts on a few (arbitrarily) selected legal issues.

First, the Commission has drawn the lesson of the Microsoft remedy quagmire. The Commission refrains from using a trustee to ensure compliance with the decision. This had been a bone of contention in the 2007 Microsoft appeal. Readers will recall that the Commission had imposed on Microsoft to appoint a monitoring trustee, who was supposed to advise on possible infringements in the implementation of the decision. On appeal, the Court eventually held that the Commission was solely responsible for this, and could not delegate those powers. Sure, the Commission could “retain its own external expert to provide advice when it investigates the implementation of the remedies.” But no more than that.

Second, we learn that the Commission is no longer in the business of software design. Recall the failed untying of WMP and Windows — Windows Naked sold only 11,787 copies, likely bought by tech bootleggers willing to acquire the first piece of software ever designed by antitrust officials — or the browser “Choice Screen” compliance saga which eventually culminated with a €561 million fine. Nothing of this can be found here. The Commission
leaves remedial design to the abstract concept of “equal treatment”. This, certainly, is a (relatively) commendable approach, and one that could inspire remedies in other unilateral conduct cases, in particular, exploitative conduct ones where pricing remedies are both costly, impractical, and consequentially inefficient.

On the other hand, readers will also not fail to see the corollary implication of “equal treatment”: search neutrality could actually cut both ways, and lead to a lawful degradation in consumer welfare if Google were ever to decide to abandon rich format displays for its own shopping services and those of rivals.

Third, neither big data nor algorithmic design is directly vilified in the case (“The Commission Decision does not object to the design of Google’s generic search algorithms or to demotions as such, nor to the way that Google displays or organises its search results pages”). In fact, the Commission objects to the selective application of Google’s generic search algorithms to its own products. This is an interesting, and subtle, clarification given all the coverage that this topic has attracted in recent antitrust literature. We are in fact very close to a run of the mill claim of disguised market manipulation, not causally related to data or algorithmic technology.

Fourth, Google said it contemplated a possible appeal of the decision. Now, here’s a challenging question: can an antitrust defendant effectively exercise its right to judicial review of an administrative agency (and more generally its rights of defense), when it operates under the threat of antitrust sanctions in ongoing parallel cases investigated by the same agency (i.e., the antitrust inquiries related to Android and Ads)? This question cuts further than the Google Shopping case. Say firm A contemplates a merger with firm B in market X, while it is at the same time subject to antitrust investigations in market Z. And assume that X and Z are neither substitutes nor complements so there is little competitive relationship between both products. Can the Commission leverage ongoing antitrust investigations in market Z to extract merger concessions in market X? Perhaps more to the point, can the firm interact with the Commission as if the investigations are completely distinct, or does it have to play a more nuanced game and consider the ramifications of its interactions with the Commission in both markets?

Fifth, as to the odds of a possible appeal, I don’t believe that arguments on the economic evidence or legal theory of liability will ever be successful before the General Court of the EU. The law and doctrine in unilateral conduct cases are disturbingly — and almost irrationally — severe. As I have noted elsewhere, the bottom line in the EU case-law on unilateral conduct is to consider the genuine requirement of “harm to competition” as a rhetorical question, not an empirical one. In EU unilateral conduct law, exclusion of every and any firm is a per se concern, regardless of evidence of efficiency, entry or rivalry.

In turn, I tend to opine that Google has a stronger game from a procedural standpoint, having been left with (i) the expectation of a settlement (it played ball three times by making proposals); (ii) a corollary expectation of the absence of a fine (settlement discussions are not appropriate for cases that could end with fines); and (iii) a full seven
long years of an investigatory cloud. We know from the past that EU judges like procedural issues, but like comparably less to debate the substance of the law in unilateral conduct cases. This case could thus be a test case in terms of setting boundaries on how freely the Commission can U-turn a case (the Commissioner said “take the case forward in a different way”).

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