DIGITAL DISRUPTION, INNOVATION AND COMPETITION LAW. HOW THE GOOGLE SHOPPING CASE IS FITTING THE FRAMEWORK?

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Abstract: In the light of the Google Shopping case and of the market impact of digital disruption and revolutionary business models, it will be debated whether traditional competition law tools and remedies are able as such to deal with the data driven economy. The question that will be scratched out is whether a more stringent effect based approach shall be advanced in order to tackle anticompetitive conducts in the digital environment.

1. INTRODUCTION

The innovation process is facing an epochal change.

What we experience as deeply new is the emergence of a data-driven economy where on one hand data and services are traded and used across sectors and borders (OECD, 2015) and, on the other hand, the data-driven innovations generate an unsolicited domino effect for the sole fact of insisting in the digital ecosystem (OECD, 2015 b).

Thanks to the digital technologies, in fact, innovations rely on and benefit from some of its inherent structural features, such as interconnection and network effects, disintermediation and scalability providing rapid access to a potentially global customer base.

If the data-driven innovation is disruptive, the process of creative destruction is much faster, affects the network at different layers and with different intensity but always in an accelerated and dynamic way.

The implications for competition law and policy are enormous, because disruptive inventions create new markets and affect all the others, revolutionize products design policy and market players business models at large.

In such context, it is debatable whether traditional competition law tools and remedies are able to deal with the digital disruption and it becomes urgent to verify whether it is desirable to adjust or even replace categories that are proven to be mainly suited to tackle anticompetitive conducts associated with stable innovations in markets where static competition prevails.

From a bottom-up perspective, such Grand Question could be well be addressed looking at

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the European Google shopping case, that seems to hardly fit in the traditional antitrust framework.

2. A GLOBAL FOCUS ON SEARCH DESIGN POLICY

The debate on search design policy and its intersection with competition law is fuelling around the world\(^3\).

This is not a surprise considering that the notion itself of “search bias” has been examined - and so far rejected - in different jurisdictions, US first\(^4\).

As known, in 2011 and later in 2012 the US Federal Trade Commission conducted an extensive investigation into allegations that Google had manipulated its search algorithms to harm vertical websites and unfairly promoted its own competing vertical properties, a practice commonly known as ‘search bias.’ In particular, the FTC evaluated Google’s introduction of ‘Universal Search’ to determine whether Google used that product to reduce or eliminate a nascent competitive threat.

In terms of principle, the FTC found that providing direct answers in search results instead of just 10 blue links on a page, rather than integrating an unlawful conduct, was the result of a product design change undertaken with a legitimate business justification. The evidence suggested that Google’s primary goal in introducing this content was to quickly answer, and better satisfy, its users’ search queries by providing directly relevant information.

The conclusion reached in 2012 was that the introduction of Universal Search, as well as additional changes made to Google’s search algorithms, could be plausibly justified as innovations that improved Google’s product and the experience of its users. The investigation was then closed because the Google’s search practices were not, “on balance, demonstrably anticompetitive.”


Also in China, an antitrust case against the most popular search engine Baidu, accused of strategic demotion of another service (RenRen), was closed for lack of antitrust harm.\(^6\)

In a 2012 ruling on a suit brought against Google by shopping comparison site Buscapé (who charged that Google favored its own shopping results over those of third-party sites), a Brazilian court decided that “nothing prevents [Google], in the conduction of its profit corporate business, from developing and using a tool (algorithmic formula) that returns results to a user query in Google search in a display order dictated by Google’s quality and relevance criteria.”

Recently, in July 2015, Taiwan’s Federal Trade Commission closed a two-year investigation and concluded that Google’s search display practices “could be seen as providing convenience to users and in line with users’ benefits”, and denied that such practices could constitute an anticompetitive refusal to deal.\(^7\)

### 3. The European Move

After the US Federal Trade Commission dealt with search neutrality in 2011 and 2012, the EU made a step further in Spring 2015.

On the 15th April 2015, the European Commission issued a statement of objections (also (SO) against Google after five years of investigations and three commitments proposals\(^8\).

The alleged violation concerns the disruptive service of Google shopping that drastically changed the internet search and the advertising markets as well as the *modus operandi* of the competitors therein.

According to the Commission, Google, holding a dominant position on the general search engine market, systematically granted preference to results linked - or in any way related - to entities with whom Google has commercial relations, irrespective of their


\(^7\) See Renda, text accompanying Note 47 and “Taiwan regulator finds no antitrust infringement in Google’s search, Play Store practices”, by Joy C. Shaw, 5 August 2015, and http://www.ftc.gov.tw/upload/cb6a6873-2c93-4a51-a97c-bbcb04277afbc.pdf.

actual relevance to the query of the user, thus infringing art. 102 TFUE\(^9\).

In the Commission reasoning the criteria set under art. 102 TFUE are met, since:

1) Google holds as dominant position in the markets for general search services in the EEA

2) As a dominant undertaking, Google shall bear the special responsibility not to further compromise the level of competition nor to undermine innovation on the market.

3) The conduct consisting in positioning and displaying more favorable in its general search results pages its own comparison shopping service compared to competing comparison shopping services qualifies for a discriminatory conduct in itself in violation of art. 102 TFUE.

The charge addressed is technically for discrimination. While Google’s ranking and display of certain types of search results are organized in a way that is specifically oriented to satisfy consumer attention and interests, the Commission believes that such design policy is likely to divert traffic from competition services, thereby foreclosing competition.

If no one doubts that policy concerns will drive the case, the final outcome shall ground on economic and legal arguments.

4. ON SOME LIMITS AND LACUNAE OF THE TRADITIONAL APPROACH

Looking at the Google case, it seems that the antitrust legal framework as it stands is unable to satisfactorily deal with search engines, where innovation, as the relevant driver, is responsible for creating and revolutionizing the feature of the market and the business models of its market players.

This proposition seems to be confirmed under three different lawyers at least.

First, to correctly frame the Google case, it is not redundant to mention that what is questioned in the SO is how Google allocates its space on its general search results pages. The Commission in fact does not question Google algorithms, nor does it contest their use.

Such distinction is not as sharp as it seems.

On one hand the Commission does not want to query the innovative service introduced by Google, nor does she intend to open a debate on if and to which extent the algorithms invented by search engines to display and rank their results shall be disclosed and transparent.

On the other hand, however, the Commission risks being ambiguous when it points out that «users do not necessarily see the most relevant results in response to queries to the detriment of consumers and rival comparison shopping services, as well as stifling innovation». From such argument in fact the Commission seems to infer that it is the algorithm in itself that raises a competition law issue, being responsible for selecting some results instead of others. And in any case, who

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decides and on which bases whether a result is the most satisfying from the consumer perspective?

Second, the Commission identifies as relevant the general search results market and alleges the existence of a dominant position held by Google. However, the boundaries of such market seem to be very mobile, at least because of the sources of access to information available on the Internet, both for consumers (interested in search results) and for merchants (interested in advertising products and services).

From a consumer standpoint, next to “traditional” search engines, whose number is constantly increasing (eg. Bing, Yahoo, Quora, DuckDuckGo), it is now possible to search the internet through research “assistants” (eg. Apple's Siri and Microsoft Cortiana). Furthermore, as the market in which the search engines operate is fast growing, new operators and services can rapidly enter the market: this is the case of specialized search (eg. Amazon, Idealoo, Guides, Expedia or eBay), as well as of social networks, such as Facebook and Twitter, which in addition to their typical function are capable of offering their users useful information, tips and advices. Last but not least, the demand is also satisfied through trusted and popular digital news and information sites, or thanks to mobile devices and apps considered accurate and specific search tools.

From a merchant standpoint, there are some sources to be considered, such as, among the others, merchant platforms such as Amazon, ebay, AliExpress, Etsy and Rakuten, online search advertising, advertising on social networks and online display advertising.

In such very smooth context, the application of the test of the hypothetical monopolist could determine a further enlargement of the boundaries of the relevant market.

Third, the Commission does not question how search results markets (as two-sided platform) operate, providing free goods/services to consumers and offering commercial services to merchants. The Commission queries how commercial services are offered since in its opinion a par condicio treatment should be applied at least by Google.

Of course, such discriminatory policy shall be criticized only if Google holds a dominant position. This seems to be the case, according to the file sheets having more than 90% of the general search research market in the EEA.

However, it remains to be verified whether, despite such evidence, a competitive pressure is experienced in search markets, where product designs change very rapidly, different sources of access to information are available on the Internet, market shares have proven to be volatile and life cycles are inherently brief and both the market and competitors at large do not suffer from an economic damage.

What seems even less clear is the economic impact on innovation and consumer welfare, thus qualifying for an antitrust harm.

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5. ONE REMARK AND ONE PROPOSAL

Digital disruption is the key factor of the new economy and as such competition policy, its instruments and remedies shall be interpreted and enforced with the view to understand its dynamics and foster innovation therein, thereby advancing consumer welfare.

Of course, the Study on the platforms’ modus operandi that the Commission has announced to conduct as part of the Digital Single Market Strategy will provide for useful hints not only in terms of market structures, competitive tensions and dynamics, but also in terms of possible actions and foreseeable remedies.

In any case, the Google case as it stands seems to show that some legal categories, such as market definition and market power, are unable to catch the evolving structure, features and competitive pressures associated with disruptive inventions.

While awaiting the modernization of antitrust tools in order to make them fit in the new environment, it is questionable whether it is advisable to keep on fostering a formal enforcement of competition law provisions, the risk of jeopardizing innovation process being concrete.

In such perspective, following the trend towards a more economic oriented approach in assessing multilateral conducts from the time of the 1999 Vertical Agreement Regulation, and in line with the Court decision both in Carta Bancarire and in the Post Danmark case, it seems advisable to foster a more stringent effect based approach also in connection to unilateral conducts in general and to the Google Shopping case in particular.

An effect based approach, in fact, could provide for an effective means for measuring the Google design policy overall effects on competition, innovation and consumer welfare. Besides, it could provide for a legal and an economic harbor, so as to avoid any possible interference between the enforcement of competition law and the inferences of regulatory policies.

Should the overall harm caused by the Google strategy to competition, innovation and consumer welfare remain vague or inconsistent, it seems undisputable that the principle of freedom to compete and win the selection “for” the market shall prevail, with the consequence that 1) no competitor shall be limited in its capability to design its products, meaning that also Google shall be free to provide for tailored results in order to catch both the consumers and the advertisers attention in the search result markets; 2) no rival shall be limited in its ability to offer its advertising space on its platform at its own conditions.


In the lack of such evidence, it seem therefore
that each rival shall contribute the process of
creative destruction, without any protection or
subsidy.

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