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Contribution:

Competition and regulation of platforms: different flavors of “bias” in search engines and other essential facilities; issues of prominence on digital platforms.

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What is search?

Search engines are based on algorithms to find content and provide answers to users's requests.

For every answer to a query, Google will provide results based first and foremost on your location (your IP address), language, and relevance.

However, Google's algorithm is based on more than 200 parameters, it is said.

Another example comes from Mashable: "the average Facebook user has **roughly 1,500 stories per day** that *could* appear in their news feed. Facebook surfaces about 20% of those stories."

Search as an essential facility

- Control of the essential facility by a monopolist
- Inability to reasonably or economically replicate the essential facility
- Denial of use or severe restrictions
- Feasibility of providing the facility to competitors

Search bias

"Algorithms designed to maximize relevance of results for user's queries"

"Algorithms conceived to harm vertical websites and unfairly promote its own competing vertical properties".

A vertical website focusses on a particular category of products, or a particular type of search (es. travel or hotel).

We explore the way the notion of "search bias" has been used in the US and Europe, in particular with regard to investigations of certain practices of Google Inc.

We also look at the commitments offered by Google to placate regulators, and how some key concepts have been used in the US and in Europe in relevant cases involving search engines and, in a broader sense, access to digital platforms.

Relationship Search / Advertising

Search bias is not evil. Leveraging dominance in search market to dominate advertising markets is the key issue.

However, in recent antitrust cases in the US and EU, the construction of related “theory of harm” focused exclusively on search functions, in the US and in the EU.

Investigations on possible abuse of dominance in the online search market

In the U.S. and EU, search engines have already been subject to formal proceedings, aimed in particular at verifying whether some of them abused their dominant position or otherwise affected competition by illegitimate means.

In 2013, findings by the Federal Trade Commission of the U.S., including an antitrust investigation into Google's search practices, closed without filing a complaint. The FTC stated that, in practice, favoring its own content in the presentation of search results does not violate U.S. antitrust law. Google offered several commitments, binding for five years, with respect to its display of content from third party websites and with respect to its Adwords API terms and conditions.

In the European Union, on 5th February 2014, the Competition Commissioner, José Almunia, announced that the European Commission has obtained a commitments proposal from Google in the context of an ongoing antitrust investigation on online search and search advertising.

An issue of market structure

According to EU legislation, “a dominant position entails responsibility” as the dominant firm should not impair genuine competition.

More substantially, the flow of revenues is altered (read damage to competition, a sanctionable practice) by the systematical display of own or affiliated services on a higher rank, at the expense of the services or products that paid less or zero for prominence, counting on relevance rather than on guided access to front street retail space (your computer screen).

Damage to consumers could also be found if products displayed on top of the list are systematically the most expensive ones in the same category of answers.

Pros of search bias

SB (search bias) allow for better search, by raising quality and relevance of found items, which are ordered according to the search engine's assessment of the users' intent.

Unbiased search would ultimately lead to worst results since 99% of content providers would tweak their pages in order to exactly fulfil the requirements of the algorithm for prominence.

Besides, Google already openly provides some indications to improve prominence and avoid being seriously discarded.

Finally, it could be that services affiliated with Google are actually the best answer to the question asked by the user(s), thus they deserve prominence.

Literature supporting search bias

In recent literature, for instance, (Patterson; Manne; Lao; Ammori and Pelican) the notion of search bias has been used:

By Patterson, to condemn attempts to prove Google's dominance in the search market;

By Manne, similarly, the notion of search as an essential facility is discarded on the ground of deeming "ridiculous" the hypothesis that a SE could favour competing rivals such as Bing or Mapquest.

More literature

Lao condemn all attempts to downscale the performance of the SE at the expense of real consumer's preferences for a SE capable of "providing answers, rather than finding documents" to quote Eric Schmidt, CEO of Google.

Ammori and Pelican (A&P) criticize the remedies proposed by the FTC in the US, and the inputs to such proposed remedies by Google's competitors coalized in groups such as Fairsearch (US) and ICOMP (in Europe), deeming them "entirely unpersuasive".

Ammori, Marvin and Pelican, Luke, Proposed Remedies for Search Bias: 'Search Neutrality' and Other Proposals in the Google Inquiry (May 14, 2012). Available at SSRN: <http://ssrn.com/abstract=2058159> or <http://dx.doi.org/10.2139/ssrn.2058159>

Manne, Geoffrey A., The Problem of Search Engines as Essential Facilities: An Economic & Legal Assessment (January 17, 2011). THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET, p. 419, Berin Szoka, Adam Marcus, eds., TechFreedom, January 2011; Lewis & Clark Law School Legal Studies Research Paper No. 2011-10. Available at SSRN: <http://ssrn.com/abstract=1747289>

Lao, Marina, *Search, Essential Facilities, and the Antitrust Duty to Deal*, 11 Nw. J. Tech. & Intell. Prop. 275 (2013). <http://scholarlycommons.law.northwestern.edu/njtip/vol11/iss5/2>

Patterson, Mark R., Harvard Journal of Law & Technology Occasional Paper Series — July 2013* GOOGLE AND SEARCH-ENGINE MARKET POWER <http://jolt.law.harvard.edu/antitrust/articles/Patterson.pdf>

Criticism of search bias

Negative views on search bias are intended to build a theory of harm.

Therefore critics note that Google is using search bias to discriminate under two points of view:

a) search results are conditioned by pay-for-prominence; Google also raises the cost of competitors by auctioning words used in searches, linking rank in its search results to higher costs at the expense of relevance.

b) this preference often goes to own or Google affiliated specialised services, which are ultimately more expensive than other comparable services.

Cases of own services preference

In the past, a similar behaviour was famously sanctioned in the field of computerised reservation systems (CRS) for air transport, which led to the EU Council Regulation N. 2299/89 of 24 July 1989. The logic here was to prevent parent carriers benefiting from preferential treatment in the operation of the CRS. However, this kind of regulatory remedies (rather than competition law enforcement) were lifted in 2005.

Obviously, there is a striking similarity with the circumstances that led to another, most famous case, i.e. Microsoft using its dominance to leverage market power from one market to another.

INVESTIGATED BEHAVIOURS



Restrictions hampering
advertisers' management of
their ad campaigns across
competing ad platforms

Algorithms designed to harm
vertical websites and unfairly
promote its own competing
vertical properties

Google's introduction of
"Universal Search" – a
product that prominently
displays targeted Google
properties in response to
specific categories of
searches, such as shopping
and local – to determine
whether Google used that
product to reduce or
eliminate a nascent
competitive threat.

Allegation that Google
altered its search algorithms
to demote certain vertical
websites in an effort to
reduce or eliminate a
nascent competitive threat.

(i) The favourable treatment,
within Google's web search
results, of links to Google's own
specialised web search services
as compared to links to
competing specialised web
search services (i.e. services
allowing users to search for
specific categories of
information such as restaurants,
hotels or products);

(ii) The use by Google, without
consent, of original content from
third party web sites in its own
specialised web search services;

(iii) Agreements that oblige third
party web sites ("publishers") to
obtain all or most of their online
search advertisements from
Google;

(iv) Contractual restrictions on
the transferability of online
search advertising to rival
search advertising platforms and
the management of such
campaigns across Google's
Adwords and rival search
advertising platforms.

Proposed remedies (US)

A&P categorized proposed remedies under

- 1) search neutrality
- 2) restricting universal search (the current search mode that fetches a huge number of results) to the once (ante 2007) dominant model of search results, ie providing “ten blue links”;
- 3) Google specific fair-use limits on the grounds of trespass-to-chattels;
- 4) No-bidding, or constraining Google’s ability to compete for acquisitions and exclusive partnerships;
- 5) Requiring disclosures, especially about G’s search .

Commitments (EU)

Google offered for a period of 5 years to:

- (i) - label promoted links to its own specialised search services so that users can distinguish them from natural web search results,
 - clearly separate these promoted links from other web search results by clear graphical features (such as a frame), and
 - display links to three rival specialised search services close to its own services, in a place that is clearly visible to users,
- (ii) - offer all websites the option to opt-out from the use of all their content in Google's specialised search services, while ensuring that any opt-out does not unduly affect the ranking of those web sites in Google's general web search results,
 - offer all specialised search web sites that focus on product search or local search the option to mark certain categories of information in such a way that such information is not indexed or used by Google,
 - provide newspaper publishers with a mechanism allowing them to control on a web page per web page basis the display of their content in Google News,
- (iii) no longer include in its agreements with publishers any written or unwritten obligations that would require them to source online search advertisements exclusively from Google, and
- (iv) no longer impose obligations that would prevent advertisers from managing search advertising campaigns across competing advertising platforms.

How to establish dominance and abuse, since both have to be proved?

Dominance needs proper delineation of relevant market (product/geographical). Abuse, to be ascertained, should assess the efficiency of competitors and the market structure.

In the case of Google, probably the most promising path (for somebody that actually wants to venture on it) would be that of vertical abuse, i.e. similarly to alleged abuse of dominance of a manufacturer against its retailers; famously, the ASICS (running shoes) case, where A. dictated conditions (to sell at higher prices) on offline retailers and online sites.

Could it be that G. abuses its dominance in SE market (global; delineated as distribution of content/services) with barriers to entry represented by technology, patents, brand strength, control over prominence and a huge market share?