Self-favoring in the digital economy
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Self-favoring and discrimination on digital platforms

And how do you see the strategy for future economic trends?

Bambi on real thin ice

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By Christian Bergqvist, ph.d.
EU’s new platform regulation

Self-favoring appears to be real on digital platforms, as indicated by the anti-trust investigations of:

- **Amazon**, investigation opened in 2019 on the matter of self-favoring when listening products followed an inquiry
- **Google Shopping**, decision rendered in 2017 on the matter of preferential treatment of own services (self-favoring)
- **Facebook**, (allegedly) favors own advertisements warranting complaints in France

Motivating the adoption of a Regulation (19/1150), mandating:

- Article 5 requiring disclosure of ranking parameters on online (general) search engines (but not vertical/specialized)
- Article 7 requiring disclosure of self-favoring/preferential treatments in online searches

But referring actual conflicts to resolving under to Article 102 regardless of the somewhat underdeveloped practice
EU’s new platform regulation

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*Google Shopping* is pending before General Court, but:

- Revolve around self-favoring in respect to internet searches where own offering are allotted more prominent displays in the ranking following a search

- Provides an opportunity to explore the ability to check self-favoring under Article 102
Search engines allow you to search

However, two alternative methods are available:

a) General (horizontal) search covering the entire internet for whatever you are looking for, or

b) Specialized (vertical) search focusing on a specific subject matter, e.g. places and events
General (horizontal) search

- Following a general inquiry, a general search will yield a generic (organic) index of hits (organic blue links).
- The quality depends on the algorithms, which constantly are improved by tracking users actual clicking (called “click-through-rates”) thus, creating a strong network and bandwagon effect.
- Further to the generic index, some links might be sponsored, generating an income for the search engine.
If you are looking for specific services, e.g. travels or places/events, you should turn to a specialized search, e.g. Expedia or Yelp, focusing on travels and places/events, respectively.

Google also offers specialized searches e.g., *Google Images*, *Google Flights*, *Google Maps*, etc.
Comparison shopping compares prices

• Comparison shopping allows users to compare prices and characteristics across different providers of product and services (see recital 191) and is **not a specialized search service** (see recital 193-195)

• **Google** is active in this market with **Google shopping** (originally known as *Froogle/Google Product Search*)

• **Foundem** is a competitor (and one of the original plaintiffs)
Searching with Google

When you open your Google search engine you get a clean window prepared for your query.
Searching with Google

Typing in, e.g. defense attorney (in USA), will provide you with this screen (in USA)

1. Information in boxes (OneBox)
2. Sponsored links
3. General search
Let’s assume you are going to an important business event and realized you are without a tie
Or appropriate shoes
Choosing a product e.g. “Hugo Boss ties” still involves multiple searches

1. general search
2. comparison shopping (using the Shopping Unit)
3. vertical search providing content for the boxes
4. (sponsored links)
Searching on the Internet with Google

- Google refers to its services as universal searches (disputing the separation between horizontal and vertical searches)
- Labels the Shopping Unit as innovation (an improvement to the general search)
- Utilizes several services for the boxes
DG COMP’s theory of harm

- Google acts abusively (see recital 341) when only Google’s own offerings are allotted and displayed with premium placement and pictures etc. as this can direct traffic away from competitors.
- Google disputes any malicious intent, but the matter of the premium displaying and effect in terms of traffic, are supported by facts.
DG COMP’s theory of harm

- Google acts abusively (see recital 341) when only Google’s own offerings are allotted and displayed with premium placement and pictures etc. as this can direct traffic away from competitors.

And I see three problems
1. The Google way is innovation

- Assuming I need a defense attorney, the boxes and universal search functions provide a superior level of information adjunct to my generic index
- It even offers directions, opening hours and reviews
- I’m therefore somewhat inclined to see this as an improvement to general searches
1. The Google way is innovation

Evolution of the Internet over time

1st generation
- Only access to predefined content
2nd generation
- General search
- Vertical search
- Comparison shopping
3rd generation
- Universal search
2. Google needs to make a profit

- Google’s business essentially evolves around selling advertisements. Either on content pages or through sponsored links on the Internet
2. Google needs to make a profit

- Comparison shopping, and the different vertical services, also generate (some) income, in contrast to the general search. However, the later feeds the algorithm and thus the advertisement business.
3. The decision is legally weak

- Self-favoring is normal when it comes to the Internet (both major Danish TV channels gives premium listening to own channels) and thus competition on the merits
- The case echos discrimination, but isn’t pursued as such, giving ground for Google’s claim of being convicted under a novel and unsupported theory of abusive leverage
The concept of abusive discrimination

The concept of **abusive discrimination** under Article 102 is somewhat **underdeveloped**:  
- *Post Danmark I* (2012) e.g. originated from a national misreading of the concept and case-law  
- *MEO* (2018) requires anti-competitive effect rebutting that all forms of discrimination would amount to abuse  
- *BdKEP/Deutsche Post* (2004) identified three forms of discrimination
The concept of abusive discrimination

BdKEP/Deutsche Post (2004) recital 93 states that:

- "The wording [of Article 102] covers three types of discrimination, the first two of them exclusionary and the last one exploitative: (i) the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis the dominant firm itself; (ii) in relation to other customers of the dominant firm; or (iii) the customer suffers commercially in such a way that its ability to compete in whatever market is impaired"
The concept of abusive discrimination

_BdKEP/Deutsche Post_ (2004) recital 93 states that:

1. **Horizontal (foreclosure) discrimination**, where “…the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis the dominant firm itself.”. Relevant if the dominant undertaking is _active downstream_.

2. **Vertical (foreclosure) discrimination**, where “…the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis …other customers of the dominant firm.” Relevant if the dominant undertaking is _not active downstream_.

3. **Vertical (exploitive) discrimination** “…the customer suffers commercially in such a way that its ability to compete in whatever market is impaired”. Relevant if the _preferential treatment_ is _based_ upon _payment_ most likely rebutting this as abusive unless exploitive.
The notion of abusive discrimination

- *Google Search* (2017) involved self-favoring in the form of preferential display of affiliated services and the (malicious) downgrading of competing services:
  - The case echoes discrimination, but isn’t pursued as such, indicating some ambiguity by DG COMP on the concept
  - The abusive conduct is initially defined (recital 2) as the favorable treatment of own services, but later (recital 342 and 344) as the downgrading of competing services. However, the merits of the case points to their combination, leaving the reader confused
  - The abuse is supported by substantial effect analysis indicating a high threshold for condemning self-favoring
- *Google Search* indicates “challenges” when it comes to checking self-favoring under Article 102
- As Google already published its ranking policy, the case also indicates that transparency doesn’t preclude manipulation
EU’s new platform regulation

The Platforms Regulation represent what was politically attainable, referring issues to Article 102

- Article 102 might not yield acceptable replies and it will take some years before this becomes apparent
- Moreover, the approach might be fragmented repeating the unfortunate approach to MFN-hotel clauses
- EU has promised to issue guidelines on the regulation. However, guidelines on discriminatory abuse would also be relevant (as promised in 2005)
Questions

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