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Last week, following an investigation that lasted almost six months but that did not result in a statement of objections, the European Commission cleared Google's acquisition of ad serving company DoubleClick. While this result had been widely anticipated for a number of weeks, not many transactions cleared unconditionally have stirred up such hot debate on both sides of the Atlantic and attracted the level of press coverage afforded to this transaction.

Google's acquisition of DoubleClick raised a number of potential antitrust concerns as highlighted in the Commission's press release opening its in-depth investigation.¹ These included the extent to which Google and DoubleClick are currently, or might in the future be, direct competitors in the area of online ad intermediation (market definition is of course notoriously difficult in fast-changing industries and areas of converging technology). The Commission also examined whether Google might have the ability and incentive to use its leading position in search advertising to require web publishers and advertisers post-transaction to use its full array of online ad services (i.e.,

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¹ Press Release IP/07/1688, European Commission, Commission opens in-depth investigation into Google's proposed take over of DoubleClick (Nov. 13, 2007).

search advertising, ad serving, and display advertising). Absent such bundling or tying strategies, it was natural to ask Google how it expected to recoup the inflated price of US\$3.1 billion it had agreed to pay for DoubleClick (more than ten times DoubleClick's earnings).

Perhaps one of the most controversial aspects of the transaction relates to the reams of information acquired and routinely stored by Google and DoubleClick through their Internet activities. Certainly much of the debate in the press focused on data protection and privacy issues and the fact that the transaction would merge the parties' two vast databases on consumers' online habits. Both the U.S. Senate Judiciary Committee and the European Parliament called hearings to explore this aspect of the Google/DoubleClick deal. Although the Commission was no doubt right in its final decision to exclude such data protection and privacy issues from its merger control review, the transaction nevertheless highlighted how antitrust concerns in vertical mergers can arise from access to information and the market power that information can confer.

The Commission has recognized that vertical integration can raise competition concerns if the merged entity obtains access to commercially sensitive information on its upstream or downstream rivals. Two examples are provided in the European Commission's new guidelines on the assessment of non-horizontal mergers.² While they could be expressed more clearly, the concerns appear to be:

1. that when company A acquires its downstream competitor B, company A

² European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Nov. 28, 2007), at para. 78.

might obtain critical information that allows it to price less aggressively in supplying to B's rivals, to the detriment of consumers; and

2. that the acquisition of B, including commercially sensitive information on A's rivals, might place A's rivals at a competitive disadvantage, thereby dissuading them to enter or expand in the market.

Such theories have been developed in past Commission cases. In *ENI/EDP/GDP*,³ for example, the Commission found that EDP's dominant position on the market for the wholesale supply of electricity would be strengthened in part by GDP acquiring access to its competitors' information on costs and daily gas nominations. In some cases, an offer by the acquiring party to erect firewalls might be sufficient to allay concerns regarding access to commercially sensitive information. In *ENI/EDP/GDP*, the Commission had doubts on the efficacy of a firewall remedy because few contracts were involved and the information could therefore be easily communicated and would be damaging if disclosed even once. Interestingly, the Commission has accepted firewall remedies in other cases.

The theory of harm that the Commission likely examined in the Google/DoubleClick transaction is summarized as follows. Google is recognized to have the leading search engine in the world and is particularly strong in Europe. It is also the leading seller of search Internet advertising on its own websites and on third-party websites powered by Google's search engine. Google had more recently started to sell contextual ads (both text and display) to advertisers, purchasing inventory from web publishers for purposes of displaying such ads. This ad network technology enables

³ Case No. COMP/M.3440 – EDP/ENI/GDP, Commission decision of Dec. 9, 2004.

advertisers to place their unsold, remnant ads on webpages by reference to the webpage's content rather than the subject of a search. DoubleClick, on the other hand, had been the leading independent provider of ad serving to advertisers, publishers, and ad networks. Ad serving helps advertisers and publishers manage direct sales of premium display ads, as well as the sale of remnant ads through ad networks. Through its activities, DoubleClick had access to proprietary information regarding its customers' activities, including the prices negotiated, traffic flow, and user demographics.

The Commission, in common with most antitrust regulators, has paid close attention to markets that exhibit “network effects”, that is where each customer who purchases a service makes that service more attractive to existing and potential customers. Having recognized the importance of network effects in attaining its leading position in search advertising, Google might have the incentive and ability to use the commercially sensitive information held by DoubleClick to achieve market power in display advertising, a product area also subject to indirect network effects (i.e., advertisers prefer an ad network with many publishers, while publishers prefer a network with many advertisers).

Google, through its ad network activities, currently competes with DoubleClick's ad network customers for the *purchase* of publishers' remnant inventory. With access to DoubleClick's information on which publishers have sold inventory to which ad networks and at what prices, post-transaction, Google might selectively outbid other ad networks by offering slightly higher prices to publishers and target publishers receiving below market prices. This could extend the *publisher* base for its ad network activities.

Equally, through its ad network activities, Google competes with DoubleClick's ad network customers for the *sale* of remnant inventory to advertisers. Google might underbid other ad networks, as well as targeting those advertisers it knows are prepared to pay the highest prices. This would extend the *advertiser* base for Google's ad network activities. Moreover, as a web publisher, Google competes with DoubleClick's publisher customers in the sale of premium inventory. With access to DoubleClick's data, Google could introduce one-way transparency into a bidding market, thereby raising the level of risk for third-party web publishers. Although competition through lower prices is typically beneficial, Google's access to commercially sensitive information on DoubleClick's customers might be exploited selectively so as to distort the normal competitive process.

The Commission ultimately seems to have rejected this theory of harm. Although the Commission's decision is not publicly available yet (and may not be for some time), its press release states that the Commission considered that Google would not have the ability to marginalize its competitors, in large part owing to the presence of credible ad serving alternatives to which customers (publishers, advertisers, and ad networks) could turn. No doubt weighing heavily on the minds of the Commission case team were the fast pace of developments in the industry generally, including Microsoft's and Yahoo!'s respective recent acquisitions of aQuantive and Right Media, not to mention Microsoft's US\$44.6 billion bid for Yahoo! (Microsoft and Yahoo! were reported to be two of the most vociferous complainants during the Commission's investigation). Readers should bear in mind that the Commission prohibits very few mergers and most likely concluded

that it would be unwise to intervene at this juncture or second guess the true impact of Google's acquisition of DoubleClick.