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U.S. Federal Trade Commission

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On December 21, 2007, the U.S. Federal Trade Commission (FTC) closed its investigation of Google Inc.'s proposed acquisition of DoubleClick Inc. The merger and the Commission's investigation attracted a great deal of public interest, and the matter presented several novel issues for antitrust practitioners and commentators. This article discusses two of the issues that generated much public discussion:

1. market definition in the nascent, dynamic online advertising industry; and
2. the interplay of competition and privacy concerns surrounding the accumulation of consumer data.

I. Market Definition Applied to Online Advertising

As in all merger cases, defining the relevant market in which to analyze the competitive effects of the Google/DoubleClick transaction was a pivotal threshold issue for the Commission. In horizontal mergers, proper market definition is necessary to determine whether the acquisition would confer market power to the combined firm. Because online advertising is evolving so rapidly and has so little precedent in antitrust analysis, the deal sparked substantial public discussion and debate on how to define the

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market. Although online advertising can be sliced several different ways (e.g., search ads versus non-search ads, display ads versus text ads, premium inventory versus non-premium inventory, directly purchased ads versus indirectly purchased ads), several commentators argued for a single "online advertising market" that would include both Google's ad intermediation service, AdSense for Content ("AdSense"), and DoubleClick's third-party ad servers, DART for Publishers ("DFP") and DART for Advertisers ("DFA").[1] These commentators argued that ad intermediation services and ad servers are interchangeable mechanisms for placing ads on websites. Others, however, concluded that the products of Google and DoubleClick compete in separate markets.[2]

[1] *See, e.g.*, Written Testimony of Bradford L. Smith, Senior Vice President, General Counsel and Corporate Secretary of Microsoft, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Hearing on An Examination of the Google-DoubleClick Merger and Online Advertising Industry: What Are the Risks for Competition and Privacy, Washington, DC (Sep. 27, 2007) [hereinafter "Microsoft (Bradford Smith) Testimony"], *available at* http://judiciary.senate.gov/print_testimony.cfm?id=2955&wit_id=6689 (arguing that Google and DoubleClick compete in the "pipeline" that connects online publishers with advertisers); Scott Cleland, Googleopoly: The Google-DoubleClick Anti-Competitive Case (Jul. 17, 2007) (Precursor LLC, mimeo), *available at* http://googleopoly.net/paper.html#relevant (defining the relevant market as "targeted online advertising").

[2] *See, e.g.*, Thomas M. Lenard & Paul H. Rubin, *Googling "Monopoly"*, WALL ST. J., Aug. 21, 2007, *available at* http://online.wsj.com/artciel_print/SB118765934437503661.html:

> . . . the two companies undertake activities that don't overlap. Google places text ads mainly on its own Web sites and search-result screens. DoubleClick delivers display ads from advertisers to Web sites. It creates no ads and controls no Web sites.

See also Written Testimony of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer of Google, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Hearing on An Examination of the Google-DoubleClick Merger and Online Advertising Industry: What Are the Risks for Competition and Privacy, Washington, DC (Sep. 27, 2007), *available at* http://judiciary.senate.gov/testimony.cfm?id=2955&wit_id=6685:

> Google and DoubleClick are complementary businesses and do not compete with each other. DoubleClick does not buy ads, sell ads, or buy or sell advertising space.

In the end, a majority of the Commission determined that ad intermediation services (e.g., Google's AdSense) constitute a distinct product market from third-party ad servers (e.g., DFP and DFA).[3] As explained in the Commission's majority statement:

> [A]d intermediation is not a substitute for publishers and advertisers who place display ads into directly acquired inventory or vice versa. (In other words, ad intermediaries placing ads indirectly do not significantly constrain the pricing or quality of ads placed directly or vice versa).[4]

Ad intermediation services traffic exclusively in indirectly sold ads that generate far less revenue per ad for a publisher than directly sold advertising (for which DoubleClick's third-party ad servers are primarily used). In addition, ad intermediation services strip the advertiser of control over the placement of the ad (an advertiser using an ad intermediation service cannot predict when and on which websites its ad will appear). Based on this evidence, the Commission majority found that neither side of the online advertising industry (publishers or advertisers) viewed these two methods as plausible substitutes.[5] Rather, publishers generally sell as much inventory as possible directly to advertisers (i.e., "premium" inventory), and turn the rest (i.e., "non-premium" or "remnant" inventory) over to an ad intermediation service.

Often premium and non-premium inventory appear adjacently on a particular web page, leading some to argue that they compete with each other in an antitrust sense. Several third parties and commentators appear to have been persuaded that the visual

[3] Statement of The Federal Trade Commission, Google/DoubleClick, F.T.C. File No. 071-0170, 5-6 (Dec. 20, 2007) [hereinafter "Commission Majority Statement"], *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf. To be clear, the Commission also found that DFA and DFP are in similar but separate product markets because advertiser-side ad servers and publisher-side ad servers cannot be substitutes for each other. *Id.* at 6.

[4] Commission Majority Statement, *id.* at 4.

[5] *Id.*

proximity of such ads is competitively significant. In their article entitled "An Antitrust Analysis of Google's Proposed Acquisition of DoubleClick," Robert W. Hahn and Hal J. Singer described an anecdotal visit to the website of the *Washington Post* where ads served by both Google and DoubleClick appeared, which they interpreted as evidence of competition.[6] Similarly, Bradford L. Smith, Microsoft's General Counsel, in his testimony to the Senate Judiciary Committee, referenced a sample screenshot of a commercial website and explained: "Here are examples of two non-search ads, the top one served by Google and the bottom one served by DoubleClick. Note how similar they are."[7] In both examples, the DoubleClick ad was almost certainly directly purchased by an advertiser seeking a specific position on a particular website, while the Google ad was likely indirectly purchased through a system that places ads in a general category of web pages but not at a specific time and position.

The Commission majority focused on the underlying question of whether customers view the *methods* by which Google and DoubleClick place ads on a particular website to be close substitutes. Because neither publishers nor advertisers considered indirectly sold ads served through ad intermediation services substitutes for directly sold ads served through third-party ad servers, the Commission majority concluded that

[6] *See* ROBERT W. HAHN & HAL J. SINGER, AN ANTITRUST ANALYSIS OF GOOGLE'S PROPOSED ACQUISITION OF DOUBLECLICK 24 (AEI-Brookings Joint Center Related Publication, No. 07-24, Feb. 2008), *available at* http://ssrn.com/abstract=1016189:

> This suggests that, at present, if a condominium developer found that Google's AdWords network had become prohibitively expensive, he could reasonably switch to a DoubleClick-served graphic ad.

[7] Microsoft (Bradford Smith) Testimony, *supra* note 1.

Google and DoubleClick were not current direct competitors, effectively negating any horizontal theory of harm based on current competition.[8]

II. The Combination of User Data and Privacy Concerns

Also generating much public debate was the possibility that combining the consumer data compiled by Google and DoubleClick could give Google an insurmountable advantage in the ad intermediation market.[9] Google, through its search engine and other applications, collects a huge volume of data about the interests and preferences of Internet users. Similarly, DoubleClick's ad servers collect data by tracking which advertisements are viewed by which users and what, if any, action is taken in response to the advertisements (e.g., number of ads clicked). The popularity of Google products, particularly its search engine, combined with the broad presence of DoubleClick-served ads could give the combined firm an immense amount of data. The question before the Commission was whether Google effectively could combine these data sets to develop and enhance its behavioral targeting of online advertisements, and if so, whether access to this data would give Google market power in the ad intermediation market.[10]

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[8] Commission Majority Statement, *supra* note 3, at 7. The Commission majority also considered two theories of potential horizontal competition, but these analyses focused on Google's planned entry into the third-party ad serving markets and DoubleClick's possible entry into the ad intermediation market. *See* Commission Majority Statement, *supra* note 3, at 8-9.

[9] The Commission investigated a number of theories of competitive harm, including the elimination of current direct competition and actual potential competition, as well as several non-horizontal theories. Commission Majority Statement, *id.* at 7-13.

[10] Behavioral targeting of online advertising is the accumulation and use of data about a particular user's online interests in an effort to provide advertising relevant to those interests. *See* Commission Majority Statement, *supra* note 3, at 2, n.5.

The Commission majority ultimately found this theory unsupported by the evidence. Pursuant to DoubleClick's customer contracts, the data collected by its ad servers is the property of its advertiser and publisher clients.[11] These contractual obligations would prevent the combined firm from aggregating the data, rendering it nearly useless for behavioral targeting on any significant scale. Furthermore, the Commission majority concluded that Google's access to a large volume of data would not be unique in the online advertising industry.[12] Google's primary competitors, namely Microsoft, Yahoo!, and AOL, also have significant data stores at their disposal to use for behavioral targeting purposes. From a competition perspective, the Commission majority ultimately interpreted this theory as either an unfounded fear or a concern that Google would develop a superior product (but not one out of reach for Google's competitors).[13]

This consolidation of data triggered concerns over the privacy of Internet users. A complaint filed with the FTC by two consumer advocacy groups, the Center for Digital Democracy and the Electronic Privacy Information Center, urged the Commission to condition or block the proposed merger based on the concern that the combined firm would be able to collect and analyze data about individual users, threatening their privacy interests.[14] The complaint alleged that "Google's proposed acquisition of DoubleClick will give one company access to more information about the Internet activities of

[11] Commission Majority Statement, *supra* note 3, at 12.

[12] *Id*.

[13] Commission Majority Statement, *supra* note 3, at 12-13.

[14] Complaint and Request for Injunction, Request for Investigation and for Other Relief, in the Matter of Google, Inc. and DoubleClick, Inc., before the Federal Trade Commission (Apr. 20, 2007), *available at* http://www.democraticmedia.org/files/google_complaint.pdf.

consumers than any other company in the world."[15] Similarly, Senator Herbert Kohl also encouraged the Commission to consider the privacy implications of the deal as part of its antitrust review: "No one concerned with antitrust policy should stand idly by if industry consolidation jeopardizes the vital privacy interests of our citizens so essential to our democracy."[16]

While acknowledging these concerns, the Commission majority concluded that its statutory mandate in merger reviews was confined solely to issues affecting competition, stating: "[T]he Commission lack[s] legal authority to require conditions to this merger that do not relate to antitrust."[17] The Commission majority examined privacy concerns only to the extent that they could "adversely affect non-price attributes of competition."[18] The Commission majority found insufficient evidence that competition as it relates to privacy would be impacted negatively by the merger.

Commissioners Harbour and Leibowitz wrote separately (Commissioner Harbour in dissent and Commissioner Leibowitz in concurrence), in part to express their desire to see the Commission address the privacy concerns highlighted by the merger. Commissioner Harbour did not draw a bright line limiting the Commission's authority in merger reviews to antitrust concerns writing:

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[15] *Id.* at para. 54.

[16] Statement of The Honorable Herbert Kohl, United States Senator, Wisconsin, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Hearing on An Examination of the Google-DoubleClick Merger and Online Advertising Industry: What Are the Risks for Competition and Privacy, Washington, DC (Sep. 27, 2007), *available at* http://judiciary.senate.gov/member_statement.cfm?id=2955&wit_id=470.

[17] Commission Majority Statement, *supra* note 3, at 2.

[18] *Id.*

> I have considered (and continue to consider) various theories that might make privacy "cognizable" under the antitrust laws, and thus would have enabled the Commission to reach privacy issues as part of its antitrust analysis of the transaction.[19]

Similarly, Commissioner Leibowitz highlighted the privacy issues brought to light by the merger, saying: "[T]he Commission should consider how to address these privacy issues . . . from multiple perspectives."[20] Ultimately, however, neither Commissioner believed that it was prudent for the Commission to condition or block this particular merger exclusively on privacy grounds.[21]

III. Conclusion

In its investigation of Google's acquisition of DoubleClick, the Commission confronted novel issues in a new and dynamic industry. Undoubtedly, antitrust authorities and commentators will continue to examine online advertising markets, and the Commission's majority statement, as well as the separate statements of Commissioners Leibowitz and Harbour, will likely provide the framework for future analysis.

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[19] Dissenting Statement of Commissioner Pamela Jones Harbour, Google/DoubleClick, F.T.C. File No. 071-0170, 10 (footnote omitted) (Dec. 20, 2007) [hereinafter "Harbour Statement"], *available at* http://www.ftc.gov/os/caselist/0710170/071220harbour.pdf.

[20] Concurring Statement of Commissioner Jon Leibowitz, Google/DoubleClick, F.T.C. File No. 071-0170, 2 (Dec. 20, 2007) [hereinafter "Leibowitz Statement"], *available at* http://www.ftc.gov/os/caselist/0710170/071220leib.pdf.

[21] Both Commissioner Harbour and Commissioner Leibowitz felt that while there were serious privacy concerns highlighted by this transaction, they were industry-wide concerns which "go well beyond the two companies involved in this acquisition." *See* Leibowitz Statement, *id.* at 2. *See also* Harbour Statement, *supra* note 19, at 10:

> While this transaction sparked great interest in privacy issues and created momentum for a meaningful discussion, it would be short-sighted to focus on the behavior of a single company (in a merger context) when the issue is relevant to so many other firms as well.