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# Competitor Complaints About Google/DoubleClick Rejected

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## Competitor Complaints

### About Google/DoubleClick Rejected

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**O**n March 11, 2008, the European Commission unconditionally cleared Google Inc.'s acquisition of DoubleClick Inc. The U.S. Federal Trade Commission (FTC) previously closed its investigation on December 20, 2007, also without imposing any conditions on the transaction.

Both the Commission and the FTC conducted extraordinarily thorough reviews, investigating a wide range of theories of harm raised by various complainants. The majority of these complainants were Google's competitors.<sup>1</sup> Their theories ranged from the economically unsound (like Microsoft's far-fetched "unilateral effects" theory) to the truly bizarre.<sup>2</sup> No coherent theme emerged from the complainants' hodgepodge of

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\* The author is a partner at Cleary Gottlieb Steen & Hamilton LLP and represented Google in connection with the antitrust review of the DoubleClick transaction.

<sup>1</sup> See, e.g., Statement of the Federal Trade Commission, Google/DoubleClick, F.T.C. File No. 07-0170 (Dec. 20, 2007) [hereinafter FTC Statement], available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>, at n. 6 ("The clear majority of third parties expressing such concerns were Google's current or potential competitors").

Non-competitor complainants included companies in disputes with Google on other issues, for example AT&T, which has been in a long-running dispute with Google over net neutrality. See, e.g., Art Brodsky, *A Washington Bank Shot*, THE HUFFINGTON POST, Sep. 25, 2007, available at [http://www.huffingtonpost.com/art-brodsky/a-washington-bank-shot-b\\_65780.html](http://www.huffingtonpost.com/art-brodsky/a-washington-bank-shot-b_65780.html) ("Call this the Bank Shot. The idea is not to hit a target directly on an issue of interest, but to hit it via a less direct route. [...] Google opposes ... the Bell companies on Net Neutrality [...]. Now it's in the Bell interest to attack Google on any front...").

<sup>2</sup> See, e.g., Scott Cleland, *Googleopoly: The Google-DoubleClick Anti-Competitive Case* (Jul. 17, 2007) (Precursor LLC, mimeo), available at <http://googleopoly.net/googleopoly.pdf>:

theories, and indeed many theories were both internally inconsistent and inconsistent with other complainants' assertions.

Nonetheless, the agencies carefully considered and rejected each of these theories. Review of the Google/DoubleClick transaction was the agencies' first extensive investigation of the online advertising industry;<sup>3</sup> accordingly, they addressed at length (and expended agency resources analyzing) even some of the more frivolous theories complainants raised.

Microsoft's arguments against the transaction are particularly instructive. Microsoft was the most vocal of the complainants, and submitted a wide range of arguments against the transaction, both directly and through third parties.<sup>4</sup> For example, Microsoft asserted early and often that Google and DoubleClick were direct, horizontal competitors.<sup>5</sup> The FTC and the Commission rejected this claim and for good reason:

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Google's General Counsel will be well advised to supervise the team of engineers that constantly "tweak" the Google search engine. Any "tweaks" that make it more difficult for the FTC to "search", and "discover" Google-relevant records and statements could be interpreted as obstructions of justice.

<sup>3</sup> *Cf.*, e.g., FTC Statement, *supra* note 1, at 1 (noting that the FTC "dedicated extensive resources to this investigation because of the importance of the Internet and the role advertising has come to play in the development and maintenance of this rapidly evolving medium").

<sup>4</sup> *See*, e.g., Robert A. Guth & Charles Forelle, *Microsoft Goes Behind the Scenes*, WALL ST. J., Sep. 24, 2007, at A4 (noting that Microsoft retained the public relations firm Burson Marsteller to generate opposition to the transaction without disclosing Microsoft's involvement); and 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) [hereinafter Hahn Singer Paper], available at [http://www.brookings.edu/~media/Files/rc/papers/2007/09useconomics\\_hahn.pdf](http://www.brookings.edu/~media/Files/rc/papers/2007/09useconomics_hahn.pdf), at note \*\* (thanking AT&T and Microsoft for providing support for the paper).

<sup>5</sup> An Examination of the Google-DoubleClick Merger and the Online Advertising Industry, Transcript of Oral Remarks of Bradford L. Smith, Senior Vice President, General Counsel and Corporate Secretary, Microsoft Corporation, Hearing before the Senate Judiciary Comm. Subcommittee on Antitrust, Competition Policy, and Consumer Rights (Sep. 27, 2007) [hereinafter Smith Transcript], at 8 (testifying under oath that DoubleClick is Google's "most significant competitor").

Google and DoubleClick do not compete with each other.<sup>6</sup> Google sells online advertising space on its own website and on the websites of partners in its advertising network. DoubleClick, in contrast, sells tools used by advertisers and website owners to serve, manage, and report on the effectiveness of display ads (“ad serving”). The agencies’ conclusion that Google and DoubleClick are not competitors was compelled by the simple facts of the case and is even consistent with statements by Microsoft’s own executives.<sup>7</sup>

Microsoft next argued that the transaction would result in a loss of potential future competition because Google was in the process of developing ad serving tools.<sup>8</sup> Again, both agencies rejected this theory. As the FTC explained, “[f]or the elimination of this potential competition to be a competitive concern, Google must be uniquely positioned to have a substantial competition-enhancing effect on the third party ad serving markets.”<sup>9</sup> The FTC found that the ad serving markets are already extremely competitive, with rapidly declining prices, and it found that there was no reason to believe Google’s ad

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<sup>6</sup> FTC Statement, *supra* note 1, at 7; Press Release IP/08/426, European Commission, Mergers: Commission Clears Proposed Acquisition of DoubleClick by Google (Mar. 11, 2008) [hereinafter Commission Press Release], *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/426> (“The Commission’s in-depth market investigation found that Google and DoubleClick were not exerting major competitive constraints on each other’s activities and could, therefore, not be considered as competitors at the moment”).

<sup>7</sup> *Cf.*, e.g., Carlos Grande, *Interview: Yusuf Mehdi*, FT.COM, Jun. 20, 2007, *available at* <http://www.ft.com/cms/s/0/a83523b4-1f02-11dc-ac86-000b5df10621.html> (Microsoft’s Senior Vice President for Strategic Partnerships, Yusuf Mehdi, stated: “Google has no display advertising business. If it closes the DoubleClick deal, it will have a part of the display business, but not the audience part... Without the audience part of display, it isn’t really clear what Google is offering ... Yahoo is strong in display ... [and] we have very strong assets”).

<sup>8</sup> *See*, e.g., Louise Story, *Microsoft’s Arguments Against Google-DoubleClick Marriage*, N.Y. TIMES BLOG, Dec. 21, 2007 [hereinafter Microsoft FTC Submission], *available at* <http://bits.blogs.nytimes.com/2007/12/21/microsofts-arguments-against-google-doubleclick-marriage/>, at 2-3 (linking to Microsoft FTC Submission leaked to the press by Microsoft’s advisors).

<sup>9</sup> FTC Statement, *supra* note 1, at 8.

serving products in development were “unique relative to existing third party ad servers.”<sup>10</sup> For those reasons and others, the FTC concluded that the elimination of Google as a potential competitor was unlikely to harm competition.<sup>11</sup>

Finally, Microsoft argued that the transaction would result in non-horizontal harm to competition. Microsoft asserted that, for three different reasons, DoubleClick’s position in the ad serving markets might allow Google to become dominant in the multi-billion dollar online advertising industry.<sup>12</sup> As a threshold matter, it is worth noting that Microsoft told the FTC that its own ad serving product was a “distant” competitor to DoubleClick while at the same time telling the industry that Microsoft has the leading position in advertiser-side ad serving.<sup>13</sup> On the merits, the agencies carefully considered and rejected each of Microsoft’s non-horizontal claims. First, Microsoft argued that “[g]iven Google’s history of providing software or services for free” it was “not a stretch to predict that Google will offer” DoubleClick’s ad serving products for free in order to gain an advantage in some other market, for example by bundling ad serving with sales of ad space.<sup>14</sup> This theory of Google lowering prices on ad serving was flatly inconsistent with Microsoft’s earlier horizontal argument that Google would likely *increase* prices for

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<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.*

<sup>12</sup> Smith Transcript, *supra* note 5, at 8.

<sup>13</sup> *Compare, e.g.,* Microsoft FTC Submission, *supra* note 8, at 1 (stating that DoubleClick is the dominant provider of buy-side ad serving tools, and has only two “distant competitors” including Microsoft’s Atlas); *with* Microsoft Corporation, Presentation at the E-Consultancy Supplier Showcase, Sep. 2007, at 3, *available at* [http://www.e-consultancy.com/knowledge/events/download/2007-Online\\_Adv/4-Atlas\\_Online\\_Adv07.ppt](http://www.e-consultancy.com/knowledge/events/download/2007-Online_Adv/4-Atlas_Online_Adv07.ppt) (stating that Microsoft’s Atlas has the “#1 market share in buy-side third party ad serving in the U.S.”).

<sup>14</sup> Microsoft FTC Submission, *supra* note 8, at 4.

DoubleClick’s ad serving products.<sup>15</sup> In any event, the FTC concluded that Microsoft’s bundling theories were implausible on the facts, including the highly competitive nature of the markets at issue.<sup>16</sup>

Microsoft next argued that Google might manipulate DoubleClick’s ad serving products without the knowledge of customers and to the benefit of Google’s ad network. Again, the FTC found this theory implausible on the facts, including the fact that customers could easily detect any such attempt at manipulation.<sup>17</sup> Finally, Microsoft argued that Google might somehow combine DoubleClick’s customers’ data with its own in a manner that would give Google an overwhelming advantage in the sale of ad space. The FTC rejected this theory for a number of reasons, including the fact that Google’s competitors, “Microsoft, Yahoo!, and Time Warner, have access to their own unique stores of data.”<sup>18</sup> The European Commission reached the same conclusions, noting that the merged entity would not be able to marginalize competitors “mainly because of the presence of credible ad serving alternatives to which customers (publishers/advertisers/ad networks) can switch, in particular vertically integrated companies such as Microsoft, Yahoo! and AOL.”<sup>19</sup>

In summary, both agencies conducted extremely thorough reviews. Both gave thoughtful attention to a host of arguments by competitors—even those that were far-

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<sup>15</sup> See, e.g., Hahn Singer Paper, *supra* note 4, at 8 (concluding that a merged entity “would have a greater incentive to increase the price of DoubleClick’s advertiser tools”).

<sup>16</sup> FTC Statement, *supra* note 1, at 10.

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.* at 10-13.

<sup>19</sup> Commission Press Release, *supra* note 6.

fetched and internally inconsistent—and both converged on the same conclusion.<sup>20</sup>

Hopefully this will serve as a reminder that it is not enough to hire lawyers and economists to concoct theories of harm and present them to the antitrust authorities in a shotgun fashion. To be effective and taken seriously, complaints about a transaction must have a strong factual basis, must be based on sound economic reasoning, and must be presented in a focused and coherent way. If this cannot be done—for example, if (as in this case) the transaction is demonstrably pro-competitive, then no amount of theoretical argumentation will persuade the agencies to challenge the transaction.

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<sup>20</sup> The acquisition has also been approved by the Australian Competition and Consumer Commission and was recommended for approval by the Secretaria de Directo Econômico and the Secretaria de Acompanhamento Econômico in Brazil.