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Does the European Commission's decision on Google open new scenarios for the Legislator? •

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1. *The facts*

On 27 June 2017, Google was found guilty of breaching EU antitrust law and was levied with a heavy fine of €2.42 billion by the European Commission. In addition, Google was ordered to give equal treatment to rival shopping services. Waiting for the full decision of the Commission to be published, I have briefly examined the strength of the case against Google and looked ahead at its implications on how the antitrust and data protection laws could develop.

The main point of the case, deduced from the press release[1], can be stated as follows. The Commission focuses on Google's behavior as a provider of a "comparison shopping service". Through this service Google "allows consumers to compare products and prices online and find deals from online retailers of all types, including online shops of manufactures, platforms and other re-sellers."

Two components of the case are especially important.

The first one refers to Google's dominant position in the market of search engines. In fact, as the European Commission points out, it has a 95% market share. However, this cannot be considered

• Lavoro sottoposto a referaggio da parte della Direzione della Rivista. Il lavoro - parte di un più ampio studio sui *Big Data and Fundamental Rights* svolto al *Max Planck Institute for Innovation and Competition* di Monaco - è stato preceduto da una riflessione tendenzialmente analoga già pubblicata nel sito dell'*International Association of Constitutional Law*, in *http://wp.me/p5sPRr-Ce*.

[1] European Commission, *European Commission - Press release, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, 27 June 2017, in *http://europa.eu/rapid/press-release_IP-17-1784_en.htm.*

per se an evil because, as will be outlined below, EU antitrust law does not punish market dominance as such, but only its abuse[2].

The second one, as the Commission recognizes, is related to a basic characteristic of Google's search engine and comparison shopping services: deeply interconnected markets. Indeed, the more a search engine is addressed with queries, the more attractive it becomes for advertisers. From Google's point of view, it makes business sense to invest in the search engine and gather a greater mass of data. However, this creates barriers to newcomers, which prevent them from entering the search engine market and, on the other hand, allows Google to transfer its dominant position from its original field to the market of comparison shopping services.

The Commission therefore concluded that Google abused its power as a search engine to gain a privileged position in the comparison shopping market causing a serious harm to competition. This effect has been accomplished by purposely showing Google's own products on the first page when answering queries, thus favoring them in the consumers' choice over the competitors' products.

2. *The legal framework*

Articles 102 of the Treaty on the Functioning of the European Union (TFEU) and 54 of the EEA Agreement give the Commission the legal authority to prohibit Google to abuse of a dominant market position.

It seems that the Telecommunications Directive Package 2002, as modified in 2009[3], has inspired the Commission to formulate the above sanctions on the asymmetrical remedy model. The latter allows the National Regulatory Authorities to mandate that former monopolists – when they are incumbents and are both Internet access and services providers – to share their own fixed network with other communication services providers[4] who do not own a network and then are forced to employ the incumbent's one. The incumbent (in this case Google) will have to make access to the service available to its competitors at the same contractual and technical conditions granted to its own divisions working in the retail market.

[2] For this aim let's refer to the long-standing doctrine: P. Areeda – D. F. Turner, *Antitrust Law: an analysis of antitrust principles*, vol. 1, Boston, Toronto, vol. 3, 1985, *passim*; J. T. Lang, *Monopolization and the definition of 'Abuse' of dominant position under art.8 6 EEC Treaty*, at *CMLR*, 16, 1979, pp. 345 et seq.; D. J. Gerber, *Law and the abuse of economics power in Europe*, at *Tul. L. Rev.*, 1987, pp. 57 et seq.

[3] European Parliament, *Electronic communications: common regulatory framework for networks and services, access, interconnection and authorisation. 'Telecoms Package' Electronic communications: common regulatory framework for networks and services, access, interconnection and authorisation. 'Telecoms Package'*, 2007/0247(COD), in *http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2007/0247(cod)*.

[4] Let me quote: G. De Minico, *The 2002 EC Directives Telecommunications: Regime Up to the 2008 Ongoing Revision - Have the Goals Been Reached?*, at *Eur. B. L. Rev.*, 19, 3, 2008, also at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345934*, pp. 657-675.

Not being this the proper place to discuss in detail asymmetrical regulations[5], I will limit myself to giving an essential sketch functional to this reasoning. They are rules aimed at imposing a unilateral obligation, namely only on one part of a relation, in order to equalize the different initial position between contractors. In the telecommunication field this duty basically consists in a specific obligation: the ex-monopolist, as owner of the network, must allow the other operators to access its line so that all the entrepreneurs could begin the competition from the same starting point. The objective of this intervention in contractual autonomy is to create ("mime") a competitive market through *fictio iuris*, with conditions similar to those which a competitive market would produce on its own.

Turning to our Google case, let's compare the remedy stated by the Commission and the quoted asymmetrical regulation.

The difference is that in our case the obligation of equal treatment is an *ex post* sanction, aimed at restraining an already performed abuse of dominant position; on the contrary, asymmetrical measures are enacted *ex ante* and with the objective of avoiding the illegal degeneration of the ex-monopolist's market power into an abuse of power. Finally, the former tend to restore the competition *status quo,* as it was before the infringement occurred; while the asymmetrical remedies look forward and tend to improve the existing level of competition.

In other words, the antitrust law is autonomous from the asymmetrical regulation[6], while the latter is applied only if the antitrust law is unable to keep a workable market; at the moment the European legislator has evaluated the general antitrust rules sufficient to keep competitive the digital market, but nothing excludes the possibility that in the future the European legislator changes his mind.

3. *The case against Google*

If we look in depth at the alleged violation of the antitrust law, one can note that it takes place because of the way Google answers questions. For instance, in response to a typical question such as: "which hotel has these given characteristics in this given area?", the reaction of the engine is prompt, unilateral and *per facta concludentia*. It will show the hotels sponsored by Google in the first results page, and those indicated by the competitors only in the following screens.

The algorithm has been designed by Google with selective and self-oriented criteria, so much so that the competitor's indication is inevitably positioned after the first page. At the same time, Google's own "comparison shopping service" appears at the top of the list. This happens for the simple reason that the latter service is exempted from the algorithm's test. This is well explained by the Commission in its press release:

[5] See note 3 above.

[6] S.G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, at *Cal. L. Rev.*, 3, 7, 1985, pp. 1005 et seq.

> "Evidence shows that even the most highly ranked rival service appears on average only on page four of Google's search results, and others appear even further down. Google's own comparison shopping service is not subject to Google's generic search algorithms, including such demotions".

But could one expect an objective assessment from a researcher which is inherently and permanently affected by a conflict of interests? Google uses the asset of the upstream market – the comprehensive data generated by our questions to the search engine – when it wears the vendor's jacket, thus dressing up its "comparison shopping service" in order that it may look better than the competitor's one.

4. *Remedial Response*

In light of these facts, we can consider the Commission's decision from a legal perspective. The Commission should be given credit for focusing not only on the search engine market – where Google is an uncontested master – but the market of comparison shopping services and recognizing that Google has used its power unfairly. Further the Commission should also be credited for having imposed a sanction forcing the Giant to assume a contrary behavior to the illegal one. This means that in the future Google will have to grant to its competitors the same treatments it gives to its "comparison shopping service": in sum, no unjustified advantage will be admissible from now on.

In the meantime, Google has proposed by the Commission's deadline (end of August) its package of behavioral remedies. Now a time span has been opened for the Commission to evaluate whether and how Google's proposals comply with the above principles of equal treatment as imposed, but not in detail, by the Commission. It would have been better that this Google plan had been made public so as to let everyone, not only the Commission, do this comparison considering that the values in play – fair competition and consumer trust - belong to all.

5. *The Future*

Despite some strength in the institutional remedial response, the Commission has perceived only a fragment of the problem. Google has built its economic strength upon our data, i.e. the very personal and non-personal information it acquires from us in exchange for its mail or cloud services. These services are, of course, only nominally free: the user pays for them by transferring parts of herself of which she loses track. We have even less rights than a minority shareholder, who is at least entitled to know how things are going in a company governed *by others*.

Thus, the affected values are at least two: the market and the right to self-determination of the virtual identity. Therefore, although the Commission has taken the antitrust law as a starting point,

what is necessary is the development of sanctions in defense of the person's dignity. These sanctions should be designed to protect this new aspect of privacy, related to those chaotic and constantly growing masses of data, which generate more information, always new and unpredictable at the moment when data is collected: the big data[7].

Such a concept of privacy is so unprecedented that we could be in doubt whether it is still the 'right to be let alone' or a new fundamental right. It is quite different from the traditional right of privacy, which is satisfied by some basic rules: informed consent, minimization of collection – as to its time and object – and specific purposes.

Now, this traditional triad is torn apart by the impact with big data. Indeed, how could the consumer consciously consent if she is not aware of the further use of her data? How can she be made aware if such further use is unpredictable, with the consequence that any *ex ante* consent would be *inutiliter datum*? Also the safeguard given by the specificity of the aim vanishes because the biggest profits come exactly from the secondary and collateral uses, which are still undefined when the data are collected. For the same reasons, the gathering of data will not be limited to its duration and object, because the broader the gathering, and the bigger the data set, the higher the probability of drawing useful behavioral predictions.

Then, will privacy disappear? No. Simply, under pressure from the big data revolution the old categories of the fundamental rights are falling to pieces. This is a radical shift and a new concept of privacy is struggling to find its way. It will involve different demands[8]: from informed consent to a juridical liability for those who gather data[9], or – more precisely – to a demand of preventive policies and risk-assessments.

From the data producer's point of view, the same rule translates at least into three different rights. In particular, to know the search engine's modes of operation; to have clear and unambiguous information about how our data are collected (by, for example, Google) and how new goods will be offered on the basis of this data; to apply to an impartial third party charged to oversee the reliability of the data gathering algorithm and, connected to this, to challenge before a judge any unreliable behavioral predictions inferred from the big data. This list is not exhaustive and so it doesn't exclude other responsive solutions[10].

Such an ambitious result is not attainable by the Commission alone. As a market watchdog, the Commission is inapt to look after the protection of digital privacy as a fundamental right. Consequently, it would be necessary for the Commission to engage in dialogue with the European authorities for data protection, be it the National Data Protection Authorities of the Member States,

[7] K.N. Cukier – V. Mayer Schönberger, *The rise of big data*, in *Foreign Affairs*, 92, 3, 2013, pp. 28 et seq.

[8] V. Mayer Schönberger – Y. Padova, *Regime Change? Enabling Big Data through Europe's New Data Protection Regulation*, at *The Col.Sc.Tec. L.Rev.*, 17, XVII, pp. 317 et seq.

[9] Council of Europe, *Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data in a World of Big Data*, Strasbourg, 23 January 2017, at https://rm.coe.int/16806ebe7a.

[10] Max Planck Institute for Innovation and Competition, *Position Statement "Public consultation on Building the European Data Economy"*, 26 April 2017, on the European Commission's Public consultation on Building the European Data Economy, at http://www.ip.mpg.de/en/research/research-news/position-statement-public-consultation-on-building-the-european-data-economy.html.

the European Data Protection Supervisor or the European Commission's Data Protection Officer. Indeed, such decisions – born in one market, the data one, and moved to another market, the shopping comparison one – affect different values: on one hand, competitive balance, and on the other, the individual's right to know what is happening to her.

The latter right is still absent in the European decision-making process, and has barely emerged in the European Regulation on personal data[11]. The first evidence of this inadequate attention to the right to follow one's digital information flow is the absolute absence of the term Big data in the text of the above Regulation. Another consideration must be added to this: the Regulation recognizes the rights connected to big data in contradictory terms, which reveals an oscillating policy on whether to protect Big data or, instead, individual rights. Here is an example to illustrate what I have just said: on one hand, the profiling of a person is permitted, albeit only under certain conditions (Art. 21), - but it is worth remembering that profiling is the technical presupposition to the gathering of Big data; and on the other hand, the right to be "digitally forgotten" is recognized, even if in relative terms (Art. 17), but the very fact that it exists as a right prevents data collection.

Just as the right to privacy has been disregarded by the Legislator, as I underlined above, so has the same right not been taken into account by the Commission's antitrust decisions. In fact, the Commission has always repeated, like a refrain, that privacy concerns don't fall within the scope of EU competition law, therefore remaining outside its competence. On the contrary I think that the values making up a person, among which undoubtedly privacy, deserve much stronger attention also by the Commission for the basic reason that the defense of the market can not go ahead without the well-being of consumers, which in turn includes also the right to privacy.

In conclusion, the European political decision-maker faces a challenge: either to redesign the decisional processes on the basis of new models – open to more Authorities, serving more values, and porous to the value of personal integrity – or to keep the jurisdictional framework unchanged, thus accepting the sacrifice of individual rights.

To summarize: the Commission's Google decision opens new horizons to the policymaker. Will she be able and willing to explore them?

[11] *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, at OJ, L 119/7, 4.5.2016, at *http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016R0679*.