

What can we learn from recent French cases in the online advertising sector?

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France as a test jurisdiction

- Several complaints regarding Google or other market participants are being investigated by a number of competition authorities (CAs)
- France is special in at least three ways:
 - CA is generally seen as sympathetic to the use a “more economic approach”
 - CA has devoted ample resources to a detailed sector investigation (English version available)
 - At least two (competition) cases regarding Google have been decided: one by the CA, one by a (lower) court
- (France is also at the forefront of the European investigations regarding Google’s privacy policies: CNIL coordinates)

Purpose of this presentation

- Revisit:
 - CA's sector inquiry (Opinion No 10-A-29 of 14 December 2010)
 - CA's *Navx* decision (Decision No 10-D-30 of 28 October 2010) (uncontested)
 - Judgment of the Commercial Court (Tribunal de commerce) of Paris of 31 January 2012, *Bottin Cartographes v. Google France, Google Inc.* (appealed)
- See how recent economic results shed light (or not) on those decisions/investigations
- Draw lessons for future of competition law enforcement in the sector

Sector inquiry

- Request by French Ministry for Economic Affairs on 18 February 2010 (pressure from website publishers and content providers)
- Detailed investigation in 2010
- Lengthy report in December 2010
- Two-sidedness of search platforms acknowledged but market for search queries not investigated
- Main evidence: survey sent out to advertisers; no econometrics
- Main economic issue: market definition on the side of advertising

Sector inquiry (2)

- National advertising markets (differences in language, culture, brands, consumption patterns)
- Online and offline advertising are not in the same market
- Specific *search-based* advertising market
- Google on a dominant position on this latter market
- A number of competition concerns (possible abuses)

Navx case

- Navx = provider of databases on radars used by police to detect speeding (inter alia)
- Legal activity
- AdWords account “abruptly” closed by Google on the basis of its content policy (contractual terms)
- Threatens the business model of the firm which makes 70% of sales through search-related commercial links

Navx case (2)

- CA accepts Google's commitment to adapt AdWords content policy for two years with regards to devices/services susceptible to undermine driving laws enforcement: better definition of what is/is not allowed and notification procedures
- CA “acknowledges” that Google will implement such changes for all contents and all countries
- Commitment decision : no economic analysis of relevant market, dominance, or abuse

Bottin Cartographes case

- Private liability action introduced by Bottin Cartographes against Google before a commercial court (B2B)
- Bottin Cartographes provides programming services to website publishers (maps)
- Argues that Google by delivering Google maps for free to websites violates Art 102 EU as well as French legislation on “abnormally low” prices
- Google appeals to Commission’s guidance paper regarding predatory pricing but Court applies formal criteria from case law

Bottin Cartographes case (2)

- Court rules:
 - That Google is “a de facto monopoly” on the French market for search engines
 - That Google is in a dominant position on the market for online maps (adjacent market)
 - That the free provision of maps by Google does not cover the variable costs of production
 - That the practice under review has the effect of evicting any competitor but is also “obviously” part of general anticompetitive strategy because contractual terms allow Google to insert map-related ads *in the future*
- Awards plaintiff EUR 0.5m in damages

Lessons

- None of the three decisions/investigations really tries to actualize recent advances in economic theory regarding two-sided markets
- General acceptance that there is a market for search-related online advertising
- Whether this applies to markets for other online services calls for more research
- A number of issues have to do with economic freedom/contractual balance: would have been picked up under contract law even if Google were not dominant

Lessons (2)

- Global firms face legal risks that affect their global business model in many jurisdictions: should we welcome private enforcement developments?
- Google's expansion into specialized services ("verticals") is particularly problematic: *Bottin* has a one-sided business model, Google a two-sided model
- What predatory pricing means in a context where one side is charged nothing is problematic; however, it should be clear that one-sided competitors cannot survive: is two-sidedness the abuse?
- Tension between (lack of precise) economic theories of harm on two-sided markets and somewhat formalistic case law: a preview of the European Commission case?