

Online search: "Antitrust"

There is still a long way to go in satisfying antitrust concerns

by *Philip Marsden**

Antitrust interest in online search and advertising only launched recently but it is already spreading around the world. Whether in mergers, antitrust or private damages actions, most complaints involve allegations of search manipulation. Given the trust that all users place in the objectivity and relevance of rankings, bias is a concern that resonates, almost viscerally. It is new ground for antitrust enforcers, though, and will require hard evidence. Even if proven, it is not yet clear what remedies would be effective.

Other antitrust concerns are less visible but may prove more potent. The most relevant search results are provided through astute collection of user data, innovative algorithms and massive computing power, funded by (and driving) advertising revenue. A key factor in all of this is scale – in terms of gathering content, data and user traffic. Since quality attracts, one hopes that it is the prime mover in successful search engines. But scale can also be bought, through exclusivity arrangements that engines have with providers of other services, content and even engines in new markets. Complainants argue that these deals prevent them from achieving the scale to compete. Some also allege that search engines are maintaining scale by buying very popular content outright, and then depriving rival engines of access, or degrading it so the latter's search-offering pales in comparison.

These concerns about exclusivity and access are classic grist for antitrust enforcers and are redolent of harm alleged in recent high tech cases. However, the approaches taken differ dramatically by jurisdiction. The prospect of conflicting enforcement results in online search is thus very real. Simply put, some permit what others prohibit. With such mercurial markets, and products that are largely global and elusive, any intervention that is required may not be effective, not in real time anyway. The conflicting policy approaches compound this problem. Pressure may thus build for governments to intervene in blunter ways that will damage and undermine genuine innovation. This paper examines these issues and calls for greater policy dialogue and robust analysis to ensure coherent and effective responses.

Theories of harm

Amid the growing number of complaints about online search and advertising, there appear to be three primary antitrust allegations:

- search manipulation is distorting competition downstream among providers of other services;
- search engines have exclusivity agreements with content providers that are denying rival engines the scale to compete effectively; and
- search engines that have bought content outright are denying or degrading access to it, and thereby starving rival engines of the ability to provide at least as relevant results.

Harming downstream rivals by manipulating search

This is probably the most visible complaint in current antitrust cases. But it can be invisible in practice. It should be easy to prove: you enter a search term such as "email" or "maps" into different engines, and if they favour their own services over others, then bias seems clear. The problem is that such ranking discrimination could be entirely fair – one product could simply be better, one search engine simply more accurate. The issue of manipulation resonates, however, and not only with the complainants who provide services that compete with those integrated with search engines. They are naturally furious when they receive low rankings as they will receive less traffic, could be forced into more expensive distribution channels or, more likely these days, out of business.

However, search engines pride themselves on providing only the most accurate results, devoid of bias or manipulation. They insist that they would never sacrifice their overall promise of objective high-quality results for users (and with them the attraction of paying advertisers) simply for a short-term and smaller gain of foreclosing a downstream rival of another of their services. Who is right? Some engines do admit that they tweak their algorithms regularly, and sometimes manually intervene to force unwanted sites like "content farms" down their rankings. So the ability to manipulate results is there, directly or indirectly. Much debate thus centres on engines' incentives to remain pure.

One serious complication is that very short-term bias can happen but be too ephemeral to prove. Any improperly favoured site would receive significant traffic and become the most popular result, sheer force of numbers thus laundering the bias. Another complication arises because some experts suggest that engines should be able to favour their own integrated services over those of their rivals, much like retailers who give pride of shelf-space to their own-brand products. It is a problem, though, if this sort of favouritism isn't done transparently, particularly in the online world, where people have little to go on but the ranking given. Since search results are "credence" goods, users have no choice but to trust that rankings are derived objectively. There is no market or other mechanism by which they can correct distortions or impropriety. Thus, if results are based on anything but quality, then this should be clearly identified, as it is with paid search results and with own-brand goods in the real world.

How one does this is not easy, however – particularly when engines deny there is any bias in the system anyway. It is tempting then to fall back on an analysis of abilities and incentives. Game theory and models can only take you so far, though. Actual proof of bias would be preferable, particularly because issues of intervention (when? how? where?) are so problematic. One hopes that – in these days of cached files,

* *Dr Philip Marsden is Senior Research Fellow at the British Institute of International and Comparative Law (BIICL) and Visiting Professor at the College of Europe, Bruges. Many thanks to participants in a BIICL seminar of the above title in April 2011 for stimulating the thinking behind this paper; the views expressed above are the author's own. Thank you to Lina Vitolo for research support.*

screen shots and hard computing power – if bias exists, then hard evidence should be identifiable.

The narrative of harm is clear: skewed results, foreclosure of rivals, less choice for consumers. What isn't clear is the remedy. Commitments to provide objective results would appear to leave us where we are already. Anything more severe – such as forced equality of results – would replace competitive rankings with regulated randomness, thus destroying search's relevance entirely. All the more reason for authorities to demand clear evidence of bias and resolve cases quickly wherever possible through punishment that is well targeted and well publicised.

Harming other search engines by denying scale

Unlike bias, this practice is observable if not widely known. Here search engines acquire scale literally by buying user data via exclusivity deals with other operations. These may include websites with a significant following, other forms of content, social media, and even popular search engines in other markets. The acquiring engine offers to run searches on or for the service, and receives exclusive access to the resulting user data. As with its own search operations, this data allows the engine to achieve greater scale with which to refine its search results, thus improving users' experiences further. Advertisers flock to the search engine with the most comprehensive offering, in terms of eyeballs and accurate results, providing it with funds for further innovation, or for more purchases of scale. Engines that can buy scale grow rapidly; little engines that can't, slide backwards, shedding users, advertisers and services.

Buying exclusivity isn't new, nor is using it to achieve scale economies. In any sector, firms big and small sign exclusivity deals with their suppliers and customers to lock-in secure supply and demand. The resulting numbers and security allow for greater investment, planning and efficiencies. From an antitrust point of view, it is accepted that exclusion is an inherent part of exclusivity – and is usually tolerated when there are such overriding efficiency benefits. Competition for the contract itself is a key driver of such gains. Antitrust concerns only arise when a significant portion of the market is tied up and denied to rivals for too long.

The difference with buying scale in search is working out what constitutes foreclosure and how long is too long in the online world. Acquiring a mountain of user experience can rapidly improve search result improvements and advertising revenue. Similarly, missing out on such deals will just as dramatically diminish a smaller engine's offering, quality and war chest. The engine with a larger and more secure supply of data enters a virtuous spiral of improvement, while smaller engines enter a Hobbesian freefall as their accuracy and advertising dries up.

The acquisition of scale requires deep pockets. Search engine operators have these, as do those with other business operations who are thus not reliant on ad revenues alone either to drive innovation or to buy scale. Given this, smaller engines that get only the rump exclusivity deals may not necessarily leave the market altogether.

What matters, though, is whether a gap in scale is created such that the chasing pack no longer acts as a competitive constraint on the leader. It is often said in the online world that competition is only one click away, as there are a number of

alternative engines and channels of distribution. However, if the difference in scale and offering is so large that that click is to an engine that is a distant second or third, then their disciplinary effect is lesser and the market power of the larger player may be entrenched even further.

This reduction in real choice may be mitigated so long as the larger player constantly refines its own offering to ensure objectivity and accuracy. However, in that case, trust and own-initiative technological advances are all that one can rely on. Innovation has been significant, but the evolution from search to suggested search to instant search came from a competitive interplay among the main engines. If this dynamic is at risk due to a scale gap, then it is not surprising that competition authorities are taking a careful look at exclusivity arrangements to try to get ahead of any potential issues.

While the successful competitor must not be turned upon when it wins, the authorities' role is also to ensure that victory was won fairly and on the merits. One factor that makes applying these maxims difficult, though, is the significant international divergence about the balance to be struck between the efficiency-enhancing nature of exclusivity and its exclusionary effects. This has caused friction among authorities in abuse of dominance cases and mergers and is still an outstanding area of informed divergence that will likely impede coherent analysis and intervention.

Harming other search engines by denying access

Another theory of harm arises from the fact that search engines often do more than sign exclusivity deals, they acquire sources of popular content outright. These can include massive libraries, video and music sites, travel operators, social media and mobile advertising. Here, though, exclusivity isn't the issue: the engine owning the content may still allow it to be searched by other engines. The problem arises, however, if they receive less ready access than the owner. Degrading access is a ploy that occurs in a number of industries, notably telecoms, and authorities have developed sophisticated analytical tools and mandatory orders with which to identify and address such concerns. Again, though, different jurisdictions take different approaches to this sort of conduct, with different thresholds for intervention. The entire concept of what constitutes reasonable and non-discriminatory access is also hotly contested. What this means in the online world is not yet clear. A complicating factor, as well, is that the engine providing access could receive insights into its customer rival's own capabilities.

Competition law considerations

Competition law acts to ensure that markets work fairly for consumers; in many jurisdictions, its screen for intervention requires that there is evidence of likely harm to consumers. With search, consumer benefits are more readily identifiable than instances of harm. In addition, search is free and an incredible benefit to a society so reliant on the online world. Competition in search isn't about price, of course, but about the quality of the results. However, if bias distorts quality, if denial of scale degrades quality, and if degrading access diminishes quality, even indirectly by entrenching dominance and limiting choice, then these are potentially huge problems.

How can they be identified and addressed coherently though?

Policy divergence raises myriad complications. Will agencies with a consumer welfare screen take too long to identify problems and intervene too late, allowing dominance to become so entrenched that it becomes impossible to prevent or correct exclusionary acts? Will agencies that focus more on ensuring rivalry respond to competitor complaints too quickly and strongly? How will business react to such conflicting signals? No one wants to punish “bigness” itself, but is a scale gap between rivals a problem, or is it evidence of competition at work? Agencies whose case law focuses on competition as a “structure” or “institution”, rather than as a “process”, are more likely to see it as a problem. They may prefer markets with rivals of similar sizes, rather than clear leaders. Can such a market structure be maintained by anything other than government fiat, however? And doesn’t this require punishing success and chilling pro-competitive innovation? Perhaps we will see a division of labour among agencies. Those concerned about market structure may be particularly exercised by scale gaps. Agencies enforcing provisions preventing unfair competition may try to tackle search bias and degraded access. How will analysis proceed though?

Key questions

Market definition is a necessary stepping-stone but a particular stumbling block in analysing these issues. Search companies are really advertising companies, first and foremost. As such, their business model, revenue stream and competitive constraints all make online targeted search and advertising the prime focus of interest. How should the discipline of vertical search engines be built into the analysis though? And even if dominance seems clear in this market, is it really serial? How does one account for the Schumpeterian nature of online competition? This makes it a legitimate corporate strategy to compete for contracts, for exclusivity and for control of access to content. These all generate the scale economies and first mover advantage that in turn drives the gears of search and advertising revenue streams.

At what point, though, do the scale and access constraints slow down the competitive interplay among rivals? Even if so, do we have long to worry? Is social search a game-changer, replacing the engines’ reliance on the wisdom of crowds and algorithmic search with counting what a users’ cohort views as most relevant to them? Is mobile search already revolutionising the market, with added features such as what is a relevant result right now where you are? Or are existing investments in scale and content already predetermining how these markets will develop?

Even if top-line competition is inherently unstable and “one click away”, what happens during the interim periods of dominance, particularly when different jurisdictions take different views on what conduct a dominant firm is allowed to engage in?

Policy differences

Policy conflict is inevitable. Some authorities view inducements to exclusivity as innocuous, others as problematic per se if offered by a dominant firm. Others intervene when the exclusives attain a particular level of market prevalence, though there is disagreement as to the threshold. If scale and access are viewed as essential for participation in these markets, then complications arise due to international divergence on what this term means,

and the dilution of tests analysing what is “indispensable” or “objectively necessary” to provide “viable” competition.

Differences also exist with respect to some defences. Some jurisdictions are cautious before intervening, taking it as read that mandating access will chill innovation incentives; others are more suspicious and take a precautionary approach, requiring dominant firms to provide access to their rivals unless they can prove such a chill. Most importantly, the threshold for intervention itself is very different. Jurisdictions that can act when harm to rivals is only “capable” of occurring, without any link to consumer harm, will have greater scope to act.

Online search and localised remedies

Unsurprisingly, jurisdictions with theories of harm that are more readily proven also have more interventionist remedies. In the high-tech arena, this has produced localised remedies that require redesign of software, the removal of code and applications, and the mandating of choice screens and interoperability. How might this translate to online search? Will OEMs be forced to carry multiple search engines? Or will even bolder interventions be attempted? Scale and access issues have been addressed in important offline sectors, through commitments for forced increases of supply. Does this mean online search remedies might see the forced release of user data? To address bias, should we expect mandated neutrality? How would that work, over and above search engines’ existing aims? Monitoring search and correcting any bias seem practically insoluble problems as yet. Enforced randomness in search is inappropriate, as it would neuter rankings and the business model, and make a nonsense of competition on the merits.

More questions than answers

Is it even possible to design targeted remedies that address specific problems? Addressing concerns about bias directly seems impossible without undue distortion. Can (or should) it be addressed by limiting some aspects of scale acquisition? Is it possible to identify where the most serious scale issues might arise? Would an agency want to limit or dilute exclusivity early on, allowing data to be shared among all engines – with innovation based on algorithms being maintained as a competitive advantage? Will dominant firms be banned from exclusive deals above a certain level and even from some vertical mergers? Or do agencies need beefed-up access remedies, to help guarantee that competitive discipline from multiple sources itself deters any incentive to bias results? Can enforceable access remedies be designed and monitored effectively through trustees, without agencies becoming regulators?

There are far more questions than answers, and even this list of issues is daunting. The risk of enforcement errors is clearly high no matter whether an “act now” or a “wait and see” attitude is adopted. International dialogue and understanding should be promoted to help achieve robust analysis and coherent and effective policy. However, given the high stakes and diversity of interests, given the jurisdictions and approaches involved, and given recent experience in antitrust cases in high-technology markets, coherence is not a likely result of such a search. Enforcers tend to learn by doing, albeit more slowly than the markets they referee. This means that we should expect more friction and more heat before there is any more light in this area.