

ARTICLE

Did Enforcers Make the Right Call When Clearing Google/DoubleClick?

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The Network Law Review is pleased to present you with a special issue curated by the Dynamic Competition Initiative (“DCI”). Co-sponsored by UC Berkeley and the EUI, the DCI seeks to develop and advance innovation-based dynamic competition theories, tools, and policy processes adapted to the nature and pace of innovation in the 21st century. This special issue brings together contributions from speakers and panelists who participated in DCI’s second annual conference in October 2024. This article is authored by Christian Bergqvist, Associate Professor at the University of Copenhagen.

Abstract. Google’s activities in the Ad Tech Industry have come under intense fire as the company stands accused, in several jurisdictions, of manipulating the sale of online display advertising space. Instrumental is a set of services that Google did not develop organically but acquired through its 2007 acquisition of DoubleClick. This has led some to question whether enforcers should have blocked the transaction, and while I disagree with this position, it merits discussion. This paper aims to facilitate such a discussion, in part by explaining why enforcers in 2007 decided not to challenge Google’s acquisition of DoubleClick. This allows readers to formulate their own opinion on the matter.

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Since its inception in 1998, Google has been on a virtual shopping spree, acquiring 256 companies,¹ including YouTube, Android, Waze, Fitbit, and DoubleClick, to mention a few. While most have gone unnoticed or at least unquestioned, this has not been the case with the 2007 acquisition of DoubleClick. Many have noted² how this acquisition has positioned Google to leverage market power into adjacent and emerging online services, creating today's digital behemoth. Neither the Directorate General for Competition of the European Commission (DG COMP), enforcing competition law in the EU,³ nor its US counterpart, the Federal Trade Commission (FTC),⁴ opposed the transaction in 2007, later creating a perception of an enforcement failure. However, this criticism relies on hindsight⁵ and ignores how both agencies undertook substantial analysis before allowing the transaction to move forward, only clearing it after being convinced that it did not endanger competition. In the case of the FTC, the votes were split 4-1, although the argument of the one commissioner who opposed the transaction⁶ was in a sense supplemented by a second commissioner who, while concurring with the majority opinion, felt compelled to issue a separate opinion⁷ outlining how many people (probably including himself) didn't "... fully understand the still nascent Internet advertising market". Naturally, this does not necessarily absolve enforcers of misdoing. Still, it indicates that genuine concerns were identified in 2007, and that a serious attempt to evaluate the transaction properly was attempted across enforcers. Nevertheless, revisiting the motivations, including embedded assumptions and analysis, appears prudent, given that--as some suggest--subsequent developments might have proven these wrong.

Before examining enforcers' (positive) review of the Google/DoubleClick transaction, the Ad Tech Industry must be presented in order to understand their conclusions better. Subsequently, this will be summarised and evaluated in more detail. For the sake of brevity only DG COMP's decision will be analysed, as this has been published and comes with substantial internal reflections and consideration. By

¹ The figure of 256 companies is derived from a Google Search inquiry.

² See, e.g., Letter to the European Commission on the EU Adtech Case, Open Market Institute, 15 October 2024 or Steve Lohr, This Deal Helped Turn Google Into an Ad Powerhouse. Is That a Problem?, The New York Times, September 21, 2020.

³ Technically, DG COMP's enforcement power extends to the European Economic Area (EEA), and thus beyond the EU. For simplicity, references will be made to the EU and not the EEA.

⁴ Statement of the Federal Trade Commission Concerning Google/DoubleClick, December 20, 2007.

⁵ Based on a Google Search, the only original papers expressing substantial concerns are Google Acquisition of DoubleClick: Antitrust Implications, AAI, November 6, 2007; and Hahn, Robert W. and Singer, Hal J., An Antitrust Analysis of Google's Proposed Acquisition of DoubleClick (February 1, 2008). AEI-Brookings Joint Center Related Publication No. 07-24. Others mainly focus on privacy issues or are remarkably short, offering no substantiated concerns. Interestingly, both AAI and Hahn/Singer rebut the claim that Google and DoubleClick were not competitors. As outlined below, this was a core assumption in DG COMP's review.

⁶ Dissenting Statement of Commissioner Harbour In the Matter of Google/DoubleClick, December 20, 2007.

⁷ Concurring Statement of Commissioner Jon Leibowitz in the Google/DoubleClick Matter, December 20, 2007.

contrast, the publicly available FTC’s Decision is short (13 pages) and offers few substantiated analyses that can be dissected and evaluated.⁸ Moreover, several concerns expressed therein pertain to privacy matters rather than antitrust.

1. Google’s acquisition of DoubleClick

Google acquired DoubleClick in 2007 after a bidding war in which Google agreed to pay USD 3.1 billion. It is understood that the other contenders included Microsoft and Yahoo!,⁹ making it plausible that DoubleClick would have ended up with one of these had Google not outbid them.¹⁰ Before the acquisition and its potential anti-competitive elements can be discussed, comments on the online advertising business must be offered, including how DoubleClick fits into the pending Ad Tech antitrust investigations against Google. As outlined initially, DoubleClick is often claimed to be the enabler of Google’s later (alleged) crime spree.

1.1. Understanding the online advertising business

DoubleClick, in 2007, offered services that we today attribute to the Ad Tech Industry, involving the selling and buying of online advertising, or more specifically, the facilitation of such transactions.¹¹ Companies like DoubleClick (and Google) do not sell or buy advertising directly but function as intermediators between the advertisers and the owners of online advertising spaces, where the latter are commonly referred to as “publishers”. Using this method, the intermediary¹² operates as a two-sided platform or a network, pooling available online advertising space and/or advertisers looking for such and matching them as an alternative to direct sales between the two parties. Besides online operators like DoubleClick (and Google), traditional media agencies were also offering intermediary services in 2007.

1.1.1. Two forms of online advertising have emerged

Online ads can roughly be categorised as either searchable or non-searchable ads, where searchable ads appear next to the organic blue links yielded in response to user inquiries on an internet search engine. These are selected based on the user’s search keyword and generate payment for the owner of the search engine. Non-searchable

⁸ However, reviewing the FTC Decision with the benefit of the information available in DG COMP’s Decision, it appears that the FTC followed the same line of reasoning as its EU partners, including not identifying Google and DoubleClick as direct competitors.

⁹ C.f. Steve Lohr, *This Deal Helped Turn Google Into an Ad Powerhouse. Is That a Problem?*, The New York Times, September 21, 2020.

¹⁰ The relevance of this will be discussed below.

¹¹ Following the acquisition, Google reorganized DoubleClick; and while Google DoubleClick still offers services in the Ad Tech Industry, it today makes less sense to refer to DoubleClick as having a separate business profile.

¹² For further, see e.g. COMP/M.4731 – Google/DoubleClick, recital 18–43.

ads, also called display ads,¹³ can appear on any webpage and be texted or enriched with pictures or videos. Often, they can be found on content pages like YouTube and Facebook or traditional content providers like online newspapers, where the owners (the publishers) monetise their real estate by making it available to advertisers.¹⁴ While searchable ads were formerly traditional revenue streams for Google and other providers of search engines, the industry is shifting to non-searchable (display) ads, making these more prominent in terms of market size and revenue.

1.1.2. The rise of Ad Tech services

Intermediators, connecting advertisers and publishers, offer several partly overlapping and complementary services when an advertiser wants to contract with publishers to run a campaign. Traditionally, this would be done manually and based on meetings and discussions, and the publishers would be newspapers and the owners of public billboards. However, the proliferation of online advertising has fundamentally changed this industry, including how to buy and sell advertising. Not only have newspapers and billboards been replaced by online options, but the whole process has been automated, such that increasingly, advertisers' and publishers' bids are cleared over an exchange akin to a traditional marketplace or stock exchange. How this is done depends on many factors, including whether one is a large or small advertiser; and direct sales remain an alternative to relying on an intermediary, particularly for premium space and by large publishers.¹⁵

1.1.3. DoubleClick's role in the Ad Tech stack

DoubleClick was and is an intermediary, but its activities originally had a more limited and targeted focus. After acquiring DoubleClick, Google changed its functionalities, and DoubleClick today serves publishers and advertisers more broadly than in 2007. However, at that time, two separate services had already emerged, involving a) the transaction directed at matching advertisers and publishers and b) the subsequent placement of the advertising. The former consists of buying and selling online advertising space, whereas the latter involves the physical placement, or management, of the advertising on the acquired online space. Intermediators, therefore, often bundle their services, managing both the sales process and the subsequent placement of the advertising, but, e.g., publishers relying on direct sales will source only the management part.¹⁶ As explained below, in 2007 DoubleClick's activities were confined to managing the placement of advertising

¹³ As non-searchable ads can be text or display, display ads are formally a subgroup of non-searchable ads. However, in practice, "display ads" appear to have proliferated.

¹⁴ A third category is called classified ads, which are grouped within specific web pages under a heading, but this did not play any role in the review. See COMP/M.4731 – Google/DoubleClick, recital 11.

¹⁵ COMP/M.4731 – Google/DoubleClick, recital 19 and 33.

¹⁶ COMP/M.4731 – Google/DoubleClick, recital 33.

space once acquired, with a minimal stake in buying and selling advertising space.¹⁷ Google, in contrast, offered both as a bundle in 2007, though it focused on facilitating the sale, with the placement being more of an ancillary service. This explains why, e.g., DG COMP did not identify Google and DoubleClick as direct competitors during the review, as outlined below.

1.1.4. Google’s role in the Ad Tech stack and the rise of Ad Tech antitrust cases

As already indicated, Google serves both advertisers and publishers when it comes to non-searchable display ads. As YouTube’s owner, Google is probably also one of the most significant publishers, and Google even owns the most prominent exchange (AdX) where bids are cleared. This creates an inherent conflict of interest in which Google could take advantage of its position and show partiality to its own services, to the detriment of competitors and customers (i.e. the advertisers and publishers).¹⁸ If pursuing a foreclosure strategy, the victims could also include competing exchanges. The risk is not abstract. In 2021, the French Competition Authority concluded¹⁹ that Google had failed to secure the best bids, at the expense of publishers and advertisers. Several enforcers have followed suit and opened investigations, including DG COMP²⁰ (2023) and the US Department of Justice²¹ (2023), but only the French case had been decided by the end of 2024. Presumably, the investigations vary across jurisdictions to take account of local factors. Still, at the core, they are directed at the embedded conflict of interest associated with serving several parties with opposing interests within the Ad Tech Industry. Moreover, the services Google acquired through DoubleClick play a pivotal role. With the benefit of hindsight, it’s tempting to conclude that DG COMP and the FTC got it wrong when they did not oppose the acquisition in 2007.

2. DG COMP analysis of Google/DoubleClick

Google acquired DoubleClick in 2007 for USD 3.1 billion, but as DoubleClick’s turnover did not meet the required thresholds (> EUR 250 million in the EU), the transaction was not initially noticeable under the EU’s Merger

¹⁷ DoubleClick was in the process of establishing an ad-exchange and thereby entering buying and selling advertising space: c.f. COMP/M.4731 – Google/DoubleClick, recital 5 and 191. However, this does not appear to have influenced the assessment.

¹⁸ C.f. Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology, Press release from DG COMP Jun 14, 2023.

¹⁹ Décision 21-D-11 du 07 juin 2021 – relative à des pratiques mises en œuvre dans le secteur de la publicité sur Internet (regarding practices implemented in the online advertising sector).

²⁰ Case AT.40670 – Google – Adtech and Data-related practices. For an outline of the case see, e.g., Christian Bergqvist, EU’s Google AdTech Investigation—Some Preliminary Thoughts, E.C.L.R. 2024, 45(3), pp. 123-126.

²¹ USA et al. v Google LLC, 23-cv-00108 in the US District Court for the Eastern District of Virginia. Several AdTech cases have been filed in the US. However, the DOJ case is the most prominent.

Regulation.²² However, upon a request from Google, the case was referred to DG COM in order to avoid parallel and overlapping reviews in several EU member states. The EU's Merger Regulation provided for this on condition that no member state would object. After opening a phase II investigation and some lengthy and complex evaluations, DG COMP cleared the transaction unconditionally in March 2008.²³ DG COMP's Decision and its assumptions are outlined below, including comments. Section 3 will offer more substantial comments, including where DG COMP might have gone wrong and why.

2.1. The Ad Tech Industry in 2007

When reviewing DG COMP's move not to oppose the transaction, we must first understand that online marketing in 2007 was still nascent, accounting for less than 6 % of global advertising (2006),²⁴ and with searchable slightly larger than non-searchable online advertising. It had excellent growth potential, with projections for 2007 of 28.2 %.²⁵ Google probably understood this earlier than others—including traditional advertisers and publishers, who still relied on newspapers, magazines, and billboards. This is obvious today, where online marketing, both searchable and non-searchable advertising, is booming while conventional channels have stagnated, but in 2007, things looked very different. Across DG COMP's Decision, the nascent and immature nature of the online advertising market is apparent, complicating data collecting and verification and often limiting the indicated market data to some broad intervals.

2.2. DG COMP market definitions

Both Google and DoubleClick were active in online advertising, and in its decision DG COMP defined this as a separate market from offline marketing. DG COMP contemplated²⁶ further distinctions, including searchable vs. non-search advertising, large vs. small publishers, and direct sales vs. the use of intermediates. However, no final decision was required, as it did not influence the transaction assessment. By contrast,²⁷ it was relevant to identify separate markets for a) publishers and b) advertisers, because they required different functionalities, and between c) buying and selling space, called intermediation services and d) the

²² COMP/M.4731 – Google/DoubleClick, recital 7.

²³ The FTC had already cleared the transaction in December 2007.

²⁴ COMP/M.4731 – Google/DoubleClick, recital 9. The less than 6 % relates to global spending, and it remains unknown whether the situation differed in the EU. Regarding actual sales, recital 17 estimates this as totalling 8 billion euros in the EU in 2006, with searchable online advertising slightly larger than non-searchable. See also recitals 9 and 16 for other assessments.

²⁵ COMP/M.4731 – Google/DoubleClick, recital 9.

²⁶ COMP/M.4731 – Google/DoubleClick, recital 56-73.

²⁷ COMP/M.4731 – Google/DoubleClick, recital 79-81.

subsequent management of these, including placing the ads, called ad-serving services. As indicated earlier, many intermediators offered both as a bundle, but separate services could be identified. Not only were they clearly distinctive and separate services, but some providers, such as DoubleClick, had specialized their business case, only offering to manage the placement of advertising space once acquired, in contrast to Google, which, in principle, offered both services.²⁸

2.2.1. DG COMP identified three markets that could be affected

DG COMP, therefore, defined three relevant product markets that the transaction could potentially influence, encompassing the market for:²⁹

Online space, involving the online real estate owned by publishers and made available for placing online display ads: a market that, for linguistic reasons, was national in scope.

Intermediation services, involving connecting the buyer (advertisers) and seller of online space (publishers) to facilitate a monetary transaction: a market that DG COMP accepted as EU-wide, if not larger.

Ad-serving services, involving the actual placement of the display ads acquired by the advertisers: a market that DG COMP accepted as EU-wide, if not larger.

While these markets are not directly comparable to the markets defined in the recent French Ad Tech³⁰ case (2021) and DG COMP’s Google AdSense³¹ (2019), they nevertheless correlate with them, indicating that this part of the Decision has aged well. The only thing that differs materially is how Google AdSense distinguishes searchable from non-searchable advertising and sees a difference between relying on intermediates and direct sales. However, this probably stems from the nascent nature of the services in 2007 and the way in which the market subsequently has matured.³²

2.3. DG COMP competitive analysis

Under the EU’s Merger Regulation, transactions that can significantly impede competition must be blocked. Different theories of harm are available, but these are

²⁸ In practice, it is not evident that Google offered both, as Google appeared more focused on selling advertising space, primarily offering management as an ancillary service. For further, see COMP/M.4731 – Google/DoubleClick, recitals 78 and 192. As indicated above, DoubleClick had potentially moved into facilitating buying and selling advertisements.

²⁹ COMP/M.4731 – Google/DoubleClick, recitals 56, 73 and 81 (products markets) and 84, 88 and 91 (geographical scope).

³⁰ Décision 21-D-11 du 07 juin 2021 – relative à des pratiques mises en œuvre dans le secteur de la publicité sur Internet (regarding practices implemented in the online advertising sector), recital 263.

³¹ Case AT.40411 – Google Search (AdSense), recital 135.

³² For completeness, it should be noted that in Google/DoubleClick DG COMP had already gravitated to distinguishing between searchable and non-searchable advertising. See, e.g., recital 17, where turnover is split.

usually subdivided into horizontal and non-horizontal harms, where the latter includes the risk of a vertical foreclosure and different forms of portfolio power. Moreover, DG COMP must establish a firm basis for any assessment and diligently collect market data, which proved somewhat challenging in 2007.

2.3.1. Collecting reliable market data proved challenging

To evaluate a transaction, reliable market data must be collected, usually by the parties, but DG COMP must be able to evaluate them, including their quality, and all steps in this chain proved challenging in 2007. DG COMP appeared uneasy about the submitted market data on several occasions,³³ as these could not be verified or came with broad margins. Eventually, a baseline was established,³⁴ including the finding that Google was the leading provider of online advertising, particularly concerning searchable advertising, with a 50-70 % EU market share. By contrast, Google had only a minimal stake in non-searchable (display) advertising (< 5 %), while DoubleClick had 30-50 % here, making it the EU market leader,³⁵ with aQuantive/Atlas (recently acquired by Microsoft) as a strong contender. However, as 60-75 % of non-searchable (display) advertising was traded directly³⁶ between advertisers and publishers without involving an intermediary, it was evident that the market was nascent and very immature in 2007. Moreover, Google and DoubleClick's high market shares did not account for direct or internal captive sales, indicating that they were inflated.³⁷

While both Google and DoubleClick were seen as leading suppliers in their respective sectors, with high market shares,³⁸ they had specialized their operations and were not identified as direct competitors by DG COMP.³⁹ With the benefit of hindsight, this might be incorrect,⁴⁰ but it did not influence the evaluation, as DG COMP considered whether DoubleClick's unbundled services potentially restrained Google's bundled offerings,⁴¹ indirectly vectoring the possibility into the analysis. DG COMP also considered whether Google could mature its nascent services without acquiring DoubleClick but found this to be implausible, as Google lacked the experience.⁴² After establishing the parties' market position, DG COMP could assess

³³ See, e.g., COMP/M.4731 - Google/DoubleClick, recital 108, or the different market size estimates available in recitals 9, 16, and 17.

³⁴ COMP/M.4731 - Google/DoubleClick, recitals 95-109.

³⁵ COMP/M.4731 - Google/DoubleClick, recitals 114-190. See in particular recitals 121, 128, and 178.

³⁶ COMP/M.4731 - Google/DoubleClick, recital 43.

³⁷ COMP/M.4731 - Google/DoubleClick, recital 178 for an attempt to correct DoubleClick's market shares.

³⁸ COMP/M.4731 - Google/DoubleClick, recitals 5, 114-115 and 193.

³⁹ COMP/M.4731 - Google/DoubleClick, recital 192.

⁴⁰ See, e.g., Hahn, Robert W. and Singer, Hal J., *An Antitrust Analysis of Google's Proposed Acquisition of DoubleClick* (February 1, 2008). AEI-Brookings Joint Center Related Publication No. 07-24, pp. 7, 13, and 37, rebutting the contention that Google and DoubleClick did not compete.

⁴¹ COMP/M.4731 - Google/DoubleClick, recital 193.

⁴² COMP/M.4731 - Google/DoubleClick, recital 280.

the transaction’s possible impact on competition under the available theories of harm.

2.3.2 DG COMP horizontal concerns

Combining two direct (or indirect) competitors is a classic concern in merger control, and while Google and DoubleClick were not direct competitors, DG COMP nevertheless contemplated the issues, identifying three potential concerns of a horizontal nature, including how:

DoubleClick might have restricted Google, making its elimination as an independent force problematic. DG COMP⁴³ rebutted this based upon Google and DoubleClick not being close substitutes, the existence of high switching, and the availability of strong alternatives to DoubleClick that could replace it as a competitive counterforce.

DoubleClick could be a potential competitor if it matured its exchange and moved into intermediation services, making its elimination problematic. DG COMP⁴⁴ rebutted this. Besides having strong alternatives, including Microsoft, AOL, and Yahoo!, publishers multi-homed, relying on several providers.

The acquisition of DoubleClick could eliminate Google’s interest in maturing new ad-serving services, including unbundling its current offerings. DG COMP⁴⁵ rebutted this, as Google lacked the experience to develop current offerings and would be confronted with strong alternatives anyway.

While considering three potential concerns of a horizontal nature, DG COMP found none of these plausible. Google and DoubleClick were not close substitutes for one another, and for different reasons, it was unlikely that the parties had an interest or ability to develop overlapping services. With the benefit of hindsight, DG COMP might have underestimated Google’s strength and ability to identify long-term trends and to mature services that it lacked. However, this was probably not apparent in 2007, when Google wasn’t even in its teens, only recently having ascended to being the preferred internet search engine (2003) and having acquired YouTube (2006).

2.3.3. DG COMP non-horizontal concerns

DG COMP also evaluated whether the transaction could create non-horizontal concerns, originating in Google’s offering intermediary and ad-serving services as a bundle. By contrast, DoubleClick offered the latter on a stand-alone basis, and by denying or downgrading these thereafter, Google could potentially⁴⁶ leverage its

⁴³ COMP/M.4731 – Google/DoubleClick, recitals 194-221.

⁴⁴ COMP/M.4731 – Google/DoubleClick, recitals 222-278.

⁴⁵ COMP/M.4731 – Google/DoubleClick, recitals 279-285.

⁴⁶ COMP/M.4731 – Google/DoubleClick, recitals 286-288.

position into vertical markets. Alternatively, it could gain portfolio power that could be used to leverage the position into adjacent markets, most significantly between search- and non-search online advertisements. However, to make these concerns plausible, both ability and inventiveness would have to be present, and eliminating a customer would, impede sales and might not be profitable. This was not lost on DG COMP,⁴⁷ making it a potential mitigating factor when reviewing the vertical aspect of transactions. DG COMP's concerns, therefore, involved whether:

Google would leverage DoubleClick's position in ad-serving, i.e., by degrading the quality when used by competitors. However,⁴⁸ confronted with strong alternatives and users' multi-homing, Google lacked ability and incentive. It wasn't even evident that any such policy would have material effects, due to low entry barriers and the broad utilisation of internal ad-serving services.

By bundling search and non-search advertising, Google could leverage its position in the former into the latter. However, DG COMP⁴⁹ rejected this for lack of incentive, due to low margins and alternatives available to customers. Strong competitors also made it implausible that it would produce anti-competitive effects.

Combining Google and DoubleClick's data would create a non-replicable position that would marginalise the competitors progressively through superior offerings. However,⁵⁰ DG COMP found this implausible, as DoubleClick's customer contract did not allow data consolidation, and attempts at modifying this thereafter would probably be met with pushback.

Even if Google were positioned to engage in, e.g., a vertical foreclosure, it would, in most situations, lack incentive. Moreover, strong alternatives were present, making it unlikely that any foreclosure attempt could succeed, as the victims could turn to these alternatives if confronted with a leverage attempt by Google. DG COMP was, therefore, confident that the transaction would not yield anti-competitive concerns of a non-horizontal nature.

3. Did DG COMP get it right?

As the transaction yielded neither horizontal nor non-horizontal concerns, DG COMP granted an unconditional clearance in March 2008. The conclusion was that the parties operated in two separate parts of the Ad Tech sector, with only limited and indirect overlaps, and that Google would be met with strong competition from, e.g., Microsoft. With the benefit of hindsight, there are two potential flaws in DG COMP

⁴⁷ See e.g., Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, recitals 40 and 68.

⁴⁸ COMP/M.4731 - Google/DoubleClick, recitals 289-329.

⁴⁹ COMP/M.4731 - Google/DoubleClick, recitals 330-358.

⁵⁰ COMP/M.4731 - Google/DoubleClick, recitals 359-366.

justification. Firstly, contrary to DG COMP expectations, Microsoft could not successfully integrate its own ad-tech acquisitions (aQuantive/Atlas and AdECN), otherwise considered equal to DoubleClick in terms of market positions.⁵¹ The strong competition from, e.g., Microsoft that DG COMP expected, never materialized itself, but it is doubtful that DG COMP could have predicted this in 2007. Secondly, the transaction might have vested Google with portfolio power, but this remains somewhat speculative. DoubleClick is only a minor element in Google’s larger ad tech ecosystem, and while it is evident that Google subsequently has been able to leverage its market power into new services, this probably speaks more to Google’s strong business case than to any specific contribution from DoubleClick. Regardless, DG COMP’s potential blind eye when it came to portfolio power merits comment as the critique of DG COMP (and other enforcers) primarily reached back to this. Before contemplating if DG COMP should have invested more time into the issue of portfolio power, a few considerations on portfolio power must be made.

3.1. What is portfolio power, and how did enforcers react to this?

Combining complementary services, as seen in large digital ecosystems, can create strong lock-in effects, where customers are unwilling, or unable, to shift to an alternative on a product-by-product basis.⁵² While competition is only a click away in theory, reality differs. Moreover, the owner of large digital ecosystems can leverage market power between the different services. This can be done either by relying on a classic bundling strategy or, more subtly, through micro nudging, where consumers are slowly pushed in the direction of other offerings of the ecosystem’s owner.

Today, enforcers understand these risks and strategies, but that cannot be said for the situation in 2007. Compounding the matter further, DG COMP had tried to move on a portfolio theory of harm in 2001 when it first blocked Tetra Laval’s acquisition of Sidel⁵³ and, later, in the same year, GE’s acquisition of Honeywell.⁵⁴ Both cases concerned a possible leverage risk associated with conglomerate mergers, but neither of the decisions survived juridical appeals. In 2003, the first was overturned⁵⁵ in its entirety, and in 2005, the same fate befell the latter⁵⁶ concerning the leverage risk. Granted, the portfolio effects outlined in these vintage cases are much weaker compared to today’s digital ecosystem, but once bitten, twice shy,

⁵¹ See, e.g., COMP/M.4731 – Google/DoubleClick, recital 114 for reference to aQuantive/Atlas’s market positions vis-à-vis DoubleClick.

⁵² For an in-depth discussion of ecosystems based on Google and Facebook, see Online platforms and digital advertising market study, Appendix E: ecosystems of Google and Facebook, CMA Market study final report, July 2020.

⁵³ COMP/M.2416 – Tetra Laval/Sidel.

⁵⁴ Case No COMP/ M.2220 – General Electric/Honeywell.

⁵⁵ Case T-5/02 – Tetra Laval BV, para 307. Confirmed on appeal as Case C-12/03P – Commission v Tetra Laval.

⁵⁶ Case T-210/01 – General Electric, para 364.

explaining why DG COMP might have had second thoughts about trying its luck in 2007.

3.2. Could DG COMP have acted on a portfolio theory of harm?

Entertaining the idea that DG COMP failed to predict Google's ability to yield portfolio power properly and the anti-competitive nature of the acquisition of DoubleClick, it becomes relevant to contemplate why this happened and whether DG COMP could have done a better job. However, it must first be understood that portfolio power and dynamic online leveraging were poorly understood back in 2007 and that the Judiciaries had kneecapped DG COMP's first attempts to rein this in. In particular, the latter makes it easier to understand how DG COMP might have had reservations against moving (again) on an obfuscated theory of harm.

Secondly, DG COMP based its conclusions on several assumptions, for example that Microsoft and Yahoo! would represent mitigating factors and alternatives. While this later proved wrong, the assumption appeared reasonable in 2007 and governed DG COMP's Decision (and probably also the FTC's). After losing the bidding war over DoubleClick, Microsoft had acquired aQuantive/Atlas and, before this, AdECN. Both were seen as direct (and strong) competitors to DoubleClick in the DG COMP Decision,⁵⁷ and while it remains unclear why this competition did not materialise, apparently Microsoft failed to integrate its acquisitions into its business.

Thirdly, revisiting DG COMP's Decision, it's apparent that DG COMP did a thorough and diligent job in assessing the transaction and its likely impact on competition. The Decision is 98 pages long and rich in market projections and estimates, speaking to the substantial intellectual resources DG COMP invested into the matter. The transaction was notified in September 2007 but not approved until March 2008. Moreover, in November 2007, DG COMP expressed serious doubt about the transaction, commanding more substantial analysis, including receiving input from stakeholders. What arguments and evidence they provided in response to this invitation remain unknown, but there is little to suggest this encompassed substantial evidence of real impediments to competition. On balance, it must be accepted that DG COMP did its best to render a carefully drafted decision.

Fourthly, we must consider a counterfactual scenario: What would have happened with DoubleClick had Google not acquired it? Naturally, this is very hypothetical, but it does not seem plausible that DoubleClick would have remained independent. The seller was a financial investor who had acquired DoubleClick in 2005, and not a long-term owner. Not selling DoubleClick was, therefore, not an option in 2007. It should also be noted that Google outbid the other bidders and that these included Microsoft and Yahoo!, making it plausible that DoubleClick would

⁵⁷ See, e.g., COMP/M.4731 – Google/DoubleClick, recitals 114, 234 and 327 for references.

have ended up with somebody who also would have integrated DoubleClick into a larger ecosystem. It remains an open question whether they would have become the object of the same level of antitrust scrutiny as has befallen Google.

3.3. Should DG COMP have blocked the Transaction?

So, returning to the initial question. Has DG COMP’s decision not to oppose Google’s acquisition of DoubleClick aged well? With the benefit of hindsight, this can be challenged. However, reviewing the original Decision, it’s apparent that DG COMP did not take its duties lightly and made a diligent and competent attempt to predict market development based on the available data. Collecting these proved very challenging, given the nascent and emerging nature of the market, making it difficult to build plausible forward-looking scenarios.

On balance, the risk of portfolio power might have been underestimated. Google has effectively integrated DoubleClick into a more extensive advertising ecosystem, leveraging market power between offerings—initially, between search advertising and non-search advertising, now dominating both, but potentially also within other sectors of the Ad Tech Industry.⁵⁸ In DG COMP’s defense, this understanding mostly follows from what happened later, including the way in which Google developed its ecosystem. The latter is particularly notable, as this means Google’s current ability to exercise market power did not necessarily follow from its acquisition of DoubleClick but rather was the compounded effect of separate but complementary offerings. It should also be recalled that the Courts had overturned DG COMP’s attempt to rein in portfolio power in the early 2000s, making it understandable why DG COMP might have had a limited appetite for a rematch.

In light of these considerations, I personally feel uneasy about calling out DG COMP, or the FTC, for having failed to act against Google’s acquisition of DoubleClick back in 2007. I’m not even sure if it’s correct that this transaction truly is the enabler of Google’s (alleged) later crime spree across the online sector, as claimed by some. However, the latter is a separate matter.

⁵⁸ C.f. Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology, Presse release from DG COMP Jun 14, 2023.