

## ALGORITHMIC OPACITY AND EXCLUSION IN ANTITRUST LAW

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**Abstract:** *Traditionally evidence of exclusion was available to those injured by it. If a dominant firm refused to deal with a competitor, perhaps denying an important input, or priced predatorily, there was no difficulty in presenting evidence of the conduct at issue. As means of exclusion became subtler, such as with rebate structures, the conduct was less public, but still evidence was typically available. Rebate terms were often incorporated in contracts, for example, and copies could be obtained from customers. Exclusion by online platforms is very different. When a competitor is injured by, say, a disadvantageous position in search results, the cause is often an algorithm whose function is entirely internal to the dominant firm. In such instances, a private plaintiff may not have access to evidence that would allow it to allege satisfactorily, let alone prove, a violation. This brief note sets out the difficulty this issue poses for competition law.*

### 1. INTRODUCTION

The differences between the US and EU Google search decisions are well-known. In

one respect, though, the decisions are similar: each relies on information that a private litigant would be unable to obtain, at least without some form of discovery or other access to Google's internal documents. Whether there is exclusion, and whether it is anticompetitive, is determined in large part by Google's algorithms, and private litigants do not have access to those algorithms.<sup>2</sup> That makes it more difficult for a private litigant to pursue an exclusion case, given that some facts regarding the nature of exclusion are necessary to avoid dismissal of such a case.

This phenomenon reflects an evolution of exclusion cases from straightforward exclusion, through unilateral refusals to deal, for example, to less transparent techniques. One example is that of "Contracts that Reference Rivals," as described some years ago by then-US Department of Justice Deputy Attorney General Fiona Scott Morton.<sup>3</sup> The terms of contracts including most-favored-nation clauses or

<sup>2</sup> That is not to say that there is no public information about Google's algorithms. In fact, the European Commission in its decision cites a number of statements by Google purporting to describe at least some aspects of the algorithms. But it is unlikely that potential challengers will find those disclosures adequate, or disinterested.

<sup>3</sup> Fiona Scott Morton, Deputy Asst. Att'y Gen., U.S. Dep't of Justice, Contracts that Reference Rivals, Presentation at Georgetown University Law Center Antitrust Seminar (Apr. 5, 2012), <http://www.justice.gov/atr/public/speeches/281965>.

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complicated rebate structures may not be available to potential challengers, though knowledge of such contracts often enters the markets. Algorithmic forms of discrimination (procompetitive or anticompetitive) are even more obscure, and the nature of such algorithms is more closely guarded.

This raises important issues not only for the Google cases but more generally for other cases that would rely on information about the use of internal algorithmic processes to make decisions that could have exclusionary effects. At least to the extent that a jurisdiction's antitrust enforcement relies on private litigation, as the US's does and as Europe's aims to,<sup>4</sup> the public unavailability of important evidence, and the inability to obtain access to it, pose significant obstacles to the achievement of that goal.

This brief informal essay will present these issues by, first, offering examples of the evidence relied upon in the US and EU Google cases, pointing out that the evidence would not have been available to private parties. Second, the essay will very briefly outline the rules that might provide private antitrust plaintiffs access to evidence in the US and EU; it is unclear to what extent those rules would aid a plaintiff that did not already have access to some important evidence. Third, the essay will discuss several types of evidence that a plaintiff might propose to rely on but that would not be

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<sup>4</sup> See European Commission, Competition policy brief: The Damages Directive – Towards more effective enforcement of the EU competition rules, Issue 2015-1, Jan. 2015, [http://ec.europa.eu/competition/publications/cpb/2015/001\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf).

publicly available. Finally, the conclusion points out that without some access to evidence at early stages of litigation, the lack of transparency in algorithmic decision-making may prevent what would be viable antitrust cases.

## 2. EVIDENCE IN THE GOOGLE CASES

In the public version of the European Commission's Google decision, the Commission "explains" how Google's algorithm disadvantages its competitors:

*"(352) Comparison shopping services are prone to being demoted by the [...] algorithm due to the characteristics of those services.*

*(353) First, [...] <sup>381</sup> [...].<sup>382</sup>*

*(354) Second, [...].*

*(355) Third, [...] <sup>383</sup> [...].<sup>385</sup>*

The redactions here demonstrate the sensitivity of the relevant information.<sup>6</sup> The case relies on the fact that Google's own shopping service is not treated similarly, but there too it relies on generally unavailable information, pointing to internal Google emails.<sup>7</sup>

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<sup>5</sup> Case AT.39740, Google Search (Shopping), 27 June 2017, [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf), 352-353.

<sup>6</sup> *Id.* at 1 ("Parts of this text have been edited to ensure that confidential information/personal data is not disclosed. Those parts are shown as [...] or replaced by a non-confidential summary, or ranges, in square brackets.").

<sup>7</sup> *Id.* 381-382.

It is true that the EC decision also pointed to external data based on the Sistrix Visibility Index that show the changes over time in website visibility.<sup>8</sup> Even there, though, the Commission cites Google for the data.<sup>9</sup> Moreover, although one could perhaps compare the prominence of Google's own shipping service to those of its competitors using the Sistrix data, doing so would not explain the reasons for the differences, and it is that information that would determine whether any exclusion was procompetitive or anticompetitive.

Although the US FTC closed its investigation into Google's search practices in 2013, it did so with similar reliance on internal Google data:

*“While Google’s prominent display of its own vertical search results on its search results page had the effect in some cases of pushing other results “below the fold,” the evidence suggests that Google’s primary goal in introducing this content was to quickly answer, and better satisfy, its users’ search queries by providing directly relevant information. For example, contemporaneous evidence demonstrates that Google would typically test, monitor, and carefully consider the effect of introducing its vertical content on the quality of its general search results, and would demote its own content to a less prominent location when a higher ranking adversely affected the user experience. Analyses of “click through” data showing how consumers reacted to the proprietary content displayed by Google also*

*suggest that users benefited from these changes to Google’s search results”.*<sup>10</sup>

The information relied upon by the US and EU agencies was not publicly available. As a result, in the absence of any means to get access to such information, private litigants would have been unable to establish a prima facie case against Google, or to know whether they would ultimately be able to do so. The discovery process in the US could provide an avenue to obtain such information, but in the absence of the information it is not clear that a plaintiff could avoid an early dismissal of its case and gain the opportunity for discovery.

### 3. ACCESS TO EVIDENCE OF ALGORITHMIC EFFECTS

In the US, a private litigant's access to information is governed by rules of discovery. In the federal antitrust context, those rules are contained in the Federal Rules of Civil Procedure, which can provide extensive access to information in control of the defendant. As a general matter, though, discovery is not available until any motion for dismissal of a case is resolved, even though the rules contain

<sup>8</sup> *Id.* 361-362.

<sup>9</sup> *Id.* at 82 n. 399 (citing “*Google submission [...] and Google’s reply to the Commission’s request for information [...]*”).

<sup>10</sup> Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google Inc., FTC File Number 111-0163, Jan. 3, 2013, [https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf).

no automatic stay of discovery.<sup>11</sup> Because antitrust defendants will almost always file motions to dismiss, the result is that the grant of such a motion will likely eliminate the plaintiff's ability to obtain discovery.

In the EU, the rules for private plaintiffs' access to evidence were recently changed by the Damages Directive.<sup>12</sup> Although the issue will surely be clarified over time, the Directive appears potentially to provide antitrust claimants with fairly broad access to evidence:

Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter.<sup>13</sup>

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<sup>11</sup> This is, at least, the general understanding, though discovery before resolution of a motion to dismiss may be allowed more often than is often thought. *See* Gideon Mark, *Federal Discovery Stays*, 45 U. MICH. J. OF L. REFORM 408-13 (2012).

<sup>12</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. *See also* Anca D. Chirita, "The disclosure of evidence under the 'Antitrust Damages' Directive 2014/104/EU," in *EU Competition and State Aid Rules: Public and Private Enforcement* (Berlin, Heidelberg: Springer, 2017) at 147-173.

<sup>13</sup> Directive 2014/104/EU, art. 5.1.

The requirement of a "reasoned justification" and "plausibility" make it possible that a national court would decline to order disclosure of evidence, of course, especially because in the absence of such disclosure, there may be "no reasonably available facts and evidence." But a court might also decide, if not facts or evidence are reasonably available, that disclosure is necessary.

Moreover, it appears (at least to this outside observer) that this provision appears to make the grant of disclosure discretionary, even at early states of litigation:

Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

- i) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- ii) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;
- iii) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.<sup>14</sup>

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<sup>14</sup> *Id.*, art. 5.3.

Ultimately, then, the right of an antitrust plaintiff to evidence that might be necessary to establish a viable case is not clear. In the US, the right to discovery is often unavailable to a plaintiff that is not already able to support allegations with some evidence, in order to establish a plausible case.<sup>15</sup> In Europe, the Damages Directive may provide a claimant with access to critical evidence, but the Directive seems to require that a claim be “supported by available facts and evidence justifying the request to disclose evidence,” and it is not clear how flexible national courts will be in interpreting this requirement.

#### 4. MAKING THE EXCLUSION CASE

Suppose that a website that has seen a change in its positioning in Google’s organic results, or in the amount that it must pay for placement in AdWords displays, believes that the change is anticompetitive. What evidence is available to the website, and under what circumstances will it be able to get disclosures from Google? I will assume here that there has been no public enforcement effort, so that the website cannot rely on any rules that would allow it access to information from public enforcers. I will also focus on the United States, because that is where these issues so far have played out.<sup>16</sup>

<sup>15</sup> See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>16</sup> There were a number of cases brought against Google for search bias in the decade of the 2000s, and they were

A monopolization case<sup>17</sup> requires a showing of monopoly power and exclusionary conduct. The former element generally requires that the plaintiff define a relevant market and demonstrate that the defendant has a large share of that market. The latter requires a showing of anticompetitive effect and probably the absence of a legitimate business purpose. On a motion to dismiss, the plaintiff need only allege these elements, not prove them, but several U.S. Supreme Court cases have made the allegation requirement a significant one.<sup>18</sup> The paragraphs below discuss some allegations that a plaintiff might make that would likely require evidence that is not publicly available.

#### 4.1 The Relevant Market

Although there is increasing skepticism about the market-definition inquiry,<sup>19</sup> unilateral-conduct cases still generally require it. The skepticism does suggest, though, that we should be open to circumstances that do not fit the archetypal model for the use of market definition and market share. Information platforms certainly are among such circumstances, as I have argued

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typically dismissed on one of the grounds discussed in the text.

<sup>17</sup> Because I am focusing on the U.S., I also focus on Sherman Act § 2, though abuse of dominance under article 102 TFEU is similar.

<sup>18</sup> See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>19</sup> Louis Kaplow, *Why (Ever) Define Markets?*, 124 *Harv. L. Rev.* 437 (2010)

elsewhere.<sup>20</sup> Although the argument cannot be rehearsed here, the basic point is that providers of information can easily deliver additional copies of it, so that the capacity limitations that underlie reliance on market share as a proxy for power are not applicable to information.

The limitations that do create power for information providers are those that affect the ability of competitors to reach consumers at the times they are making use of information and persuade the consumers of the value of the information they are providing. It is more difficult for an information provider to demonstrate that its information is more useful or accurate than that provided by a competitor than it is for a seller to demonstrate that its prices are lower.<sup>21</sup> As a result, the nature of any market definition inquiry is not straightforward, and likely requires evidence of the credulity of consumers and the time available to them to search for and compare information. An information platform like Google or Facebook will often have useful evidence on these points for their users, but that information will be less available to outsiders.

These issues are also likely to be consumer-specific, depending as they do on the particular characteristics of individual consumers. For that reason, there are likely to be submarkets of

consumers that share particular characteristics with respect to the consumption of information. Again, the information that would be needed to identify and allege such submarkets will be in the possession of information platforms but will not be available publicly, though perhaps consumer surveys could produce some such information. Whether courts would accept surveys as sufficient to establish a right to further evidence is far from clear.

#### 4.2 Anticompetitive Exclusion

Proving or alleging anticompetitive effect raises some of the same issues as does market definition. Here, though, the focus is on (a) how competing information providers are excluded, and (b) the significance of that exclusion. Again, both factors are in the control of the defendant. The first is the one referred to in the quotation from the EC Google case above,<sup>22</sup> where the Commission redacted the ways in which the competitors were excluded. The second turns primarily on the effectiveness and volume of exclusion, because those are the factors that determine the degree to which competitors are disadvantaged.<sup>23</sup> Thus, in the EC Google case, the relevant evidence would be the nature of the algorithmic demoting of competing providers and the scope of that

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<sup>20</sup> Mark R. Patterson, *Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information* 61-84 (Cambridge: Harvard University Press, 2017).

<sup>21</sup> That may not be true where competing price structures are complicated, as with some cellphone plans, particularly in the US. There, too, though, the problem is an informational one.

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<sup>22</sup> See *supra* text accompanying note 5.

<sup>23</sup> “[T]he plaintiff must define the relevant market and provide the degree of foreclosure.” *United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001) (en banc).

demotion, both of which would be in the possession of the defendant.<sup>24</sup>

### 4.3 Legitimate Business Purpose

Some exclusion is procompetitive. To the extent that a provider is injured because its competitor provides better service, antitrust law would not intervene. But whether a competitor in fact has acted with the goal of providing better service will not be publicly known. The quotation above from the FTC's statement regarding its Google investigation points to exactly this sort of evidence,<sup>25</sup> but it would not have been available in any useful way to private plaintiffs. Intent is not dispositive, but it is relevant, and in markets for information, where competitive effects are uncertain, it will probably be especially important. Here, too, then a plaintiff will be at a disadvantage with respect to the defendant.

### 4.4 Freedom of Speech

Several of the US cases brought by private plaintiffs against Google have been dismissed on First Amendment grounds.<sup>26</sup> The rationale has

been that Google's search results are "opinions" protected under the First Amendment to the U.S. Constitution. I have addressed this issue elsewhere.<sup>27</sup> For present purposes it is sufficient to note that there are difficult questions regarding the distinction between facts and opinions and regarding whether opinions imply assertions of fact. I have argued, with judicial support, that these issues require an analysis similar to that for assessing whether the speaker had a legitimate purpose.<sup>28</sup> Therefore, a plaintiff seeking to overcome a motion for dismissal would require information that would be within the control of the defendant, and the plaintiff would probably be unable to get that information without overcoming the motion to dismiss.

## 5. CONCLUSION

Exclusion in the real world differs from exclusion by algorithm. These brief comments are intended to point out one critical difference. Real-world conduct will often be

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<sup>24</sup> Perhaps the plaintiff would be able to introduce some evidence of lost consumers, but there are at least two obstacles. First, the plaintiff does not have access to the but-for world, and the defendant would surely that some such losses would have been suffered in any case. Second, the "degree of foreclosure" has usually been interpreted as a portion of the entire market, and it is the defendant that would have access to better information about the scope of the entire market, particular if a defendant-specific submarket were the relevant one.

<sup>25</sup> See *supra* text accompanying note 10.

<sup>26</sup> See, e.g., *S. Louis Martin v. Google, Inc.*, No. CGC-14-539972 (Calif. Super. Ct. Nov. 3, 2014) (California antitrust law), available at

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<http://cdn.arstechnica.net/wp-content/uploads/2014/11/Order.pdf>; *Search King, Inc. v. Google Technology, Inc.*, No. CIV-02-1457-M (W.D. Okla. May 27, 2003) (case for tortious interference with contractual relations), available at <http://blogs.reuters.com/alison-frankel/files/2014/03/Search-King-Inc-v-Google-Technology-Inc.pdf>. A similar case involving a credit-rating agency is *Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.* 175 F.3d 848 (10th Cir. 1999).

<sup>27</sup> Patterson, *supra* note 20, at 207-229.

<sup>28</sup> *Id.* at 227-229.

sufficiently transparent, in effect if not in motive, to give plaintiffs that seek to challenge it sufficient evidence to demonstrate the plausibility of their cases. Algorithmic exclusion, in contrast, will leave much evidence internal to the computer systems that execute the algorithms. Evidence of the nature of the market and consumers, of the degree of market foreclosure, and of the intent and effects of the exclusion will all be in the possession of the platform that uses the algorithm and thus will be unavailable to plaintiffs. Without access to that evidence, courts may dismiss the plaintiffs' claims. That is, without evidence plaintiffs' claims will be dismissed, but evidence will be unavailable unless plaintiffs can avoid dismissal. Catch-22<sup>29</sup>.

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<sup>29</sup> Catch-22 is presented in Joseph Heller, *Catch-22* (1961):

*"There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he were sane he had to fly them. If he flew them he was crazy and didn't have to, but if he didn't want to he was sane and had to".*

Interestingly, and perhaps relevantly in the antitrust context, one scholar makes the following comments about the development of applications of Catch-22 in Heller's book:

*"Earlier in the book, Catch-22 has a kind of bogus sophistication; [later] its totally transparent part in the brutal operation of power makes the point that those without power are its reified and mechanistic puppets".*

Ian Gregson, *Character and Satire in Postwar Fiction* 38 (London: Continuum, 2006).

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