Intermediaries and data: Conflicts of interest?

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First stop – look at the data

- Starting point for discussion about competition law assessment of the use of data
  - What is the data, and what is being done with it?
    - Not just about the personal-non-personal split
  - Is the data raw, processed or the output of analytics?
  - Is the data replicable/fungible/available from multiple sources?
  - Beyond that, is the data indispensable to compete – relevant not only to access discussions

First stop – look at the data

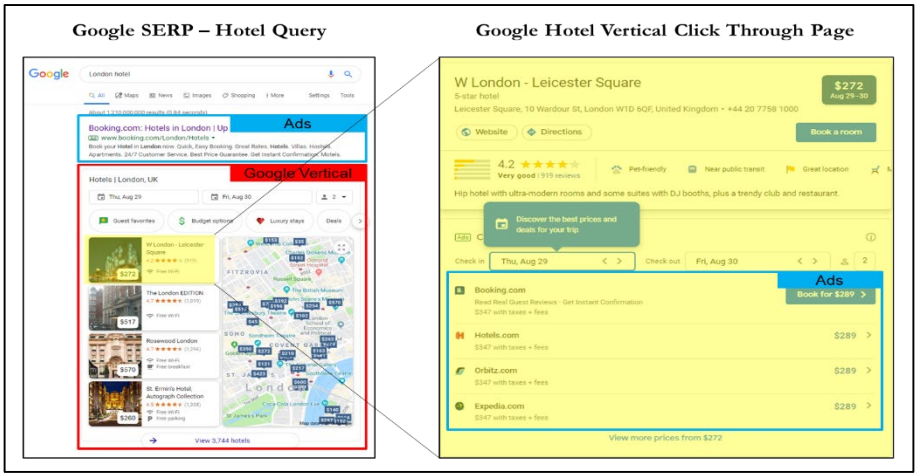
- Combination of “data-isation” across sectors highlights the need to be specific
- Consider both the range of sectors and mix of raw, aggregated and derived/inferred data:
  - agriculture
  - manufacturing and predictive maintenance
  - digital health
  - online (targeted) advertising
  - ecommerce
  - log in tools and analytics
- Some sector-specific regulation (CRS Code, PSD2 *etc*)

Intermediaries and Use Cases Differ

- Intermediaries
  - Provide an environment for “transactions” to occur
  - Lead to savings on transaction costs (in part through internalization)
  - Are multi-sided (with inherent externalities)
  - Can generate revenue in many ways (including the supply of data services)

Intermediaries and Use Cases Differ

- Online (targeted) advertising
  - Information about users used to target
  - Information about service advertised provided to populate ads – HPA (now Hotel Ads) and PLA
    - Differentiation between ads and competing service?

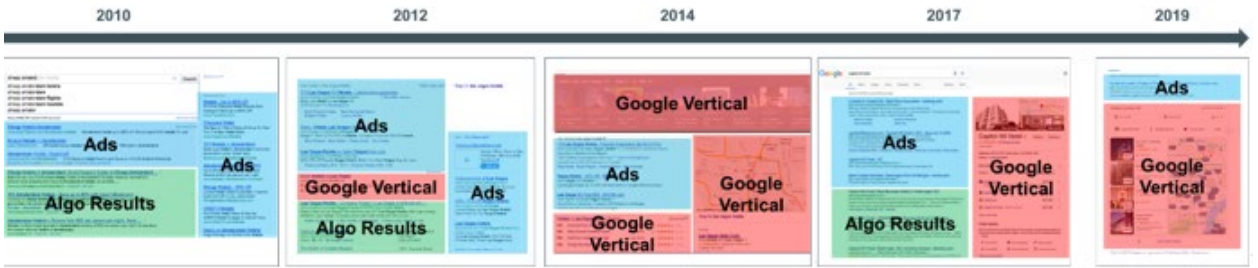


Intermediaries and Use Cases Differ

- eCommerce - AMZN investigation re whether it *"uses commercially sensitive information available to [its] marketplace operations, regarding … products listed by third party sellers or transactions with third party sellers on Amazon's marketplace, for the purposes of Amazon's retail activities, including … in the selection of the Featured Offer…"* In particular, the EC is investigating:
  - "the **standard agreements between Amazon and marketplace sellers**, which allow Amazon's retail business to analyse and use third party seller data. In particular … whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition."
  - "the role of data in the **selection of the winners of the "Buy Box"** and the impact of … potential use of competitively sensitive … seller information on that selection

Potential Theories of Harm?

- Article 101
  - Exchanging commercially sensitive information (*e.g.*, costs or prices) – degree of aggregation/ whether raw or derived matters here
    - Also look at information available to all and third party solutions
  - Alignment of costs or product features
- Article 102
  - Exploitative abuses (*e.g.*, requirement that ad feed can be used for own product) – question of how the data is used (important to differentiate between role as intermediary and supplier of competing product in making assessment)
  - Preferencing – again, a question of how the data is used (and whether it is used in providing intermediary services or competing services)

Remedies not straight forward

- HPA/PLA example because competing product is built on the appropriated feed
  - Consequence of cease and desist would be competitors disappear from SERP, other than SEM ads
  - Requiring a license fee raises compulsion issues and challenge of the appropriate payment
  - Requiring that the competing product be populated other than as ad displays could be characterised as redesigning products, even though: