

## Digital Policy Newsletter

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The Digital Agenda was launched in May 2010 and has since risen to the top of the EU agenda. It spans a range of different portfolios, including the Digital Agenda under the aegis of Commissioner Neelie Kroes, the Innovation Union, which is the remit of Commissioner Máire Geoghegan Quinn, the EU 2020 Strategy for growth and jobs (Commissioner Andor), as well as Competition (Commissioner Almunia) and Consumer Protection (Commissioner Dalli).

The Digital Agenda for Europe places ICT at the centre of plans for European recovery. The seven main objectives are: the creation of a digital single market; delivery of very fast Internet; the enhancement of e-skills; interoperability and common standards; the generation of trust amongst consumers and enhancing security; fostering research and innovation; and using ICT as a means of social inclusion engage the elderly, the marginalized and people with disabilities in the digital world.

In May 2011, the European Commission is due to produce its Digital Agenda Scorecard indicating the success of individual Member States in increasing the number of people using the internet, and their e-skills capacity. The scorecard will be a useful benchmark for government and policy makers and identify Ireland's ranking with regard to implementing the Digital Agenda.

The Institute has a dedicated Digital Future Group, which regularly hosts distinguished international thought leaders and policy makers in the digital area, who address these issues in more detail.

This newsletter will analyse recent developments in Digital Policy, highlight current trends in the Digital Agenda, explore their implications and extrapolate likely future developments. The focus in this issue is on Search Neutrality, Behavioural Advertising and the Digital Single Market.

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## Search Neutrality: An Emerging Regulatory Issue

The concept of Search Neutrality is based on the principle that search engines should have no editorial policies except for their preference for impartiality, comprehensiveness and relevance.

On 30<sup>th</sup> November 2010, the European Commission announced a preliminary anti-trust investigation into whether 'Google has abused a dominant market position in online search by allegedly lowering the ranking of unpaid search results of competing services'. Three sites, Foundem (a British price comparison site), Ciao.de (a German online shopping site which was bought by Microsoft in 2008 and is now called Ciao Bing) and ejustice.fr (a French legal search engine) had lodged complaints with the European Commission. This landmark case represents the first European Commission action on regulating the practices of search engines, and the results of this case will fundamentally impact on how search engines operate for years to come.

The dispute centres around the ranking of sites that appear after a user searches on Google. Google utilises an algorithm to determine the order in which sites appear in search results. The core of this algorithm is called PageRank, which analyses links found across the Internet and ranks sites in order of their relevance to a given search.

Foundem claims that from June 2006 to December 2009 its website was purposefully de-listed from Google search rankings. It alleges that Google made an exception to its algorithm to effectively obscure Foundem from search results, the consequence of which resulted in Foundem being dropped from a rating of "excellent" to a lower ranking of "poor" on the Google search. Google argued that this was due to the nature of the content on Foundem's website, which mainly comprised content from other websites - similar to the content produced by numerous spam websites. The downgrading allegedly occurred simultaneously with the introduction of "Universal Search" by Google, a new search algorithm that integrated Google products into the search results.

Foundem argued that despite a number of appeals to Google, the latter refused to alter the search algorithm until December 2009, when Google manually "white-listed" Foundem.

As search engines are increasingly becoming a major conduit for business, any manipulation could have wide ranging implications for competition as Google has an 85% share of the search market globally, and a 95% share in Europe. However, the network Google uses has remarkably low barriers to entry and setting up a search engine does not require extensive capital, as evidenced by the fact that there are

four search engines that enjoy at least 2.5% market share globally<sup>1</sup> and over 100 search engines currently in operation.

It is up to the European Commission, therefore, to decide whether these allegations have any substance or whether Google is merely delivering the most relevant results to its users.

The outcome of this particular case, if it proceeds, will be of seminal importance in how search engines are regulated in the future. It will determine whether Google has abused its dominant position for online searching by decreasing the likelihood that searches will produce results from competing search services by reducing their quality score and by prioritizing Google services such as Google Maps or YouTube for instance and making their service the easiest option.

A comparison could be made between a search engine, such as Google, proposing a particular product or service, such as Google maps, when someone searches for “maps” and the case of an operating system, such as Microsoft, proposing/offering a particular product or service, such as Internet Explorer, by having it pre-installed. In neither case does the company require you to use their service, they just make it the easiest option.

One proposal to ensure fair practice for search engines is the introduction of the principle of ‘search neutrality’. It is similar to the concept of “net neutrality”, which protects access to the Internet for users and favours openness. Search neutrality could potentially require search engines to ensure that they do not explicitly favour one company over another.

Search algorithms are designed to discriminate on the basis of assigning value to the production of search results. Proponents of search neutrality want transparency about how the underlying algorithms work and transparency in their application. Furthermore, they argue that all websites should have access to a timely appeal process if they become subject to any new exclusionary penalties from a Google search algorithm.

As the European Commission has also initiated an investigation into the portability of online advertising data and into restrictions which Google places on interoperability, it is likely that this is the beginning of a series of investigations into Google practices which will feature prominently in the work of the Competition Directorate in the coming years. Google’s senior competition counsel argues that Google does not lock in its users or create barriers to entry and says that the company has responded with equanimity to this preliminary investigation. The European Commission can fine companies up to 10% of global turnover for breaching EU competition rules, allowing fines of up to €1.75 billion. The largest fine given by the European Commission to date was against Intel for €1.06 billion.

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<sup>1</sup> <http://www.boutell.com/newfaq/misc/howmanysearch.html>

## Behavioural Advertising:

Behavioural Advertising is the collection of user data for advertising purposes. Behavioural targeting uses information collected on an individual's web-browsing behaviour, such as the pages they have visited or the searches they have made, to target them for future advertisements. This can be combined with other factors such as demography, page content and geography in order to maximise effect.

The European Parliament Committee on the Internal Market and Consumer Protection has published a report, authored by Philippe Juvin, MEP, who has suggested a range of measures to deal with this issue. The key regulatory issue is the balance between granting the user free access to online content and the use of personal data gleaned by profiling.

The report proposes that all behavioural advertising that is targeted at children be banned (this call was echoed by the European Data Protection Supervisor in an opinion issued this month)<sup>2</sup>. It also proposes that all behavioural advertisements should have a clear icon stating "behavioural advertising", linked to a page which explains what it is. Furthermore, it encourages an EU-wide information campaign designed to highlight the issues for consumers and encourage awareness.

One type of behavioural advertising utilises cookies in order to function. (Cookies are pieces of data created when someone visits a website and contain a unique number which is stored in the hard disc of the computer, revealing when they return to a website and what pages or services they use). The EU's ePrivacy Directive had previously, in 2009, set out the rules for cookies and their usage. However, the Commission has indicated in the European Commission strategy on Data Protection that they are re-considering this position.<sup>3</sup>

As many users consent to the utilisation of their data for behavioural advertising, the scope of the Communities powers in this area is limited. However, the consent is often elicited through the terms and conditions at the beginning of the online registration process, when it is suggested that many people are not fully aware of the contract they are signing. The awareness campaign, combined with the icon, represent an attempt by the Commission to increase awareness of the issue in the public consciousness and alter the behaviour of users accordingly.

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[http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-01-14\\_Personal\\_Data\\_Protection\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-01-14_Personal_Data_Protection_EN.pdf)

<sup>3</sup> <http://www.euractiv.com/en/infosociety/web-firms-face-eu-data-privacy-crackdown-news-499412> in the 4th November European Commission Strategy on Data Protection

It is possible these measures will gain significant public support considering that the majority of people polled in a recent Zogby poll indicated that they are 'very concerned' with behavioural advertising. Increased awareness of the extent of it may lead to a stronger public backlash against its use by advertisers.<sup>4</sup> Furthermore, 77% stated that they would support a "Do Not Track" list, an option proposed in the United States by the Federal Trade Commission,<sup>5</sup> which would allow users to opt out of behavioural advertising.

Behavioural advertising, compared to traditional forms of advertising, is understandably popular with advertisers. As a result, many of the organisations which utilise behavioural advertising operate on a freemium model, whereby the services are provided free of charge to the user and funded by advertising sales. Restrictions on these practices could result in a reduction of the freemium services offered. The extent to which users would be willing to give up their free services in order to prevent behavioural advertising is unclear.

In contrast to other Internet companies which utilise behavioural advertising, Google has taken a leading role in allowing users to exercise control over which data is held by the company. With products like Google Dashboard, it is possible for users to see all data which is held on them by Google, and the user is allowed to clear all data whenever he/she wishes. Unlike social networks such as Facebook, it is still possible to use Google products and not store data, which could be used for behavioural advertising.

The Institute will be hosting a speaker on this topic in the coming months.

## Digital Single Market

The Digital Single Market project (DSM) was launched in May 2010 as part of the Digital Agenda package. It is an attempt to break down the national barriers that are hindering the creation of a Europe-wide digital single market. These barriers include a lack of trust in cross-border e-commerce, restrictive access to content in different countries and prohibitive roaming charges.

In a speech to the IIEA on 21 January 2011, Fabian Zuleeg, Chief Economist of the EPC, outlined the potential of the Digital Single Market. His view was that progress has been slow and the situation has been exacerbated by the financial and economic crisis.

Zuleeg, whose presentation is available at (<http://www.iiea.com/events/fabien-zuleeg-the-digital-single-market-the-next-steps>), traced the evolution of the Digital

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<sup>4</sup> <http://www.bizreport.com/2010/06/zogby-behavioral-targeting-in-public-consciousness-in-a-bad.html#>

<sup>5</sup> <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>

Single Market to the 1992 Single Market project, and argued that it is designed to allow the EU to fully embrace the knowledge economy. He contended that the Digital Single Market could add more than 4% to EU GDP by 2020, with benefits such as increased labour market efficiency, more efficient public services and solutions to some of the EU's long-term challenges such as demographics. However, he added that without decisive action, the younger generation will find the Single Market rules are irrelevant to the goods and services that young people consume, particular relating to digital content.

As the Digital Single Market operates over a wide range of portfolios, he specifically highlighted the risk that fragmentation of the Digital Single Market poses to achieving progress in the digital area, as it is likely that each proposal will be judged within the framework of its own portfolio, rather than as part of an overall package.

Recent progress in the EU-wide Patent system may give cause for both celebration and concern. Ministers from 25 Member States have decided to go ahead with plans to introduce a common system for registering patents that would save European businesses millions of Euro each year, as the current system requires companies to make applications in each Member State, where protection of the patent is required Italy and Spain have refused to participate because they disagree with the language regime which allows patent applications to be filed only English, French and German. The agreement by the member states to move forward on the basis of enhanced co-operation between some but not all of the EU 27 members, creates the possibility of making concrete progress on a patent debate which has been ongoing for decades. However, the disadvantage of this approach is that it creates the potential for multiple overlapping digital markets, which could increase confusion rather than decrease it.

However, hopes of creating a specialist patent court for a community patent regime were dashed when the European Court of Justice (ECJ) found that such a patent court would not be compatible with EU law because it would deprive national courts of the power to refer cases to the EU court for a preliminary ruling. The ECJ said that it is an essential feature of EU law that there is a relationship of co-operation between national courts and the EU's courts, to ensure the correct application of EU law. This would be undermined by giving a specialist patent court the sole right to refer cases.

Consumer confidence in a single digital market is crucial both in terms of safety in online shopping, building consumer confidence in e-commerce, data protection and safety for children online. From a consumer perspective the updated version of the EU's Consumer Rights Directive which was approved by the European Parliament on 24 March 2011 is a move in the right direction. The Directive seeks to merge the existing four EU consumer rights Directives which pre date the digital revolution into one set of fully harmonised rules. The proposed Directive concerns business-to-consumer (B2C) sales contracts for goods and services and specifically covers issues such as pre-contractual information, delivery rules, 'cooling off' periods for distance sales, repairs, replacements and guarantees as well as new selling technologies. The

new regulations are expected to grant better protection and stronger rights to European consumers and firms who buy goods online in another EU Member State

### Upcoming

John Bell, Head of Cabinet for Maire Geoghegan Quinn – *“Innovation: The Key to Economic Recovery”* – Thursday 7 April at 12:45 p.m.

In the coming months, this newsletter will address issues including: creating a single market for telecoms; open data; developing e-skills; and the dynamics of a European content market.