UNITED STATES OF AMERICA
IN THE FEDERAL TRADE COMMISSION

IN THE MATTER OF Google Inc., 1600 Amphitheatre Parkway, Mountain view, CA 94 0403.	)	
	)	**File No. 102 3136**
COMMISSIONERS: Jon Leibowitz, Chairman, William E. Kovacic, J. Thomas Rosch, Edith Ramire, and Julie Brill.	)	

PUBLIC COMMENTS FILED BY DANIEL MARTIN BELLEMARE AS TO THE PROPOSED CONSENT ORDER PLACED IN THE PUBLIC RECORD BY THE FEDERAL TRADE COMMISSION IN THE ABOVE-CAPTIONED MATTER.

On April 5, 2011 the Federal Trade Commission ("Commission") issued a public notice in the Federal Register inviting public comments respecting a proposed consent order ("PCO") submitted by Google Inc. in the above-captioned matter. 76 Fed. Reg. 18,762 (2011). Two aspects of the PCO deserve specific comments. Firstly, the hermetical enforcement and compliance mechanism in the PCO, which should be improved toward greater openness and transparency. Secondly, Part II in the PCO is in the public interest; likewise, Part II meets the "reasonable relation" standard set forth in *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 612-613 (1946), consistent with the Commission's mandate to enforce Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) ("FTC Act § 5").

OVERVIEW

The PCO in the above non-adjudicative proceeding is paramount to Internet users. Protection against invasion of privacy such as unauthorized dissemination of Internet users' personal and confidential information is of utmost public interest, given that the web is fast becoming an essential part of everyday life, much like the telephone. Telephone users enjoy significant protection against invasion of privacy. See *Katz v United States* 389 U.S. 347 (1967);

United States v United States District Court, 407 U.S. 297 (1972). See also *Amnesty International (USA)* v *Clapper* 2011 WL 941524 (C.A. 2) (US citizens on U.S. territory have standing to challenge the constitutionality of a federal statute authorizing warrantless interception of a telephone call placed by a person located on U.S. territory to an interlocutor abroad).

Misuse of personal and confidential information on the web may have serious detrimental consequences on victims. See Draft Complaint ¶11. ("[A]utomatic generation of lists of followers and people to follow from email contact lists ... included in some cases: individuals against whom they had obtained restraining orders; abusive ex-husbands; clients of mental-health professionals; clients of attorneys; children; and recruiters they had emailed regarding jobs"). The practices uncovered by the Commission during the investigation of Google, call for enforcement action. The measures in the PCO address an important privacy issue in an area where appropriate oversight and regulation is much needed.

COMMENTS

As mentioned above, comments below address two particular issues: (i) shortcomings in the enforcement and compliance mechanism embodied in the PCO; and (ii) reservations about Part II in the PCO expressed by Commissioner Rosch in a concurring statement attached to the PCO and the draft complaint.

A.
LEGAL STANDARD

The PCO should be reviewed under a "public interest" standard. Concurring Statement of J. Thomas Rosch. In order to determine whether the PCO should become a final order, regard should be had to the "reasonable relation" standard applied to judicial review of remedies under FTC § 5.

Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-613 (1946) ("The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practice found to exist").

B.
THE PROPOSED CONSENT ORDER'S REMEDIAL PROVISIONS

The PCO's purpose and meaning meet the above legal standard. The Commission conducted a comprehensive investigation on a matter of public interest. The investigation conducted by the Commission shows that Google appears to have engaged in questionable practices against consumers on a large scale. The case against Google as set out in the draft complaint is overwhelming; the PCO provides reasonably tailored remedies therefor. In short, the proposed cease and desist order would:

a. Enjoin Google from misrepresenting: (i) the level of privacy and confidentiality protection afforded to users of Gmail and related products; and (ii) membership in, and compliance with, U.S.- European privacy regulations. P.C.O. Part I.

b. Impose user consent before transmitting personal and confidential information to third parties. P.C.O. Part II.

c. Compel the implementation of a comprehensive privacy program within the company, combined with an obligation to obtain assessments and reports from third-party professionals having minimal qualifications and experience. P.C.O. Parts III-IV.

d. And, filing compliance reports before the Commission. P.C.O. Part VIII.

1.

The Commission would enforce the PCO, and supervise Google compliance therewith, behind closed doors. Compliance-related information and records enumerated in the PCO — implementation of a privacy program, periodical assessments and reports prepared by third parties,

compliance reports — would be unavailable to the public for inspection and comments. Therefore, the public would be unable to supervise enforcement and compliance with the PCO. This shortcoming must be addressed.

Full public participation and awareness is essential to the enforcement of antitrust laws. ("In response to the launch of Google Buzz, many users complained" and "[f]ollowing widespread public criticism and thousand of consumer complaints, Google made certain changes to the Buzz service"). Draft Complaint ¶¶ 11and 12. The Federal Trade Commission Act provides effective penalties for violations of a final order issued by the Commission: contempt of court and attendant fines (15 U.S.C. § 45 (l)); and civil penalties (15 U.S.C. § 45 (m)). Enforcement of the PCO would require extensive monitoring. Openness is conditio sine qua non to the effective enforcement of the PCO, as "this is no ordinary antitrust case". *United States v AT&T Corp.,* 552 F.Supp. 131, 151 (D.D.C. 1982) *aff'd., sub. nom. Maryland v. United States,* 460 U. S. 1001 (1983).[1]

2.

In a concurring statement Commissioner Rosch states that he has "substantial reservations about Part II of the consent agreement", on the ground that the Commission shall be "opposed to accepting consent agreements that may be contrary to the public interest because a party is willing to agree to terms that hurt other competitors as much or more that the terms will hurt that party",

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[1] "The Court will accordingly require as a condition of its approval of the proposed decree that it be modified (1) to require Court approval of the plan of reorganization and (2) to confirm the Court's authority to initiate enforcement proceedings *sua sponte.* These modifications will enable the Court both directly to enforce specific provisions of the decree and to issue orders construing its principles in more specific terms so that, if there is a violation, sufficient grounds will exist for the entry of further enforcement orders or the imposition of appropriate punishment". 552 F.Supp., at 217.

which "may occur, for example, when a consent agreement is used as 'leverage' in dealing with the practices of other competitors"; adding, " Part II of the PCO may be susceptible to this happening".

Commissioner Rosch warns, further, that "Part II seems to be contrary to Google's self-interest", asking why "Google willingly agreed to it, and if so, why it did so"; then, suggesting, Google (i) either "was being challenged by other government agencies and it wanted to 'get the government off its back'"; or (ii) expected "that Part II would be used as leverage in future government challenges to the practices of its competitors". Thus, "the purpose and effect of Part II may be to 'fence in' Google".

Firstly, targets of an antitrust investigation and defendants in antitrust proceedings often consent to provisions in consent orders that are against interest; by definition, consent orders are against interest. Bargaining power is of the essence in consent order negotiations. *United States v. Microsoft Corp.,* 147 F.3d. 935, 146 (D.C. Circuit 1998) (Wald J. concurring in part dissenting in part) (citing *United States v. Armour & Co.* 402 U.S. 673, at 681-82). ("[P]arties [to a consent decree] have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve"). As already mentioned, the Commission has a substantial case; the claims in the draft complaint are compelling.[2]

Secondly, Part II in the PCO imposes disclosure and consent requirements for the benefit

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[2] The antitrust litigation in the matter of American Telephone & Telegraphs is instructive in that regard. See *United States v AT&T Corp.,* 524 F.Supp. 1336 (D.D.C. 1981) (AT&T motion pursuant to rule 41 (b) Federal Rules of Civil Procedure to dismiss antitrust civil action filed by the United States Department of Justice denied). See also *United States v AT&T Corp.,* 552 F.Supp. 131 (D.D.C. 1982) *aff'd., sub. nom. Maryland v. United States,* 460 U. S. 1001 (1983) (Consent decree).

of Google users; the proposed cease and desist order sanctions past unauthorized disclosure of personal and confidential information by forbidding such conduct in the future. The disclosure and consent requirements in Part II extend to "any new or additional sharing" of users' personal and confidential information with third parties, stemming from "any change, addition, or enhancement to a product or service by [Google]". Part II is essential to cure the acts and practices identified in the draft complaint. Technology is evolving quickly, hence it is imperative to prevent Google from avoiding compliance with the PCO merely by improving existing products and services.[3] Otherwise, the PCO will be meaningless. Microsoft, 147 F.3d at 940 citing *Armstrong v. Executive Office of the President,* 1 F.3d 1274, 1289 (D.C. Cir.1993) ("party seeking to hold another in contempt faces a heavy burden, needing to show by 'clear and convincing evidence' that the alleged contemnor has violated a 'clear and unambiguous' provision of the consent decree").

Thirdly, Part II meets the "reasonable relation standard". *Jacob Seigel Co.* 327 U.S. 608, at 612-13. The draft complaint contains no allegations that Google used a trade name or trade mark

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[3] See *United States v. Microsoft Corp.,* (No. 94cv1564 D.D.C.) (Aug. 15, 1994) (Proposed Final Judgment submitted for approval; Part II. (A)):

> "Covered Product(s)" means the binary code of (1) MS-DOS 6.22, (2) Microsoft Windows 3.11, (3) Windows for Workgroups 3.11, (4) predecessor versions of the aforementioned products, (5) the product currently code-named "Chicago," and (6) successor versions of or replacement products marketed as replacements for the aforementioned products, whether or not such successor versions or replacement products could also be characterized as successor versions or replacement products of other Microsoft Operating System Software products that are made available (a) as stand-alone products to OEMs pursuant to License Agreements, or (b) as unbundled products that perform Operating System Software functions now embodied in the products listed in subsections (1) through (5). The term "Covered Products" shall not include "Customized" versions of the aforementioned products developed by Microsoft; nor shall it apply to Windows NT Workstation and its successor versions, or Windows NT Advanced Server".
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> [Emphasis added].

for the purpose of disseminating users' personal and confidential information without proper authorization; instead, the draft complaint alleges that Google failed to "adequately communicate that certain previously private information would be shared publicly by default". Complaint ¶ 9.

No divestiture of a "valuable business asset" is ordered in Part II. *Jacob Siegel Co.*, 327 U.S., at 612. To be sure, divestiture is "the most drastic, but most effective, of antitrust remedies" (*United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 326 (1961). It is a well settled principle of antitrust law that "[antitrust] relief must not be punitive". Ibid. However, "[t]hose who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience". Ibid., at 326-27. The same reasoning applies in the context of a consent order directing and prohibiting specific types of conduct (conduct versus structural relief). In any event, Google has no property interest in users' personal and confidential information.

One last point: the assertion in Commissioner Rosch concurring statement that Google may have accepted Part II in order to gain a competitive advantage. In short, Commissioner Rosch raises an issue whether Part II would give Google a competitive edge while yielding the Commission enforcement leverage over Google's competitors. A consent order enforceable against Google, only, would hardly provide a competitive advantage on Google. To the extent Google's competitors do not engage in the type of conduct alleged in the draft complaint, they don't have to fear any kind of agency action.

However, should competitors of Google engage in those practices referred to in the draft complaint, the Commission will investigate and determine which enforcement action is most appropriate in the circumstances. In that perspective, the most that can be said is that the PCO sets

forth, de facto, a tentative level playing field, although the PCO would be enforceable only against Google. Therefore, we are of the view, based on the evidence in the Commission's record, made available for public comments, that the PCO would not have the effect to confer a competitive advantage on Google.

CONCLUSION

For the foregoing reasons, the PCO should become a final order; however, the enforcement and compliance mechanism should be improved toward more openness and transparency.

Submitted this 2nd day of May 2011.

/s/
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