

Google antitrust proceedings: Digital business and competition

SUMMARY

Google holds around 90% of the market share for internet search services in most European Economic Area (EEA) countries, and several companies have complained to the European Commission about Google's market dominance. The European Commission has thus formally launched two separate investigations, one on Google's comparison shopping and the other on the company's handling of applications installed on Android operating mobile devices.

In April 2015, the Commission sent a Statement of Objections to Google, indicating that the company had abused its dominant position in the European Economic Area (EEA). Google admits that it is dominant, thanks to its innovative products and services, but does not agree that it has abused its position on the market.

The Google case may provide an opportunity for the Commission to clarify some aspects of competition law with regard to certain digital practices, and to close the difficult gap between the rights of companies who dominate the market, free competition and consumer protection.



In this briefing:

- Background
- EU competition policy and the digital economy
- The EU and the US: investigating Google
- Digital market: outlook

Glossary

Android: An operating system used by many information and communication technology (ICT) devices. Android, mainly developed by Google, is broadly based on open-source Linux software.

Antitrust regulation: Legislation intended to promote free competition and to prevent monopolies, cartels and the abuse of a dominant position. In the European Union, these derive from EU rules and are [enforced](#) by the European Commission and national authorities.

Market dominance: An indicator of the strength of a certain product or service, often calculated on the basis of market share (e.g. 50% and over), of the dominant company in relation to its competitors.

Statement of Objections: A written European Commission [communication](#), addressed to persons or enterprises, during competition procedures and antitrust investigations, containing all charges.

Vertical search (engine): In comparison to general web-based search (engines), vertical search (engines) [focus](#) on specialised online content, such as shopping, travel, flights, etc. These specialised search services deliver subject-relevant results to users by indexing only a pre-defined set of topics.

Background

Google has probably changed internet use, especially with regard to web search patterns, like no other company before. Today, Google is one of the major global players with regard to the internet and the world's largest, and most popular, search engine. Google provides general online search services for information, images, maps, videos, news, but also offers specialised search for travel reservations and shopping.

Generally speaking, Google presents two types of results: (1) unpaid search results and (2) paid search results and/or sponsored links – advertisements, which are shown at the top and to the right of Google's search results.

In recent years, Google has been confronted with antitrust allegations in the United States and the EU. Criticism of Google in both Europe and America focuses on confusing advertising (e.g. the mix of general and specialised search results and the high position given to paid search results), and abuse of its

Google Search (screenshot)

The screenshot shows a Google search for 'tablets'. The search bar contains 'tablets' and the search button is visible. Below the search bar, there are navigation tabs for 'Web', 'Images', 'News', 'Videos', and 'More'. The search results are displayed in a grid format. On the left side, there are organic search results for 'Nieuwe Surface™ 3 - Perfecte tablet, krachtige laptop', 'Tablets in aanbieding - Profiteer van de beste prijzen', 'Vergelijk Tablets - Al vanaf €49,95 op Vergelijk.be', 'Tablets - CNET - CNET.com', 'Best tablet 2015: Our top 10 ranking | TechRadar', 'Tablet Reviews | Tablets Review | PCMag.com', 'Amazon.co.uk: Tablets, Computers & Accessories', and 'Tablets: Amazon.com'. On the right side, there are sponsored advertisements for 'Shop for tablets on Google' and 'Tablets Uitverkoop €45'. The sponsored ads include images of various tablets and their prices.

dominant market position. Some claim that Google favours its own or affiliated services (e.g. for flight reservations), by presenting them at the top of the search or, allegedly, by lowering the ranking of unpaid search results from competing specialised search services. Thus, the company is suspected of abusing its dominant market position in the European Economic Area (EEA).

After several unsuccessful attempts to reach an agreement (see below), the European Commission sent a [Statement of Objections](#) to Google in April 2015, as the next step in the investigation [opened](#) in 2010. Google has the opportunity to respond to the Commission's statement and to call for a hearing to present its defence. If the Commission finds that Google indeed abuses its dominant market position, it can require the company to change its search practices. In addition, the Commission can impose fines of up to 10% of an enterprise's global annual proceeds. In the case of Google, this would amount to some US\$6 billion, or around €5.3 billion.

EU competition policy and the digital economy

EU competition framework

Competition policy has always been an important policy area for the European Union. Antitrust regulations were implemented in order to guarantee free trade and fair competition in the common single market.

Both the number of cases dealing with antitrust issues and the level of fines has increased rapidly over the past two decades. According to the Commission's [cartel statistics](#), cases against companies rose from 230 (1990-99) to 362 (2000-09) and, over the five-year period from 2010 to 2014, to 192. The total amount of fines imposed since 1990 is €20.4 billion, with more than three quarters of that figure, around €16.6 billion, charged between 2005 and 2014.

The relevant competition rules are set out in Articles 101 and 102 of the Treaty on Functioning of the European Union ([TFEU](#)). As regards Article 102, some experts criticise Article 102c, which indicates that an abuse of a dominant position may consist in *placing other parties at a competitive disadvantage*.

Pablo Ibanez Colomo, an EU competition law expert from the London School of Economics, points out that this wording may allow a broad interpretation: 'In fact, Article 102(c) TFEU provides that discriminatory conduct must impose a "competitive disadvantage" on firms for it to be abusive. It is true at the same time that, as far as many practices are concerned, this threshold of effects is a very low one that can easily be met by an authority or a claimant.'¹

Article 102 TFEU (ex Article 82 TEC)

'Any abuse by one or more companies of a dominant position within the internal market, or in a substantial part of it, shall be prohibited as incompatible with the internal market, in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

Some experts² argue that specific rules are needed in fast-moving and dynamic markets, such as the market for information and communications technologies (ICT).

The definition of antitrust procedures is found within two Regulations. Article 11(6) of [Council Regulation No 1/2003](#) states that the Commission takes precedence over proceedings by national authorities, and Article 2(1) of [Commission Regulation No 773/2004](#) sets out the time frame for initiating investigations.

Council Regulation (EC) No 1/2003 decentralised some of the Commission's control functions to national competition and antitrust authorities, but at the same time it strengthened some of the Commission's investigative and enforcement powers. Both Regulations [apply](#) to the digital single market; there is no specific legislation for the digital economy.

EU antitrust cases in information and communications technologies

Over recent years, the Commission has opened several cases against, inter alia: Microsoft (conditions of access to their operating system); IBM (conditions of supply of computer maintenance to third parties); and Apple (use of non-proprietary software development tools). This illustrates that access and interoperability issues are frequent in the information and communications technologies market. It also demonstrates, as in the case of Microsoft, that EU antitrust investigations in the digital economy can take a very long time – the Commission's investigations began in 1999 and ended in 2004. For some experts, this procedure could be considered too lengthy, as the ICT market is reshaped on a daily basis.³

The results of the above-mentioned legal action, and the justifications made, suggest that the interoperability of different technical devices, hardware and software, as well as the refusal by the dominant company to enable interoperability, are key factors in the European Commission's decisions.

Antitrust assessments of online services and search engines are indeed challenging. In the case of Google, some experts consider general and specialised search engines as different products and markets.⁴ However, it might be that, due to its market dominance, the company does try to influence specialised search markets, but this is a question to be decided by the European Commission. It should be remembered that 'the purpose of competition law has never been to achieve optimal market outcomes,

Article 11(6) Council Regulation No 1/2003

'The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.'

Chapter III covers, inter alia, the Commission's findings and termination of infringement, interim measures and commitments.

Article 2(1) of Commission Regulation No 773/2004

'The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation or a statement of objections or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.'

Article 9(1) covers, inter alia, the Commission's binding commitments. Article 27(4) focuses on the possibility of public hearings of the parties, complainants and others.

but to preserve the ability and the incentive of firms in the marketplace to outperform their rivals.⁵

The objectives of EU competition law, nonetheless, suggest that dominant firms have to deal with their competitors on a non-discriminatory basis. Firms are, however, likely to lose the incentive to invest and to innovate if they are unable to exploit their competitive advantage. In addition, others may choose to rely on competition law to gain access to their competitors' advantages, instead of investing or improving the quality of their own products or services.⁶

The EU and the US: investigating Google

The US vs Google

Google's search engine is used for two thirds of all searches in the US; with many internet users searching with both Google's main general search engine and its specialised search services. Google gives its specialised search results a prominent place at the top of its results pages. Some competitors in specialised search services (such as those for flights or shopping), criticise Google's presentation of results, claiming it gives Google an unfair advantage over their own, competing, vertical search engines.

In June 2011, the US Federal Trade Commission ([FTC](#)) started official investigations into Google.⁷ However, in January 2013, the FTC closed the file, as the evidence presented did not support the allegations made. In a statement, the FTC [concluded](#) that: 'Undoubtedly, Google took aggressive actions to gain advantage over rival search providers. However, the FTC's mission is to protect competition, and not individual competitors. The evidence did not demonstrate that Google's actions in this area stifled competition in violation of US law.'

Despite this ruling, Google announced that it would enter into voluntary commitments with the FTC, e.g. allowing websites to opt out of display in specialised vertical search results. The FTC reasoning, however, is not [unanimously](#) shared.⁸

The European Commission vs. Google

In April 2015, the EU Commission sent a [Statement of Objections](#) to Google. The investigation will focus on whether the company has 'entered into anti-competitive agreements or abused a possible dominant position' in EEA markets (in violation of Articles 101 and 102 TFEU). The Commission has formally launched two separate [investigations](#) into Google's comparison shopping and on the company's handling of applications installed on mobile devices using the Android operating system.

Comparison shopping

The EU has been investigating Google since [November 2010](#), over complaints made by 18 European and US companies, regarding [comparison shopping](#). The complainants accused Google of abusing its dominant position by promoting its own services and depriving them of business opportunities – an issue that was also raised by the FTC.

In its third attempt to settle the case (February 2014), Google made some concessions to the EU. The company agreed, inter alia, to give more prominence to rival websites by displaying results from three competitors whenever it promotes its specialised search services. It also agreed to label search results from its own services more clearly. In addition, Google agreed to lift restrictions that prevent advertisers from moving their campaigns to the search engines of competing companies.

The then Commissioner for Competition, Joaquin Almunia, [pointed](#) out that 'the concessions are far-reaching and have the clear potential of restoring a level playing field with competitors' and that 'no antitrust authority in the world has obtained such concessions'. However, the agreement remained tentative, as several competitors criticised the proposed deal, suggesting that commitments were not (yet) enough to restore/achieve a truly level playing field. In the aftermath, Members of the US Congress and some experts argued that this rejection resulted from political pressure on the European Commission by some EU Member States. These Member States not only wanted to protect their companies' digital market access, but also put forward arguments in favour of consumer protection, for example by criticising some US high-tech companies' sharing of private data with the National Security Agency (NSA).⁹

Concerning comparison shopping, the Commission's preliminary conclusion was that Google favours its comparison shopping service: 'Google Shopping'. Google 'systematically positions and prominently displays its comparison shopping service in its general search results pages, irrespective of its merits'. In addition, Google 'does not apply to its own comparison shopping service the system of penalties, which it applies to other comparison shopping services on the basis of defined parameters, and which can lead to the lowering of the rank in which they appear in Google's general search results pages'. According to the Commission antitrust assessment, this may not only hinder rival comparison shopping services, but also affect user and consumer rights, as consumers might not necessarily see the most relevant results to their requests.

Google, however, [explains](#) (via its official blog), that the company's dominance is due to its innovative products and services, and that it is not market abusive. According to Google, many users and consumers already directly employ specialised search engines for travel reservations, news or shopping. In addition, whilst Google Shopping's market share might be climbing, so is that of its competitors' specialised search engines.

Android mobile devices

The Commission initiated a second investigation in April 2015, on the company's handling of applications on mobile devices operating on [Android](#). The majority of smartphone and tablet manufacturers use Android software, combined with Google's applications and services. These manufacturers sign contracts with Google to obtain the right to install Google's applications on their devices. The Commission's preliminary view is that Google infringes EU antitrust rules by (1) 'requiring or incentivising smartphone and tablet manufacturers to exclusively pre-install Google's own applications or services', (2) 'illegally hindering the development and market access of rival mobile operating systems and mobile applications or services', and (3) by 'tying or bundling certain Google applications and services distributed on Android devices with other Google applications'. According to the Commission, Google is hindering the development of innovation, and market access for rival mobile operating systems, applications and services.

Digital market: outlook

In March 2015, the European Parliament (EP) adopted an own-initiative [report](#) on the Annual Report on EU Competition Policy (rapporteur: Morten Messerschmidt, ECR, Denmark). Concerning Google, the report supports the Commission's antitrust investigations. The EP, however, regrets that despite four years of investigation and three sets of commitment proposals, the Commission was not able to achieve an agreement approved by all stakeholders. The EP stresses that, to remain credible, the

Commission should resolve the Google case urgently. In addition, the EP proposes that the Commission should take 'strong measures' in order to ensure fair competition in the digital single market. The Parliament considers open standards and interoperability as key to fair competition. With regard to the adoption of competition legislation, the EP requests that this should be adopted under the ordinary legislative procedure (co-decision), as opposed to the special legislative procedure which currently applies, where the EP is only consulted (Articles 103 and 109 TFEU).

The EP, together with some [experts](#), believes that the EU's legislative framework needs to adjust to fast-moving and dynamic markets such as for the information and communication technology sector. They propose, inter alia, that the Commission should adjust competition law and instruments for the digital economy. In its new Digital Single Market [Strategy](#), presented in May 2015, the EU Commission pointed out the relevance of the digital economy for growth, jobs and investment. While the Commission refers to the relevance of cross-border e-commerce, consumer protection and antitrust rules, it nevertheless made no specific proposal for introducing a digital economy law.

The Google case, notwithstanding the above, may provide a window of opportunity for the Commission to clarify some aspects of competition law with regard to digital practices, and to close the difficult gaps between the rights of market dominant companies, free competition and consumer protection.

Main references

[Competition policy in the digital economy](#), European Policy Information Centre (EPIC), 17 April 2015.

[The 'Google Case' and the Promotion of Europe's Digital Economy](#), F. Erixon, European Centre for International Political Economy (EPICE), ECIPE Bulletin No 1/2015.

Competition on the Internet, edited by G. Surblyte, Heidelberg, Springer, 2015.

R. Hauck, *FTC v. Google: The Enforcement of Antitrust Law in Online Markets*, in: G. Surblyte (ed.), *Competition on the Internet*, Heidelberg, Springer, 2015, p. 53-61.

P. Ibanez Colomo, *Discriminatory Conduct in the ICT Sector: A Legal Framework*, in: G. Surblyte (ed.), *Competition on the Internet*, Heidelberg, Springer, 2015, p. 63-79.

R. Podszun, *The More Technological Approach: Competition Law in the Digital Economy*, in: G. Surblyte (ed.), *Competition on the Internet*, Heidelberg, Springer, 2015, p. 101-108.

[What to do about Google?](#), J. Grimmelmann, *Communications of the ACM*, September 2013, Vol. 56, No. 9.

[Antitrust – Manual of Procedures](#), European Commission, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012.

Endnotes

- ¹ Pablo Ibanez Colomo, Discriminatory Conduct in the ICT Sector: A Legal Framework, in: G. Surblyte (ed.), Competition on the Internet, pp. 73-74.
- ² Ruprecht Podszun, The More Technological Approach: Competition Law in the Digital Economy, in: G. Surblyte (ed.), Competition on the Internet, p. 101.
- ³ Ruprecht Podszun (2015), op. cit., p. 106f.
- ⁴ Ronny Hauck, FTC v. Google: The Enforcement of Antitrust Law in Online Markets, in: G. Surblyte (ed.), Competition on the Internet, p. 59.
- ⁵ Pablo Ibanez Colomo (2015), op. cit., p. 65.
- ⁶ Pablo Ibanez Colomo (2015), op. cit., p. 74.
- ⁷ The FTC is an independent regulatory agency which has a broad mandate to enforce antitrust and consumer protection law (Section 5 FTC Act).
- ⁸ See also Ronny Hauck (2015), op. cit.
- ⁹ [Washington weighs in on EU Google probe](#), ft.com, 25 November 2014; [France, Germany back MEPs against Google](#), EurActiv.com, 28 November 2014.

Disclaimer and Copyright

The content of this document is the sole responsibility of the author and any opinions expressed therein do not necessarily represent the official position of the European Parliament. It is addressed to the Members and staff of the EP for their parliamentary work. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2015.

Photo credits: © Denys Prykhodov / Shutterstock.com

eprs@ep.europa.eu

<http://www.eprs.ep.parl.union.eu> (intranet)

<http://www.europarl.europa.eu/thinktank> (internet)

<http://epthinktank.eu> (blog)