

Antitrust Trade and Practice

Expert Analysis

EU and Google: Study in Divergence For Antitrust Enforcement

On April 15, 2015, the European Commission levied formal charges against Google, the culmination of a long-simmering and politically charged investigation into the Internet giant's search practices. Despite various inquiries in recent years, the announcement marks the first time a government regulator has gone so far as to charge Google with an antitrust violation. The charges—which assert that Google abused its dominant position in the European search engine market to favor its own “vertical” services—are coupled with the launch of a formal investigation into allegations that Google currently bundles its Android mobile operating system with Google applications. The news has been met with a defiant response by Google, as well as both praise and criticism from state governments and antitrust commentators.

The recent EC decision is not the first time a prominent government agency has examined Google's potential anti-competitive behavior. In 2013, the Federal Trade Commission concluded its own investigation into Google's search practices, recognizing a pro-competitive basis for Google's prioritization of certain content. Complainants had alleged that Google utilized an algorithm specifically tailored to favor the return of Google's own content above that of competitors during an Internet search. This practice, known as “search bias,” resulted in the supposed favoring of “vertical” Google content—i.e., Google-sponsored shopping and travel searches—at Google's competitors' expense.

The FTC ultimately concluded that these design changes were aimed at improving the user experience (by offering more responsive



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content) and that any harm to competitors was purely incidental. Indeed, the FTC found that Google frequently conducted testing to measure the effects of these changes on consumers, as well as determining that other general search engines had embraced similar tweaks. In declining to file charges against Google, the FTC stated that to “second-guess a firm's prod-

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uct design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence” would be inappropriate from an antitrust perspective.¹

The FTC was, however, able to secure a number of concessions from Google, including the company's promise to provide competitors with access to certain patents, allow advertisers increased flexibility to manage ads on Google's AdWords platform and grant certain websites an “opt out” option from Google searches. Despite these remedies, the decision was largely hailed as a victory for Google that allowed the company to bypass the financial and reputational drain

of a prolonged antitrust battle similar to the one Microsoft endured in the 1990s.²

The FTC's 2013 decision was largely met with positive reactions from antitrust commentators, many of whom saw the investigation as (in the words of former FTC chairman James Miller) a “shameless attempt at rent-seeking” by Google's rivals.³ In early 2015, *The Wall Street Journal* obtained a copy of an FTC staff report, which referred to the FTC's 2013 decision not to file charges as a “close call.” *The Wall Street Journal* article suggested that the decision may have been influenced by a political agenda, a claim that the FTC vehemently denied in a press release shortly after the article's publication.

Action in Europe

While the FTC was conducting its Google investigation, the European Commission was proceeding with its own inquiry into Google's search practices. The EC specifically looked at three primary areas: (1) search bias, (2) copying (or “scraping”) of content from other search engines and (3) restrictions on the use of certain Google advertising features. The EC eventually reached a tentative settlement with Google on the first issue (which had become the focus of the investigation)⁴ that would have allowed competitors to purchase space near the top of Google search results pages. The proposed remedy was met with a flurry of harsh criticism from EU government officials and commissioners, as well as Google's European competitors, arguing that the EC had failed to extract an adequate settlement to quell search bias fears.

Despite Google's public appeal that its search algorithm was pro-competitive and benefited consumers, it appears that intense political pressure culminated in EC antitrust head Joaquin Almunia's decision in September 2014 to re-open the Google investigation. Additionally, Almunia initiated a separate investigation track focused on Google's supposed bundling of its mobile phone Android

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operating system with Google applications.

Less than a year later, new EC antitrust chief, Margrethe Vestager, announced the EC's decision to file charges on the search bias issue, while simultaneously formalizing the EC's investigation into Google's use of Android. Vestager noted that the EC's decision to file charges was based on the "preliminary conclusion that Google had abused its dominant position to systematically favor its own comparison shopping service, Google Shopping, over rival services on its general search page."⁵ Meanwhile, the Android investigation would focus on whether Google improperly utilized its market leading position in mobile operating systems to hinder the development of competitors' products by, for example, requiring the bundling of Android with Google applications.

Google responded to the charges with a mix of public statements and an internal memo that focused on the pro-competitive justifications for Google's alleged search bias and the high degree of competition amongst search engines and vertical services. Specifically, Google highlighted competition from general search engines (like Bing and Yahoo), specialized websites (like Amazon and eBay) and social media as vying for "vertical" sale and marketing opportunities. On the Android issue, Google countered that Android is an open-source operating system that can be freely accessed and that the pre-loading of certain applications on Android enhances the user experience.

Much of the commentary that followed the announcement was muted in its support of the EC's decision. In fact, a number of commentators viewed the EC's decision as typical of the European Union's focus on European protectionism, a practice that critics argue has stifled the rise of major European tech companies capable of competing with U.S. giants such as Google and Facebook.⁶ Other commentators⁷ were quick to draw a comparison to the EU's decision to challenge Microsoft's bundling practices, an investigation that led to a €2.2 billion fine for Microsoft.⁸ In fact, Microsoft has found itself connected to the recent EC charges in more ways than one—a recent New York Times article suggests that Microsoft has deep ties to a number of the entities that lobbied the EC to bring its antitrust campaign, perhaps in an attempt to stifle the growth of a key rival.⁹

Issues and Impact

There are no indications that the announcement of charges will affect the United States' position on the issue. The decision is, however, indicative of key differences in U.S. and EU approaches to antitrust enforcement. The 2013 FTC decision was

largely based on the fact that, despite potential incidental harm to competitors, consumers were benefited by Google's practices. U.S. antitrust law seeks to protect consumers first and foremost, whereas EU law requires an additional focus on competitors' welfare.

The EC decision is also fraught with potential political implications. President Barack Obama recently cautioned the EU against making "commercially driven" decisions against major U.S. tech companies. Indeed, shortly before the EC announcement, Daniel Sepulveda, deputy assistant secretary in the U.S. State Department Bureau of Economic and Business Affairs, warned the EU against basing its decision on a protectionist agenda, publicly stating that it is "important... that the process of identifying competitive markets and remedies be based on impartial findings and not be politicized."¹⁰

So where do the parties go from here? Vestager has stated that the EC is open to settlement

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options, but noted that any acceptable settlement will need to differ significantly from the previous proposal that was based too heavily on "a particular look of the screen" rather than a change in corporate principles.¹¹ Google now has approximately 10 weeks to respond to the charges, a process that ultimately could entail a hearing request before the commission and, in the event fines or an injunction are imposed, an appeal to the EU appeals court in Luxembourg.

An EC victory would almost certainly have a widespread impact on other U.S. tech companies currently facing antitrust scrutiny in Europe.¹² Additionally, many will continue to closely watch the Android investigation, as some of Google's largest competitors (Microsoft and Apple, for example) also routinely provide their operating system in conjunction with various applications.

Of the many issues raised by the EC's Google investigation, one of the most interesting centers on whether antitrust investigations in the tech industry are inevitably antiquated. Since tech companies

are rapidly innovating, an antitrust claim centered on perceived anti-competitive use of these technologies is often obsolete by the time a decision is rendered. Nonetheless, while the outcome of the instant case remains uncertain, it is clear that the EC does not fear plotting its own course of antitrust enforcement, the next step in the continuing divergence of U.S. and EU competition regulation. It is also starkly evident that this path, at least in the tech context, is riddled with dangers posed by the political motives of state actors and, perhaps, the self-interested agendas of competitors as well.

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1. Press Release, FED. TRADE COMM'N, Statement of the Federal Trade Commission Regarding Google's Search Practices, *In the Matter of Google*, at 3 (Jan. 3, 2013), FTC File No. 111-0163, https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf.

2. In the late 1990s, the U.S. Department of Justice, along with 20 individual states and the District of Columbia, filed suit alleging that Microsoft had utilized monopoly power to bundle products and commit a host of other antitrust violations. After a multi-year process that involved numerous appeals and remands, Microsoft settled with the Justice Department, but was later subject to suits by private parties that resulted in significant settlements and an extended European Commission investigation that ended with a massive fine. A. Douglas Melamed and Daniel L. Rubinfeld, *U.S. v. Microsoft: Lessons Learned and Issues Raised*, in *ANTITRUST STORIES* (Eleanor M. Fox & Daniel A. Crane eds., 2007).

3. James C. Miller III, "The Case Against Google Was Always Weak," *WALL ST. J.*, Jan. 3, 2013, <http://www.wsj.com/articles/SB10001424127887323874204578220050460529918>.

4. The advertising issues were settled separately.
5. Tom Fairless, *EU Charges Google on Its Searches*, *WALL ST. J. EUR.*, Apr. 16, 2015, <http://www.pressreader.com/belgium/the-wall-street-journal-europe/20150416/281865822000815/TextView>.

6. See James Kanter and Mark Scott, "Europe Challenges Google, Seeing Violations of Its Antitrust Law," *N.Y. TIMES*, Apr. 15, 2015, <http://www.nytimes.com/2015/04/16/business/international/european-union-google-antitrust-case.html>.

7. Tom Fairless, "EU Charges Google on Its Searches," *Wall St. J. Eur.*, April 16, 2015, <http://www.pressreader.com/belgium/the-wall-street-journal-europe/20150416/281865822000815/TextView>.

8. If the EC prevails in the instant case, it could seek a fine of over €6 billion, approximately 10 percent of Google's annual revenue.

9. Danny Hakim, "Microsoft, Once an Antitrust Target, Is Now Google's Regulatory Scold," *N.Y. TIMES*, April 15, 2015, http://www.nytimes.com/2015/04/16/technology/microsoft-once-an-antitrust-target-is-now-googles-regulatory-scold.html?_r=0.

10. James Kanter and Mark Scott, "Europe Challenges Google, Seeing Violations of Its Antitrust Law," *N.Y. TIMES*, Apr. 15, 2015, <http://www.nytimes.com/2015/04/16/business/international/european-union-google-antitrust-case.html>.

11. Fairless, *supra* note 5.

12. The EC is also investigating certain tax concessions granted to Apple and Amazon, as well as Facebook's privacy protections.