

# GOOGLE INVESTIGATED OVER ANDROID BUSINESS PRACTICES: THE COMMISSION STRIKES AGAIN

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The European Commission has issued a statement of objections to Google, alleging that Google has potentially abused a dominant position in the markets in the EEA for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system. The Commission believes that Google's business practices may affect the ability of rival mobile browsers to compete, and may hinder the development of operating systems, new apps and services.

Alex Noury, Chandralekha Ghosh and Chris Worrall, Clifford Chance LLP

According to the European Commission (the Commission), Google has potentially abused a dominant position in the markets in the EEA for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system. The Commission considers that Google enjoys market shares of at least 90% on these markets in most EU member states.

On 20 April 2016, the Commission sent a statement of objections (SO) to Google and its parent company, Alphabet Inc, alleging that Google had potentially breached Article 102 of the Treaty on the Functioning of the European Union (Article 102) by imposing restrictions on Android device manufacturers and mobile network operators (see box "*Alphabet's potential liability*").

The Commission believes that these business practices may lead to a further consolidation of the dominant position of Google Search in general internet search services. It is also concerned that these practices affect the ability of rival mobile browsers to compete with Google Chrome, which integrates Google's search service by default, and that they hinder the development of operating systems based on the Android open source code and the opportunities that these would offer for the development of new apps and services.

## COMPETITION CONCERNS

The Commission's concerns relate to the licensing of Google's proprietary apps, exclusivity-inducing mechanisms and anti-fragmentation provisions.

**Licensing of apps.** The Commission is concerned that Google's agreements with manufacturers that wish to pre-install Play Store, Google's app store for Android, on their devices, require them also to pre-install Google Search and set it as the default search provider on those devices. In addition, manufacturers that wish to pre-install Google's Play Store or Search also have to pre-install Google's Chrome browser.

According to the Commission, given the commercial importance to manufacturers of Google proprietary apps, such as the Play Store and Google Search, Google effectively ensures that for the significant majority of devices sold in the EEA, the pre-installed apps used to access internet search services are Google Search and Google Chrome. The Commission's concerns are that these practices reduce the incentives of manufacturers to install competing apps and adversely affect competition in the markets for both mobile browsers and general search.

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## ALPHABET'S POTENTIAL LIABILITY

On the same day as it sent the statement of objections to Google, the European Commission (the Commission) also opened formal proceedings against Google's parent, Alphabet Inc, in respect of alleged abuses of dominance in breach of Article 102 of the Treaty on the Functioning of the European Union. The Commission had previously opened formal proceedings against Google in April 2015, but Alphabet was not established as Google's parent company until October 2015. There is a rebuttable presumption under EU law that a parent company is liable for the anti-competitive conduct of its wholly owned subsidiary, allowing the Commission to extend the proceedings to Alphabet, even though they directly concern Google's conduct (see Briefing "Competition risk: the issues for boards").

**Exclusivity-inducing arrangements.** The Commission takes issue with the significant financial incentives that Google granted to some of the largest smartphone and tablet manufacturers as well as to mobile network operators on condition that they exclusively pre-install Google Search on their devices. These financial incentives took the form of revenue-sharing mechanisms.

The Commission claims to have evidence of the exclusivity condition inducing device manufacturers and mobile network operators not to pre-install competing search services. This could adversely affect competition in the general search market.

**Anti-fragmentation agreements.** While the first two concerns appear to relate to tying, or bundling, and exclusivity arrangements, which are relatively familiar forms of potentially abusive behaviour by dominant companies, the Commission has also raised concerns about anti-fragmentation measures taken by Google. Android is an open-source system, meaning that it can be freely used and developed by anyone to create a modified mobile operating system (a so-called "Android fork"). Google, however, only allows the licensing of its proprietary apps, including Google Play and Google Search, to manufacturers that enter into a set of anti-fragmentation agreements that prohibit them from selling devices running on Android forks.

The Commission is concerned that Google's conduct has had a direct adverse impact on consumers, as it has denied them access to innovative smart mobile devices based on alternative, potentially superior, versions of the Android operating system. In doing so, Google is also hindering its competitors' ability to reach consumers as, in the absence of Google's practices, Android forks would offer a platform on which rival apps and services, in particular general search services, could be pre-installed.

The Commission's concerns regarding anti-fragmentation agreements are relatively novel but may become increasingly important in the application of competition law to the rapidly growing technology sector.

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## THE PRICE OF SUCCESS

Google is subject to multiple ongoing Commission investigations into potential abuses of dominance. In addition to the investigation into Android, Google also received an SO in April 2015 in relation to the alleged favouring of its comparison shopping services results on the Google Search results webpage (see *News brief "Google competition charges: Commission raises the stakes"* (<http://uk.practicallaw.com/2-610-2845>)). In addition, the Commission continues actively to investigate other concerns regarding Google's conduct, including the copying of competitors' web content (scraping), exclusivity in its agreements with advertising partners, and restrictions on the ability of advertisers to use competing advertising platforms. The EU's former Competition Commissioner, Joaquín Almunía, had predicted that Google could pose bigger competition concerns than Microsoft, which was subject to investigations and fines totalling more than €2 billion.

The current EU Competition Commissioner, Margrethe Vestager, has opted to issue SOs in this investigation instead of negotiating commitments from Google to cease the potentially abusive conduct at this stage. However, sending an SO does not prejudice the outcome of the investigation. The Commission typically fixes a period of

approximately two months during which the company may submit a response. Google and Alphabet will therefore likely have to respond to the SO by the end of June 2016, after which they may seek a formal hearing. In the event that the Commission concludes that they have infringed Article 102, it could impose fines of up to 10% of their worldwide turnover or prohibit the infringing conduct, or both. However, it also remains open for Google and Alphabet to offer commitments to the Commission in order to avoid an infringement decision.

*Alex Nourry is a partner, and Chandrelekha Ghosh and Chris Worrall are senior associates, at Clifford Chance LLP.*