

NEWS BRIEF

Google competition charges: Commission raises the stakes

According to the European Commission (the Commission), Google has potentially abused a dominant position in the markets for general internet search services in the EEA. On 15 April 2015, the Commission sent a statement of objections (SO) to Google saying that it has potentially breached Article 102 of the Treaty on the Functioning of the European Union (Article 102) by systematically favouring its own comparison shopping product, Google Shopping, in its general search result pages.

The Commission is concerned that users do not necessarily see the most relevant results in response to queries, which potentially harms consumers and competing comparison shopping services, and stifles innovation. The Commission's preliminary view is that Google should treat Google Shopping and its rivals' comparison shopping services in the same way in order to address the Commission's concerns. The Commission considers that this would not interfere with Google's application of its algorithms or its design of the search pages.

Sending an SO does not prejudice the outcome of the investigation. Google has the opportunity to respond to the allegations in the SO within ten weeks, after which it may seek a formal hearing. It also remains open for Google to offer revised commitments to the Commission in order to avoid an infringement decision. Should the Commission conclude that Google has infringed Article 102, it could impose fines of up to 10% of Google's worldwide turnover and/or prohibit the infringing conduct.

The path to the SO

The Commission can terminate Article 102 proceedings by adopting a commitments decision where the company under investigation is willing to offer commitments that remove the Commission's initial competition concerns (*Article 9, Modernisation Regulation (1/2003/EC)*) (Article 9). The commitments can be behavioural and/or structural and may be limited in time.

In April 2013, Google offered commitments to address a number of concerns raised by the Commission, including in relation to Google

Other battlefronts

The statement of objections relates to only one of the areas where the European Commission (the Commission) might have potential competition concerns regarding Google's conduct.

The Commission intends to continue its investigations into its other concerns regarding Google's conduct, including the copying of rivals' web content (scraping), exclusivity in its agreements with advertising partners, and restrictions on advertisers' ability to use competing advertising platforms as well as Google's conduct in relation to other specialised search services that it offers.

The Commission has also launched a separate in-depth investigation regarding Android, in which it intends to examine whether or not Google:

- Requires or incentivises smartphone and tablet manufacturers to exclusively pre-install Google's own content or services; in particular, Google's search engine.
- Bundles together Google products with other apps and services.
- Hinders the ability of smartphone and tablet manufacturers that want to use the Android operating system from being able to use and develop other open-source versions of Android.

The Google investigations have attracted political attention, with allegations that US companies were being unfairly targeted by EU authorities. In November 2014, the European Parliament voted in favour of a resolution calling on the Commission to consider unbundling or splitting up Google's search engine from its other commercial services. Recognising the level of public interest in the Google investigations, Commissioner Vestager has emphasised that competition investigations are independent from political and commercial interests. In particular, she noted that one in four of the individual complainants against Google were also US companies.

Shopping (*see box "Other battlefronts"*). In particular, Google offered that, for a period of five years, it would:

- Label and clearly separate promoted links to its own specialised search services so that users could distinguish them from natural web search results.
- Display links to three rival specialised search services close to its own services, in a place that is clearly visible to users.
- Dedicating a larger space in the Google search results page to, and providing more information about, rival specialised search services.
- Amendments to the auction mechanism for the selection of the display of the rival links.

Following feedback from the market test of these initial commitments, Google offered revised commitments in October 2013. Although these were not published by the Commission or subjected to a second market test, the complainants and the respondents to the first market test were provided with a second proposal. Key changes included:

As a result of widespread criticism of the second proposal, Google offered a third set of commitments in February 2014. These included further revisions to the way the rival specialised search services would be displayed so that they were presented in a manner which, according to Google, would be comparable to the way it displayed its own services. This would apply for existing specialised search services, changes in the presentation of those services and for future services.

These revised commitments were provisionally accepted by the Commission. On that basis, the Commission sent pre-rejection letters to the complainants. However, complainants and other respondents continued to criticise the proposals as inadequate, leading the Commission to reject the proposal, continue its investigation and ultimately issue the SO.

Article 9 implications

The procedure under Article 9 is an important and, recently, often used part of the Commission's toolkit for resolving alleged competition concerns efficiently. It is often favoured by the companies under investigation as it allows for potentially faster termination of the investigation and the Commission is able to accept commitments without making a final decision as to whether or not the company infringed competition law.

However, concerns have been expressed about the recent increase in the use of Article 9 commitments. Out of 31 decisions accepting Article 9 commitments since 2005, 17 decisions were made since 2010 during the term of the previous EU Competition Commissioner Joaquín Almunia.

Critics have alleged that accepting commitments prevents the proper development of the law given that, in the absence of an infringement decision, there is no opportunity for judicial scrutiny of the potentially concerning behaviour. Calls have also been made for increased transparency in the process. In particular, the Commission's inability to identify remedies that are adequate to address its concerns after three sets of commitment proposals from Google in this high-profile investigation could cast doubt on the appropriateness of pursuing a negotiated settlement in all cases.

While the current EU Competition Commissioner, Margrethe Vestager, has opted to issue an SO instead of continuing to negotiate commitments with Google, it remains to be seen whether, in general, unlike her predecessor, she would seek to limit the use of the commitments under the Article 9 procedure and instead pursue infringement decisions in competition investigations.

Commissioner Vestager has acknowledged the precedent value of an infringement decision in the Google case by noting that if an infringement is proven, a case focusing on comparison shopping could potentially establish a broader precedent for enforcing EU competition rules in other instances of Google allegedly favouring its own services over competing services.

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