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EU Pursues Questionable Antitrust Case Against Google

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In a long line of European regulators taking aggressive stances against American tech companies, on April 15, 2015, Margrethe Vestager, the European Union's antitrust chief, charged Google Inc. with antitrust violations for allegedly abusing its dominance in Web searches. Though the European Union has been investigating Google for the past five years, Vestager's predecessor, Joaquin Almunia, had seemed hesitant to file the "statement of objections" — the European equivalent of formal charges. Google had proposed three different settlements during those five years, but all three were ultimately rejected by Almunia's office.

William Cavanaugh

Vestager showed little hesitancy. In her statement to European Parliament in November of last year — the same month she accepted her role as antitrust chief — she announced she had been following the Google investigation closely and was eager to take a closer look. Six months later, few were surprised when she filed a statement of objections — the next step in an Article 102 case under the Treaty on the Functioning of the European Union — against Google.

What did surprise some observers was the limited nature of the objections, which focus exclusively on the contention that Google is abusing its dominance in Web searches by favoring its shopping service over those of other search engines. Although the investigation into Google included other areas of the company — such as Google Maps and Google Travel — the objection filed by the EU is silent on those subjects. Instead, Vestager has kept those inquiries open as well as opening a formal investigation into Google's practice of having its apps and services pre-installed onto Android smartphones, presumably based on the theory that doing so gives Google's software preferential treatment over its competitors.

Since Vestager's action, debate has raged among the press and academics about the effect this case and the other investigations will have on Google's business and what impact the outcome of these objections and ongoing investigations will have on competition. Much of the debate has centered on the comparison of Google's current legal challenges with the suits brought against Microsoft Corp. over a decade ago. Ten years ago, Microsoft lost antitrust cases in both the EU and the United States and paid over $3 billion in fines. While some still view the case against Microsoft as justified, others argue that, in hindsight, the concerns over Microsoft's alleged dominance were not well founded.

Some modern commentators view the antitrust allegations against Google as equally baseless. In the U.S. case against Microsoft, one of the antitrust violations of which Microsoft was found liable was its practice of bundling its Web browser with its operating system. Today, however, it is unthinkable to buy a computer without a Web browser bundled with the operating system. Indeed, every computer, tablet and smartphone ships with an operating system and built-in browser: Such bundling is considered essential by consumers.

Similarly, Google argues that its search results page for shopping queries does not harm competition and others baldly state that Google should not be required to include links to rivals' shopping search services. Indeed, Danny Sullivan, founder of the respected industry news site Search Engine Land, argues that requiring Google to link to competing search services would be like requiring The New York Times to carry The Los Angeles Times' sports section.

While the analogy may not convince European regulators, the point remains that the market for "search engine results" is new and capable of great innovation, just like built-in Web browsers were when Microsoft came under antitrust scrutiny. And if the past is any indicator, some argue that antitrust regulators should be cautious in pursuing Google.

For example, in the 1999 decision holding Microsoft liable for antitrust violations, the presiding federal judge predicted that there were not likely to be any products in the near future to compete with Microsoft's computers. No one can fault him for not predicting the invention of tablets and smartphones, or the growth of Apple Inc. computers, but the fact remains that shortly after that decision, Microsoft was toppled from its position at the forefront of technological innovation.

While some argue that the lawsuit against Microsoft allowed competitors like Apple and Google to thrive, one could just as plausibly argue that Microsoft's strength in desktops would have made it less likely that it would pioneer in the mobile-computer field — regardless of the outcome of the antitrust suits against it. And some, like Geoffrey Manne, executive director of the International Center for Law and Economics, argue further that, had no antitrust suits been pursued against Microsoft, Microsoft may have been a more effective competitor against Apple and Google.

Defenders of Google, such as Geoffrey Manne, are adamant that courts and other regulators are not well suited to accurately analyze antitrust claims in the technology market, a market that has proven to be quite volatile. In particular, Manne criticizes how Google's market share is calculated. First, he notes that Google's search engine is estimated to be 90 percent of the European market; he argues, however, that this number fails to take into account that 70 percent of searches run on Google's site are informational rather than commercial. Unlike commercial searches, information searches generate no sales or ads, and thus Google makes no profit from 70 percent of consumers' use of Google's search engine.

Furthermore, the 90 percent market-share estimate is skewed because it does not take into account alternate ways consumers shop online. For instance, if a consumer is looking to purchase music, he or she may go directly to iTunes rather than search on Google. Likewise, if a consumer is searching for books (or many other products) the consumer may go directly to Amazon.com Inc.'s website or app. These factors are often not taken into account in the calculation of Google's market share. Thus, Manne argues that because it is impossible to create a workable market definition for "online searches" it is difficult to pinpoint Google's market share.

The investigation into Google's Android practices is just as troubling. First, pre-installing apps and services onto smartphones is quite commonplace among many other tech companies, such as Apple and Microsoft, and is distinctly analogous to Microsoft bundling its Web browser with its computer product. The argument that such bundling benefits consumers is quite strong. Second, Android is an open-source platform, which means that anyone may use it free of charge. What people pay for are Google's apps, not Android's operating platform. Perhaps the most well-known example of the free use of the Android operation system is Amazon's Kindle.

Despite these wrinkles in the antitrust analysis of Google's bundling practices, if Vestager's investigation leads to formal EU charges against Google for its bundling practices with Android, the suit could affect all other cellphone makers. Ian Fogg, a cellphone analyst, predicts that if Europe brings formal charges, Google may open its mobile software to rivals in order to avoid large penalties. Under the TFEU, those penalties may be quite large: The European Commission can pursue a maximum fine of up to 10 percent of the annual turnover of the company. For Google, that means the fine could reach over $6 billion and potentially slow Google's tremendous innovation. Given the possibility of such steep fines, other cellphone makers would also likely be reluctant to bundle apps with their devices.

Some believe — President Obama included — that the EU is acting more like a commercial entity than an impartial governmental body in pursuing suits against American companies. America's dominance in technology is well recognized, and, if European regulators continue their aggressive stance against American tech companies, political tensions may begin to rise. In February 2015, President Obama warned Europe against making decisions that would penalize large companies like Google and Facebook Inc. because he believes such decisions are commercially driven. Likewise, when asked about Google's legal troubles in Europe, Daniel A. Sepulveda, a deputy assistant secretary in the U.S. State Department's Bureau of Economic and Business Affairs, stated that investigations into antitrust violations should not be politicized.

Perhaps to stave off accusations of political bias, one week after filing a statement of objections against Google, Vestager filed a separate statement against Russia'sGazprom for allegedly misusing its dominance to overcharge clients. She did not stop there, either: Shortly thereafter, she opened investigations into Amazon, Apple,Starbucks Corp. and Fiat SpA based on allegations that they received beneficial and discriminatory tax treatment in Ireland, the Netherlands and Luxembourg.

Given the numerous investigations Vestager's office is pursuing, some have expressed concern that the complexities of the case against Google — in particular the challenge of defining the relevant market and Google's market share —might not receive sufficient consideration, especially given the speed with which the case could be resolved. Google has until early July to respond to the statement of objections and request an oral hearing before the commission. After the hearing, the commission could impose an injunction and announce fines. Even though Google could appeal the decision, the fine would be held in a separate account while the appeal is heard. Such appeals typically take years to resolve. By that time, the market for search engines will surely have witnessed rapid developments that we cannot predict in the year 2015.

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