No Comparison: Google Hit with Record EC Fine

Last month, the European Commission (EC) fined Google €2.4 billion for abusing its dominance in the search engine marketplace by favoring its own price comparison service in searches. This is the largest ever penalty against a single company by the EC. The case does not necessarily end here — Google has the right to appeal and has already noted its disagreement with the EC's analysis.

The EC has determined that Google's promotion of its own price comparison service above rival comparison services is an abuse of dominance, given Google is the primary search engine in the market. Google has the right to appeal the decision on grounds of fact and law.

At root of the EC's complaint is that when Google users search for a product to purchase, Google's own price comparison results come high up the list of search results, and customers focus on those results to the significant exclusion of others. The EC has determined that Google's promotion of its own price comparison service above rival comparison services is an abuse of dominance, given Google is the primary search engine in the market.

In addition to the requirement to pay the historic penalty, the EC has required Google to cease this alleged infringement within 90 days and explain how it will reform its search algorithm. The EC would be able to impose fines of up to €10.6 million a day, which equates to 5% of the average daily revenue of Google's parent, Alphabet, if it decides Google has not complied with this requirement. In a signal of its seriousness, the EC has earmarked up to €10 million to employ technical experts to help evaluate compliance.

This is not the only antitrust case by the EC against Google — others relating to Google's Android and AdSense are ongoing. In the United States, there is speculation that Federal Trade Commission (FTC) may re-open their previously closed antitrust investigation into Google. Civil damages claims are also starting to mount.

How did we get here?

The roots of this case go back to 2010, when the EC began investigating abuse of dominance in shopping, travel services, maps and local search. Nineteen companies filed complaints. Over the course of the investigation, Google offered three proposals to settle the case. Each offer attracted significant controversy with complainants doubting the effectiveness of the offers. Although former EC Competition Commissioner Joaquín Alumnia supported the third proposed settlement, he was unable to secure a resolution before the end of his five-year term as Commissioner. Margrethe Vestager, the current Competition Commissioner, took over in November 2014. She did not delay in changing tack — issuing a list of charges related to Google's search comparison tool in 2015 and a revised charge list in 2016, ultimately culminating in last month's tough decision.

The fine against Google is the latest in a series of penalties against U.S. companies since Vestager became Commissioner. While the fines and investigations related to American corporations have led some to infer there is a target against American companies, others would argue this merely reflects Commissioner Vestager's willingness to do what she thinks is the right thing regardless of the negative inferences others may draw.

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The claimed harm

Complainants argued Google significantly disadvantaged their access to potential customers since Google acts as an entry point to the internet. The EC found that the top Google results receive 35% of the clicks and in total, the top 10 results on page 1 receive 95% of the clicks. In contrast, the first result on page 2 only receives 1% of the clicks. The EC claimed that the effects on mobile devices are even more pronounced considering the decreased screen size. On average, links to Google's search rivals were on the fourth page of results, thus drastically cutting traffic to those sites, according to the EC. Additionally, academics and consumer groups argued that paid-for comparison sites like Google drive up prices by providing the "illusion" of fair competition.

What happens next?

Going forward, Google may face increased regulatory scrutiny both in the EU and abroad. In 2011, the FTC investigated Google's search practices, but in 2013 closed the case accepting as sufficient voluntary changes Google planned to implement to eliminate search bias. As of May 2016, the FTC was questioning whether to re-open the investigation into Google's search practices, although as yet there has been no official response to the EC's decision.

As for civil actions, there are already several European cases filed and more in the pipeline according to comments by plaintiff law firms. With the prospect of treble damages, civil litigants may also look towards the United States as is often the case now when the EC makes an adverse decision against multinational companies also operating in the United States.

The EC decision is by no means the end of the road, however. The EC does not have judicial status, and Google can bring an appeal before the European Court of Justice and surely must consider it has grounds to do so, whether on the question of its market power or on the interpretation of the conduct in question. Google must move quickly as its deadline for lodging the appeal is early September, so we will know soon for sure whether it is accepting or rejecting the decision. However, the Court moves at a glacial pace, and we can expect a long-drawn-out review assuming an appeal is brought. Google is only the latest technology giant in the crosshairs of the EC — by the time its case has been finally adjudicated by the court, who knows who will have replaced it: tech markets move a whole lot faster than antitrust processes.

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