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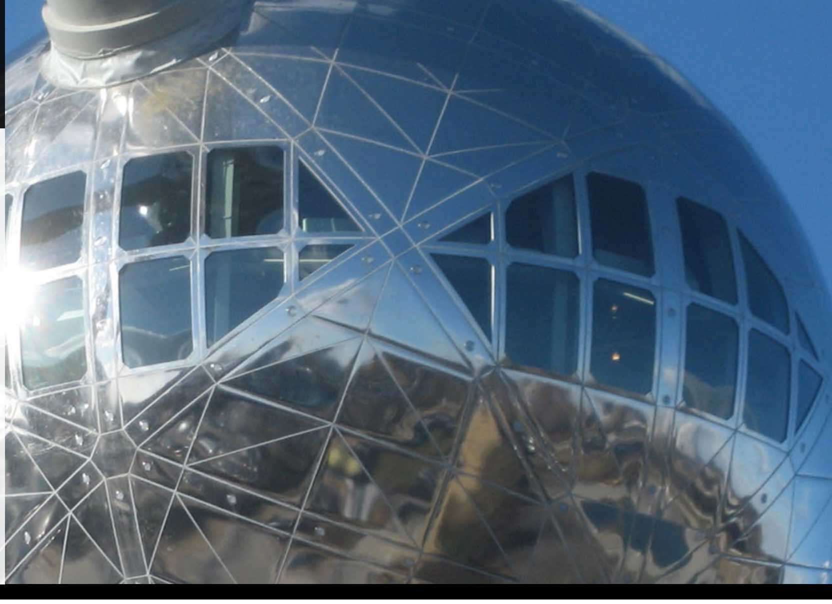

Content

News

Antitrust

European Commission sends Statement of Objections to Google for abuse of dominance and opens an investigation concerning Google's conduct with regard to Android

The Commission has formally accused Google of abusing its dominant position in the markets for general internet search services in the European Economic Area by giving a favourable treatment to its own comparison shopping products when displaying the general Internets search results. Comparison shopping products are used by consumers to carry out an online search for products on websites and to compare prices among different vendors. Google's product is called 'Google Shopping' and appears more prominently on the screen for searches, which may have artificially diverted traffic from its competitors.

In addition, the Commission has formally opened a separate investigation regarding the mobile operating system Android. This system is used in most smartphones and tablets in combination with some of Google's applications and services. The investigation will focus on: (i) whether Google, by demanding or encouraging smartphone and tablet manufacturers to exclusively pre-install Google's applications or services, has obstructed the development and market access of other competitor's apps or services; (ii) whether Google has prevented these manufacturers who want to install Google's apps and services on their devices from developing and marketing modified versions of Android ("Android forks") on other devices, and (iii) whether Google has carried out tying or bundling practices for certain apps and services.

In parallel, the Commission is also investigating Google's conduct with regard to: (i) web scraping, (ii) advertising exclusivity and (iii) restrictions on advertisers.

European Commission sends Statement of Objections to Gazprom for abuse of dominance

Gazprom is the dominant natural gas supplier in Central and Eastern Europe, with market shares between 50% and 100% in some of the countries. The Commission opened proceedings against the company in August 2012.

The preliminary investigation carried out by the Commission showed that Gazprom could be violating EU competition rules by reducing its customers' ability to resell gas abroad, which may have allowed Gazprom to charge unfair prices in some countries. In addition, Gazprom may also have abused its dominant position by conditioning the supply of gas to obtaining unrelated commitments from wholesalers concerning transport infrastructure. Following these findings, the Commission has sent a Statement of Objections to Gazprom that now has 12 weeks to reply.

More concretely, the Commission fears that Gazprom imposed territorial restrictions in the supply agreements with its wholesalers and with some industrial customers in Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia. These restrictions included export bans and destination clauses (i.e. provisions that force to use the gas in specific territories). This type of clauses may have resulted in higher prices in Bulgaria, Estonia, Latvia, Lithuania and Poland.

Finally, Gazprom may be abusing its dominant position in Bulgaria and Poland by conditioning its gas supplies to commitments concerning transport infrastructure. More concretely, in Bulgaria, such condition would have consisted on the wholesaler's participation in Gazprom's project of the South Stream pipeline, whereas in Poland Gazprom would have maintained control over investment decisions concerning the Yamal-Europe pipeline project, which could allow other competitors to enter the market.

EU Commissioner for competition announces a sector inquiry into e-commerce.

Only one in seven EU citizens purchases online from suppliers located in another Member State. This does not only apply to the acquisition of goods but also of content (video, music, games, apps etc.). Language barriers, consumer preferences and legislative differences may explain in part this situation. However, the European Commission has also identified some indications that certain companies could be restricting cross-border e-commerce.

In this scenario, EU Commissioner Margrethe Vestager has announced the Commission's intention to investigate the reasons behind the still relatively low cross-border online trade in the EU.

The Commission's inquiry will specially focus on vertical distribution agreements between manufacturers or content holders and online retailers. Moreover, the investigation will include the so-called "geo-blocking", which allows to make content available to users online in some Member States but blocked in others.

The information gathered by the Commission will help to undertake different legislative initiatives in order to boost the Digital Single Market. In addition, if the Commission identified specific competition concerns, it could open case investigations to ensure compliance with EU competition rules.

Mergers

Spanish competition authority approves the acquisition of DTS by Telefónica subject to commitments

The Spanish competition authority (*Comisión Nacional de los Mercados y la Competencia* or CNMC) has finally authorised the acquisition of *Distribuidora de Televisión Digital*, S.A. (DTS) by Telefónica. DTS is a Spanish satellite broadcasting company and the largest pay-tv broadcaster in Spain. This operation allows Telefónica, currently holder of 44% of DTS, to acquire the remaining 56% that was still held by PRISA.

The CNMC has subject the approval to commitments that can be divided into three categories:

(i) As regards the pay-tv market: Telefónica undertakes not to hinder the mobility of its current and future clients. This will include handling termination applications in a fast manner and not executing retention agreements if certain circumstances are met. In addition, Telefónica will maintain and comply with all current agreements between DTS and other operators of electronic communications to distribute its satellite TV offer.

(ii) Concerning the markets for wholesale of content & channels: Telefónica undertakes to make 50% of its premium content (including all premium football) available to competitors. In addition, should Telefónica acquire contents on an exclusive basis, it may only benefit of such exclusivity for two years.

(iii) As to the conditions of access to Telefónica's internet network: Telefónica undertakes to assure the access of Internet pay-tv operators to its broadband network in conditions that allow efficient competition.

The conditions will be applicable during a period of 5 years that could be extended to 3 additional years.

Case-Law & Analysis

The Court of Justice of the EU confirms that sales from a joint venture to its parent companies can be taken into account for calculating the fine in a cartel under certain circumstances.

In 2010 the Commission fined six Korean and Taiwanese manufacturers of liquid crystal display panels (LCD panels) for operating a cartel from 2001 until 2006. Among the fined companies, LG Display received a €215 million fine and brought and action against the Commission's decision before the General Court, which fundamentally upheld the decision but reduced by €5 million the fine imposed. LG Display appealed this judgment before the Court of Justice of the EU and claimed a more significant reduction of the fine.

LG Display argued that, when calculating the amount of the fine, the General Court wrongly included its sales of LCD panels to its parent companies LG Electronics and Philips. In its view, such sales should not have been taken into consideration since they were made at a preferential price under the terms of the joint venture agreement that established the company.

However, the Court of Justice has upheld the judgment of the General Court and stated that, considering that LG Display does not form a single unit with its parent companies, the sales made to the parent companies are to be considered as sales made to independent third parties and, therefore, should be included in the calculation of the fine insofar that those sales were made on the market affected by the infringement. The fact that the prices applied to those sales were not influenced by the cartel arrangements is not relevant.

Currently at GA&P Brussels

Mário Marques Mendes has been ranked Band 1 lawyer at the directory Chambers & Partners for 2015 in Portugal for Competition/ European Law. The publication adds that Mário enjoys a long-standing reputation in the market: "*He is one of the lawyers who has the most knowledge and authority*" has enthused one source.