THE CAPITOL FORUM
December 7, 2016

Google Antitrust Enforcement: Complaints Mounting Against Google Amidst Calls for Immediate Relief; AdSense Case Has Wide-Ranging Implications for Google's Business Model

Enforcement Update

Pressure against Google continues to mount in Europe, as a source close to the Google cases told us that at least 26 complaints have been filed against Google with the EC. Some of those complaints involve conduct not covered by the current cases, meaning the pipeline of cases against Google is robust and likely to grow further if the Commission obtains meaningful remedies. Last week, complainants made urgent calls for interim measures in Europe against Google's alleged anticompetitive conduct. Below we detail the current timing and procedures in the EU's charges against Google and the possibility of the EU filing a new case on scraping.

In our previous articles, we did deep dives into the Google Shopping and Android cases, and in this article we take a close look at the third EU case against Google – search advertising intermediation. As in the Shopping and Android charges, the EC's search advertising intermediation (or "AdSense") case against Google covers a relatively narrow scope of conduct. Like the Android case, the abuse of dominance allegations involves contractual provisions, making the EC's case straightforward and relatively easy to prove. This narrowness does not mean the risk to Google's business model is small. Rather the EC's narrow approach means it has a clear path to several prohibition decisions finding abuse of dominance, and requiring Google to adopt neutrality regarding search results in Shopping and non-discrimination regarding competitors in Android and AdSense.

Search neutrality and non-discrimination principles can then be extended to numerous other Google business lines, be enforced by a wide range of complainants, and be adopted globally as other international regulators adopt similar prosecution theories. The implications are thus wide-ranging.

EC Google Enforcement Timing Update

Pressure for near-term enforcement action is heating up, with the Initiative for a Competitive Marketplace (ICOMP) and the Open Internet Project (OIP) jointly issuing a press release Tuesday calling for interim measures and prompt enforcement against Google. "Justice delayed is justice denied. Small and medium size companies in Europe are suffering and dying under the abuse of dominance by Google," said Michael Weber, ICOMP Chairman. The groups announced they will hold a joint press conference providing "detailed analysis of Google's false allegations in defence of its anti-competitive conduct in the Shopping-Case."

"The length of an investigation is the ally of the monopolies and the enemy of the companies suffering greatly from their abuses. The time for decisions, sanctions and remedies has come…." said LŽonidas Kalogeropoulos, Delegate General of the OIP. Axel Springer, who has close ties to European Commission President Jean-Claude Juncker, is a member of OIP.

If ICOMP and OIP were to succeed in their advocacy for interim measures from the EC, which we view as unlikely, the business impact on Google would be sooner than expected. As timing now stands, we expect an Android decision at the very earliest next summer, but more probably the Fall of 2017, a Google Shopping decision in Fall 2017-late 2017, and a search advertising decision in Spring-Summer 2018.

To understand why we consider EC seeking interim measures unlikely, some background is necessary. EC Antitrust law, Regulation 1/2003, provides three options for antitrust cases: 1) Prohibition decision procedure (Article 7); 2) Commitment decision procedure, akin to settlement in the US (Article 9); and 3) Interim measures (Article 8). Unlike some National Competition Authorities such as the French, however, the Commission has only used interim measures in 10 cases since 1983 and none since 2002.

There are two reasons for this. The first reason is the *IMS Health* case in 2002. In that case, IMS challenged an interim measure decision by seeking its suspension in the EU General Court, and won. The Commission appealed to the European Court of Justice, and lost. The Court placed substantial restrictions on the ability of the Commission to bring interim measures, which make them unlikely unless a case is a clear cut breach of Article 101 or 102, there is clear urgency, and there is limited damage to the market position of the party on the receiving end of the order. This is a heavy requirement for the Commission to meet. Second, as former Director General of DG Comp Philip Lowe said in a paper he wrote in 2008, the difficulty with interim measures is that the procedure is so burdensome with the need to draft a Statement of Objections, receive a reply, potentially hold a hearing, and the prospect of review by the EU courts, that it draws resources away from the main case and delays its completion.

Because *IMS Health* blocks the capacity to use a major tool in the EU's antitrust toolbox and the case is viewed as conflicting with earlier case law, the Court may well be willing itself to revisit *IMS Health*. Nonetheless, we expect EC Commissioner Margrethe Vestager to focus on obtaining a prohibition decision as the fastest way to obtain a remedy with which Google would have to immediately comply. Nonetheless, the calls for interim measures are worth paying attention to because if the EU gets a prohibition decision against Google in Shopping, one of the many complainants against Google may seek interim measures regarding other verticals. Such actions could also lead to the reversal of the *IMS Health* case and lead to a quicker expansion of the cases against Google into other verticals with similar conduct.

Settlement in the nearer term also remains a possibility, yet one with significant challenges that are explained below. Google's Sundar Pichai reportedly met with Commissioner Vestager on November 18, the first meeting between Google and Vestager since February. Guenther Oettinger, the EU's Commissioner of digital economy and society, was also expected to attend the meeting. Oettinger is the proponent of the changes to the current copyright framework, and proposes having news aggregators like Google pay to use snippets of articles in their search results. Further meetings are worth monitoring as they may indicate Google is attempting to settle the charges.

Absent interim measures or settlement, the process will continue as follows. To start, the EC will turn to paperwork Google has provided in response to each case. Thomas Vinje, counsel for FairSearch, the lead complainant in the Android case explains, "Google has dumped a lot of paper on [the EC], so it's going to take time for the Commission to get through all of it and make sure it has good answers for everything. The EC also might have questions about what Google submits, and then it might undertake a further market investigation to obtain information relevant to the additional items that Google raised in its response."

Sources close to the matters have indicated that in the Shopping case, and possibly in the other two cases, Google has not requested an oral hearing. Google's decision to forgo a hearing (which typically takes 3-4 months) is surprising as it runs counter to the delay strategy Google has been employing. This decision could mean that

Google has more to lose than to gain from a hearing, as a hearing would open them up to greater risk – further scrutiny from complainants, the media, and the Commission's case team.

Stakeholders should watch for a potential expansion of the cases or further delays. This could occur if the EC issues a supplementary Statement of Objections (SSO) – as it did in the Shopping case – or a Letter of Fact (LOF) to present any new legal theories or additional facts which will need to be on the record. As a matter of fundamental due process under EU law, the Commission cannot issue a decision that contains either facts or law for which Google has not been given the opportunity to respond.

The EC already has been discussing potential remedies with market participants in the Android case. A decision is expected first in this case, given the allegations are somewhat discreet and the legal remedies relatively clear-cut (voiding the offending provisions in the Mobile Application Distribution Agreements, as explained in our article on the Android charges). Even if the Commission is able to conduct an oral hearing in the first quarter of 2017, it is still unlikely to get the case to a draft prohibition decision before Summer at the earliest, and Fall is more likely.

The Shopping case is expected to take longer than the Android case to resolve for a few reasons. First, the case has a long history, which includes the repeated failure of former EC Commissioner Almunia to settle the case. In three attempts, almost all other market participants, some Member States, and the European Parliament were strongly opposed. And while the EC under Vestager is intent on prosecuting Google, rather than settling, this turbulent history does not create a smooth path to resolution. Second, the expected remedy – a non-discrimination standard – is more difficult to craft than simply voiding terms in the Android contracts. That the Commission filed a Supplemental Statement of Objections in July is further testament to that case's greater complexity. Third, more market participants are engaged in the Shopping case than in the Android case. Accordingly, a decision is not expected until Fall 2017 at the earliest and possibly the end of 2017.

The search advertising intermediation (AdSense) case, discussed in detail below, is expected to be resolved last because it goes more directly to the heart of Google's revenue model. Although its charges are somewhat narrow, its scope or the precedent it establishes could expand to additional advertising practices, cutting at the core of Google's profits, making a hard fight from Google likely. The AdSense case is not expected to conclude before Spring/Summer 2018.

Potential scraping case. A fourth case may develop as well, as Getty and News Corp have brought complaints against Google for content scraping. The EC is expected to have followed up with requests for information from other market participants and Google. Formal charges and a Statement of Objections regarding scraping would not likely be filed before Spring 2017.

In-depth Look at the EC's Search Advertising Intermediation Charges

The Commission outlines three primary allegations in the search advertising intermediation Statement of Objections. The charges, issued on July 14, 2016, alleged that Google abused its dominant position in the global search advertising intermediation market by imposing unfair requirements on third party websites who use the Google AdSense platform to create and display ads and monetize content.

The SO reads: "Google is dominant in the market for 'search advertising intermediation' in the European Economic Area (EEA), with market shares of around 80% in the last ten years. A large proportion of Google's revenues from search advertising intermediation stems from its agreements with a limited number of large third parties, so-called 'Direct Partners.'" The Commission specifically outlines three areas of concern where Google has foreclosed existing and potential competition, including other search providers and online advertising platforms in the search advertising intermediation market:

(1) Exclusivity – Google requires third parties not to source search ads from Google's competitors.

(2) Premium placement – Google requires third parties to take a minimum number of search ads from Google and reserve the most prominent space on their search results pages for Google search ads.

(3) Right to authorize competing ads – Google requires third parties to obtain Google's approval before making any change to the display of competing search ads.

How AdSense works. Through its four Google Network Member websites (GNMW's) – AdSense, AdExchange, AdMob; and DoubleClick – Google provides advertising, web search, and other services to third party advertisers. In 2015, these GNMW's accounted for almost 21% (~7.2B) of revenues, but Google does specify revenue numbers for AdSense alone. The "AdSense for Search" service is the focus of the Commission's charges.

Google acts as an intermediary on third party websites (e.g. online retailers, telecom operators and newspapers), administers, sorts, and maintains ads, while also placing the search ads directly on its own Google.com search page. When a user enters a search query in the search box offered on a third party website, both search results and search ads are displayed. If the user clicks on the ad, Google and the third party share the revenue, which is based on a per-click or per-impression (i.e. display of an ad to a user while viewing a web page) rate.

An unfavorable decision in search advertising intermediation paves the way for other aspects of Google's search advertising business to be scrutinized and challenged. As we reported previously, the Commission's strategy in both the Shopping and Android cases was to focus on very specific aspects of Google's anticompetitive conduct in narrowly defined areas to ensure the decision is upheld in the EU Courts and to establish principles that could be applied more broadly to other related aspects of Google's business.

The Commission is hoping is bring cases that are more manageable and that can move faster. Moreover, sources following the cases say EC Commissioner Vestager is focused on prosecuting cases to establish precedent that Google is dominant and abuses that dominance. "Once [one decision is upheld], Google goes from being innocent until proven guilty to guilty until proven innocent," says Scott Cleland, President of Precursor, LLC.

While the Commission has not explicitly stated this is a strategy in the AdSense SO, antitrust experts anticipate that the Commission will employ a similar strategy. The SO narrowly references Google's "AdSense for Search" business (precluding its AdSense for Content, AdSense for Video, and AdSense for Shopping businesses). However, it is likely the Commission will also be looking at the extent to which Google has imposed the same restrictions in related advertising services. If so, these other advertising services would be under threat as well.

An abuse of dominance decision likely would instigate the opening of additional investigations and damages claims. In addition to the threat of the Commission extending its decision across Google's advertising services, Google also faces the risk of complainants triggering the opening of additional investigations in other advertising service areas and bringing damages claims, plus snowballing fines, which ultimately would have a substantive impact on Google's bottom line.

With a prohibition decision in the advertising case, which the Commission would publish in more than 20 official languages, the decision can then be applied to other cases. Lawyers use that to go to their clients and say, 'We can raise this in relation to other aspects of Google's advertising streams, and file further complaints based on this decision.' A prohibition decision thus can spawn a whole stack of other complaints as well as damages claims, providing a roadmap for damages claims in relation to the fact patterns in the decision.

Remedies are expected to consist of a fine and changes to third party contracts that would include non-discrimination standards. As with all of the cases Google is likely to face fines (not to exceed 10% of its annual revenues and typically closer to 4%). However, the wide consensus among industry analysts is that these fines are a weak deterrent to effectively address Google's conduct – let alone restore competition.

In terms of behavioral remedies, antitrust experts expect that, at a minimum the offending provisions of AdSense contracts would be reversed (regarding exclusivity, premium placement, and the right to approve ads). Most likely, a non-discrimination standard would be imposed, which would require Google to treat competitors fairly. Scott Cleland noted, "I would be very surprised if the behavioral remedy did not have a central dimension of a non-discriminatory requirement… [doing this] would act as a prophylactic measure to prevent new types of offensive, abusive behavior."

Digital platform industry analysts believe that such remedies may open the door for competitors to run ads on properties using Google search. As one European industry expert explained, "Google more or less as a lock on and is running Google site search on more than half of the top websites in most [European countries]. And it's similar in many other places… So in any case, it's significant… It's just a small thing for Google to change the contracts, but the consequences of that would certainly curb their business model of locking in website owners and their own ads."