

EU Antitrust Regulators Went After Google. Now They're Going After Amazon...

Karla Nader, Lawyer, MinterEllison provides an overview of the European Commission's recent competition investigations

In the past two years alone, the European Commission (EC) has ordered Google to pay €6.76 billion in fines for abusing its dominant market position. The EC's Competition Commissioner, Margrethe Vestager, has said that Amazon is next in line, with preliminary investigations into its use of merchant data already underway.

The EC's investigations have revealed the unique ability that these digital platforms have to influence competition in certain markets. The combination of their market power, ability to act as both host and competitor to third parties using their services, and access to user generated data, places them in a position to not only better understand the markets in which they operate, but to manipulate them, whether intentionally or not.

Google decisions

Google's search engine uses algorithms to generate results in response to user queries ranked in order of relevance. In November 2010 the EC commenced antitrust investigations into Google for allegedly abusing its dominant position as a search engine to promote its comparison shopping service (**Google Shopping**) and demote rival comparison shopping services in its search result rankings.

The EC handed down its decision in 2017, fining Google €2.42 billion for illegally abusing its market dominance, and ordering it to end its illegal conduct within 90 days or

face penalty payments (**2017 Google Decision**).

In circumstances where users of the Google search engine typically only look at the top 3-5 search results, the EC found that the impact of Google's conduct was to increase online traffic to Google Shopping and decrease traffic to its competitors. Vestager described this conduct as illegal because it *'...denied other companies the chance to compete on the merits and to innovate...'*¹

The EC's investigations have drawn attention not only to the dominance of digital platforms such as Google and Amazon, but also to their unique role as both host and competitor to third parties using their services.

In July 2018 the EC fined Google a further €4.34 billion for abusing its dominant market position in three ways:

- requiring Android mobile manufacturers to pre-install Google apps as a bundle on Android devices;
- granting device manufacturers financial incentives on the condition that they exclusively pre-install Google Search across all Android devices; and

- obstructing the development and distribution of competing Android operating systems, (**2018 Google Decision**).²

Amazon investigation

The EC's Competition Commissioner was recently asked about anti-trust concerns in relation to Amazon. She confirmed that a preliminary investigation into Amazon was underway, saying:

*'...If you as Amazon get data from smaller merchants that you host, which can be, of course, completely legitimate because you can improve your service to these smaller merchants, do you then also use this data to do your own calculations as to what is the new big thing?...What kind of offers do [consumers] like to receive? What makes them buy things?'*³

Whilst the investigation into Amazon is still in its early stages, Vestager's comments have highlighted the potential for vertically integrated digital platforms to use data generated by users to their own competitive advantage.

Key takeaways

The expansion of digital platforms poses a threat to competition in various markets. The 2017 and 2018 Google Decisions alone, show the diverse range of services offered by the tech giant — acting not only as a search engine (where it enjoys over 90% market share in many parts of the world including many European countries and Australia),⁴ but also

¹ European Commission, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (27 June 2017) http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

² European Commission, *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine* (18 July 2018) http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

³ see Q&A on the Amazon investigation at <https://ec.europa.eu/avservices/video/player.cfm?ref=1160574>.

⁴ See European Commission above at n 1; and IBIS World report on Search Engines in Australia <http://clients1.ibisworld.com.au/reports/au/industry/majorcompanies.aspx?entid=5505#MP11646>

as a comparison shopping website and software developer for smart phones, among other things.

Amazon does not enjoy the same market share as Google, but has nonetheless been described as '*the titan of twenty-first century commerce*', acting as retailer, marketing platform, payment service, credit-lender, book publisher and fashion designer, to name a few.⁵

The ability of these platforms to act across multiple markets, places them in a powerful position to influence competition. It has allowed them to play the role of both host and competitor to third parties benefiting from their services, putting them

in a position to promote their own goods and services over those of competitors.

In addition to this, their role as host grants them access to the data generated by users of their platforms entering queries or making purchases. This gives them a greater understanding of the push and pull factors in relevant markets, and could be used, as is the allegation against Amazon, to their advantage when competing in those markets.

Digital platforms are further empowered by the fact that this behaviour is difficult to detect. The algorithms that dictate the functioning of online platforms are protected as confidential

business information, making it difficult to determine if platforms are intentionally promoting their own services over those of third parties benefiting from their platform. It is similarly difficult to detect whether an online platform is using consumer generated data to gain a competitive advantage, as these platforms are generally quite opaque about the way in which such data is used.

The Australian Government has recently raised similar concerns about the ability of digital platforms to shape relevant markets. On 4 December 2017, then Treasurer, Scott Morrison, instructed the Australian Competition and Consumer Commission (ACCC) to conduct an inquiry into the impact of digital platforms on the state of competition in media and advertising markets. The Terms of Reference indicate concerns with the way that digital platforms exercise market power and affect the level of choice and quality of news content available to users. The inquiry is still underway with the preliminary report due to the Treasurer on 3 December 2018, and the final report due on 3 June 2019.

Conclusion

The EC's investigations have drawn attention not only to the dominance of digital platforms such as Google and Amazon, but also to their unique role as both host and competitor to third parties using their services. This enables them to access data generated through the use of their platforms, and use that data to their advantage.

Together, these factors place digital platforms in a powerful position to understand and manipulate certain markets. Whether or not they do so is a question of how they choose to use their power.

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⁵ Khan, Lina, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 710, 710.