Other web browsers are available: The EC case against Google

- The European Commission alleges that Google is enhancing its dominant position by tying Android with it search and browser apps

- The case has some parallels with the Commission's earlier case against Microsoft

- But there are also key differences for the Commission to examine

This edition of Hexagon first appeared as a blog post by Richard Cadman available at https://competitionpolicy.wordpress.com/. I am grateful to by colleagues at the UEA Centre for Competition Policy for their comments.

On 20th April 2016, the European Commission (EC) sent a Statement of Objections[i] to Google outlining its view that Google had breached EU antitrust rules by imposing restrictions on Android device manufacturers and mobile network operators (MNOs). This edition of Hexagon briefly discusses the economics of this case and draws a parallel with the EC case against Microsoft (Case COMP/C-3/37.792)[ii], but also identifies two key differences.

The EC alleges that Google is deliberately preserving and enhancing its dominant position in the Internet browser and search markets by forcing smartphone manufacturers using the Android operating system to pre-install the Google search bar and the Chrome browser apps: a behaviour known as tying. According to the EC, the market is foreclosed to other developers of browser and search apps as consumers will simply use the pre-installed apps and not bother to seek out and download alternatives. The consumer harm is reduced innovation in the market.

The EC also alleges that Google is preventing manufacturers from selling smart mobile devices running on competing operating systems based on Android open source code (known as Android forks) and of giving financial incentives to manufacturers and MNOs to pre-install Google Search exclusively on their devices. All three of these behaviours are likely to result in Google's dominant position being enhanced.

The economics of this case are fairly straightforward, but have two potential twists. The straightforward part is the vertical market structure: Android being the upstream product

SPC Network

Chapel House Booton Norwich NR10 4PE UK +44 20 3173 9132

hexagon@spcnetwork.eu http://www.spcnetwork.eu

and the search/browser app being the downstream product.

The figure above shows Android and Chrome as vertically related within an integrated firm and an independent app, in this example Firefox, as the downstream product competing with Chrome but dependent on Android.

According to the EC's Statement of Objections, 80% of smart mobile devices run on Android, meaning it is likely to be dominant in the upstream, or tying, product market. Google's insistence that Android be tied with its own search bar and browser is alleged to allow the firm to leverage its upstream dominance into the downstream markets, thereby enhancing its dominance there too. Such behaviour potentially forecloses the downstream market to other providers of search and browser apps who will find it difficult to persuade consumers to download their products. At the very least it raises the cost of these rivals who have to spend resources informing consumers that other web browsers are available for their smart mobile devices. This then looks like a case of anticompetitive tying to leverage dominance from one market to another.

The EC has been here before in its long running, controversial and ultimately successful case against Microsoft for its anticompetitive bundling of the Windows OS with the Windows Media Player. Like Google, Microsoft's market share of OS was so substantial that it could be held as evidence of dominance in own right. Microsoft also enjoyed protection from high barriers to entry that reinforced its market share[iii]. In this case, the EC determined that Microsoft's behaviour fulfilled the four criteria to make such behaviour anticompetitive:

i) The tying and tied goods are two separate products;
ii) The undertaking concerned is dominant in the tying product market;
iii) The undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and
iv) Tying forecloses competition[iv].

Given the information available at present, the Google case appears to fulfil at least the first two criteria, and possibly the others.

i) The Android OS and search app would appear to be two separate products as neither performs the functions of the other;
ii) Google is almost certainly dominant in the OS market given its high market share;
iii) Google does not give the customer a choice to obtain Android without its search bar and browser; and
iv) Tying raises entry barriers for producers of alternative apps such that may be excluded from the market.

Google appears to dispute the third and fourth criteria. It claims, for example, that Samsung pre-installs apps from its rivals and that its competitors' apps, from the likes of Amazon and Microsoft, are easily available and so not foreclosed from the market[v].

Chapel House Booton Norwich NR10 4PE UK +44 20 3173 9132

hexagon@spcnetwork.eu http://www.spcnetwork.eu

The European Commission may need to distinguish between tying that excludes a rival and tying that relies on customer psychology to deter entry.

The investigation by DG Competition may want to distinguish between tying that excludes rivals from the market and tying that allows a customer to install an alternative app but where customer psychology may prevent him or her from doing so. On the surface this case appears to be the latter. The EC may also need to consider two possible twists that make the Google case different from the earlier Microsoft case.

First, Google is likely to be dominant in both the tying and the tied market. According to the European Commission's factsheet[vi] that accompanies the Statement of Objections, Google's share of the search market in most Member States is 90% or more. Microsoft, by contrast, was dominant in the tying, upstream, market but not in the tied, downstream market. Indeed, normally we would expect a vertically integrated firm that is dominant upstream to leverage that dominance into a downstream market where it isn't dominant to foreclose competition and gain a dominant position. If Google were found to be dominant at both levels would this make any difference to the case?

Chicago School economists would argue that that an upstream dominant firm has no incentive to extend its monopoly as it is already in a position to extract monopoly profits. There is, therefore, a danger that the EC might be seeing anticompetitive behaviour where none exists.

The second twist is where the money comes from. Microsoft gained its revenues from sales of software, whereas Google gives software away for free to gain revenue from advertisers. The alleged harm in this case is that consumers may not benefit from more innovative search and browser apps, if the market is foreclosed to producers of such apps. But, it is advertisers rather than consumers who pay for these apps. Perhaps another question for the EC to examine is whether advertisers are harmed. Does raising the costs for alternative apps to get downloaded onto an Android phone harm advertisers if they are less able to target their adverts more precisely or get access to more big data about consumers?

The Google case clearly has some parallels with Microsoft. However, even if we accept the logic of the earlier Microsoft case, the EC may need to consider the specific questions raised by the market structure and financial flows of smart device OS and app software.

[i] http://europa.eu/rapid/press-release_IP-16-1492_en.htm
[ii] Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf
[iii] ibid, paragraphs 471 - 472
[iv] ibid, paragraph 794
[v] 'Why does Brussels have Google's Android in its sights?' Financial Times 20 April 2016
[vi] http://europa.eu/rapid/press-release_MEMO-16-1484_en.htm

Chapel House Booton Norwich NR10 4PE UK +44 20 3173 9132

hexagon@spcnetwork.eu http://www.spcnetwork.eu