

# Monopoly or fair game? Google's FTC settlement

The Federal Trade Commission ended its investigation into alleged anti-competitive practices by Google on 3 January. The FTC's decision to end the investigation with a voluntary agreement has drawn criticism, while the European Commission progresses with its own antitrust case involving Google, some commentators hope that the EC will come to a different conclusion. Rachel Hirsch, an Associate at Ifrah Law, discusses the FTC's findings and how the EC's verdict may stand in contrast.

Earlier this year, the Federal Trade Commission (FTC) concluded a 20-month investigation into whether some of Google's business practices constitute illegal, anti-competitive behaviour. Despite mounting pressures from Google's competitors to bring a lawsuit against the search engine, the FTC entered into a voluntary agreement with Google that preserved the company's dominant market share. With a verdict expected this fall in its own investigation of Google, the European Commission should not be deterred by the FTC's inaction but rather act more aggressively in protecting competitors' interests and encouraging innovation in the marketplace.

## The FTC settlement

The FTC announced on 3 January 2013 that it would not proceed with an antitrust case over Google's search practices. Instead, the agency's investigation culminated in voluntary and enforceable commitments on the part of Google, and a separate consent decree related to patents. The much-awaited decision drew the ire of Google's competitors

who had clamoured for the agency to institute a lawsuit for what they perceived to be anti-competitive behaviour in manipulating search results to favour some websites. While acknowledging that some manipulation did occur, the FTC declined to bring a lawsuit against Google for one simple reason: consumers didn't seem to care.

## Search bias & consumers

A main component of the FTC's investigation concerned allegations that Google's search results were unfairly biased in favour of its own products. A practice commonly known as 'search bias.' The FTC investigated Google's introduction of 'Universal Search' - a product that prominently displays targeted Google properties in response to specific categories of searches. In the past, when a search term was entered into Google's search field, it returned links to websites that best matched the query. Now when a user searches for a particular service in a particular place, for instance, a Google map appears in the search result ahead of competitor products.

In a 5-0 vote, the FTC, decided that there was insufficient evidence to support claims that Google's 'search bias' violated antitrust law. Although acknowledging that Google undoubtedly took aggressive measures to gain an advantage over rival search engines, the FTC found that Google's search algorithms could plausibly be justified as improving the experience of its users. In a press statement, then FTC Chairman Jon Leibowitz said that "[t]ellingly, Google's search engine rivals engaged in many of the same product design choices that Google did, suggesting that this practice benefits consumers."

Not surprisingly, for the FTC - an agency primarily concerned with consumer welfare - user experience

is all that mattered. Rather than focus on the harm to competitors, the FTC measured Google's design changes against its own consumer-centric yardstick - did the Google user benefit from the changes? The FTC's findings depicted Google's methods simply as a more convenient way to aggregate and capsule information for the user. Although some of Google's rivals might have been harmed by Google's algorithm changes, the FTC said that 'the totality of the evidence' showed 'any negative impact on actual or potential competitors as incidental.'

Observers who followed the investigation reported that Google presented the FTC with results from focus groups hired by an outside firm to review different versions of a Google search results page. Users showed a preference for search pages containing a box at the top with direct links to their search result, as opposed to search pages with links only. Google's suggestion that consumer appreciation is the true measure of the benefit of a design change seemed to resonate with the FTC and played a role in its decision not to institute a formal action.

## Google makes promises to FTC

As part of the settlement, Google did promise to make voluntary changes to its search practices. Specifically, the terms of the FTC settlement require Google to take the following steps:

- Scraping: Refrain from misappropriating, or scraping, online content from so-called 'vertical' websites that focus on specific categories for use in its own vertical offerings;
- Opt Out: Allow websites to opt out of Google vertical services without affecting their rankings in Google's core search engine;
- AdWords: Give online advertisers more flexibility to

simultaneously manage ad campaigns on Google's AdWords platform and rival platforms; and

- Patents: Allow competitors reasonable access to Motorola patents based on wireless industry standards.

Google's patent commitment, however, is part of a separate agreement with the FTC over the availability and use of injunctions in asserting Standard Essential Patents.

### The practical effect

Although Google may have agreed to make some voluntary changes to appease regulators, its agreement is not part of a binding legal settlement. Consequently, Google will largely be accountable to itself for upholding its promises.

However, while the commitments may be voluntary, they are still enforceable under Section 5 of the FTC Act, which forbids 'unfair and deceptive acts or practices.'

The lack of a legally binding consent decree, however, has drawn the ire of competitors and critics. Former FTC Commissioner J. Thomas Rosch, who as a member of the Commission in early 2013 did not advocate suing Google, said that such decrees are necessary to avoid future problems. "After promising an elephant more than a year ago, the Commission instead has brought forth a couple of mice," Rosch said. As Rosch observed, the FTC's antitrust settlement with Google will create few changes in the way the company operates. Under the settlement agreement, there is no regular oversight of Google's changes. The FTC's inaction on the central issue of search bias has given Google free range to misuse its dominant position.

The most practical effect of the FTC's inaction is on how online advertisers approach advertising spend. Google's algorithm

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adjustments will force competitors to spend more money on advertising to compensate and draw more traffic to their sites. The FTC, however, does not consider Google's algorithm changes to constitute an antitrust violation, even if they do induce some sites to modify or increase advertising spend. According to the FTC, if a company has to spend more on advertising on Google in addition to investing in search-engine optimisation, it is just a price the company will have to pay for competing in this market.

### Awaiting the EC's move

It may be business as usual for Google in the US, but the FTC settlement is by no means the last word. There is nothing preventing private companies from bringing lawsuits for antitrust violations. Google still faces antitrust investigations by European regulators and by some US state attorneys general. Google has an even larger market share in web search in Europe than in the US. The agreement between Google and the FTC should not be a deterrent for European officials, who are still undertaking their own independent investigation of Google's search practices. EU officials face fewer constraints on their antitrust authority than the FTC, as EU competition law is generally more protective of competitors' interests than US law.

Recently, Joaquin Almunia, EU Competition Commissioner, told the Financial Times that while he's "still investigating" Google's search practices, he is convinced that Google is "diverting traffic" and that it will be forced to change its results. Almunia also said that he felt there was an "abuse" of Google's dominant position. Almunia also suggested that the European Commission (EC) - unlike the FTC - will want to see

changes in the way Google treats its own vertical properties.

In February, Google presented its proposal to the EC, which contained concessions, including clearer labelling of its own services in search results. The EC will investigate Google's proposed concessions before reaching out to rivals for their input. The day before Google submitted its proposal to the EC, the Initiative for a Competitive Online Marketplace (ICOMP) said it had filed a new complaint alleging that Google had engaged in anti-competitive practices to obtain its dominant market position. ICOMP's members include Microsoft and UK search engine Foundem, both involved in a first round of private complaints against Google. Unless the EC takes long-term corrective measures to heal the wound inflicted by Google's search practices, any settlement between Google and its competitors will be like putting a Band-Aid on a bullet hole.

With a verdict expected in early fall, there is still time for Google's competitors to weigh in on the EC's decision. Watchdog groups were particularly disappointed by what they deemed to be a premature decision by the FTC to enter into a non-binding agreement that lacked industry input. As the world awaits the EC's move, it is clear that the EC has an important role in ensuring that Google is not allowed to engage in behaviour that harms fair play. Those who felt let down by the FTC settlement will look to the EC to take more aggressive measures against Google and only end with a formal, binding order that holds Google accountable to someone other than itself.

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