Session 3: Market Power: Antitrust

We will discuss regulatory approaches to market power. In this session, we will look at the antitrust/competition policy approach to market power, while in our next session, we will consider the sort of regulations that we see of natural monopoly in areas such as telecommunications or electricity regulation. For today, we will read chunk of the recent case involving Apple, the iPad and the ebooks market. We then turn to the situation with Google in the European Union. On April 15, 2015, the EU announced a statement of objections regarding one of Google's shopping products and it also announced an investigation into some of Google's practices regarding Android. Roughly one year later, on April 20, 2016, the EU sent Google a statement of objections regarding Android.

United States v. Apple, Inc.

791 F.3d 290 (2nd Cir. June 30, 2015)

DEBRA ANN LIVINGSTON, Circuit Judge: Since the invention of the printing press, the distribution of books has involved a fundamentally consistent process: compose a manuscript, print and bind it into physical volumes, and then ship and sell the volumes to the public. In late 2007, Amazon.com, Inc. ("Amazon") introduced the Kindle, a portable device that carries digital copies of books, known as "ebooks." This innovation had the potential to change the centuries-old process for producing books by eliminating the need to print, bind, ship, and store them. Amazon began to popularize the new way to read, and encouraged consumers to buy the Kindle by offering desirable books—new releases and *New York Times* bestsellers—for $9.99. Publishing companies, which have traditionally stood at the center of the multi-billion dollar book-producing industry, saw Amazon's ebooks, and particularly its $9.99 pricing, as a threat to their way of doing business.

By November 2009, Apple, Inc. ("Apple") had plans to release a new tablet computer, the iPad. Executives at the company saw an opportunity to sell ebooks on the iPad by creating a virtual marketplace on the device, which came to be known as the "iBookstore." Working within a tight timeframe, Apple went directly into negotiations with six of the major publishing companies in the United States. In two months, it announced that five of those companies—Hachette, Harpercollins, Macmillan, Penguin, and Simon & Schuster (collectively, the "Publisher Defendants")—had agreed to sell ebooks on the iPad under arrangements whereby the publishers had the authority to set prices, and could set the prices of new releases and *New York Times* bestsellers as high as $19.99 and $14.99, respectively. Each of these agreements, by virtue of its terms, resulted in each Publisher Defendant receiving *less* per ebook sold via Apple as opposed to Amazon, even given the higher consumer prices. Just a few months after the iBookstore opened, however, every one of the Publisher Defendants had taken control over pricing from Amazon and had raised the prices on many of their ebooks, most notably new releases and bestsellers.

The United States Department of Justice ("DOJ" or "Justice Department") and 33 states and territories (collectively, "Plaintiffs") filed suit in the United States District Court for the

Southern District of New York, alleging that Apple, in launching the iBookstore, had conspired with the Publisher Defendants to raise prices across the nascent ebook market. This agreement, they argued, violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*. ("Sherman Act"), and state antitrust laws. All five Publisher Defendants settled and signed consent decrees, which prohibited them, for a period, from restricting ebook retailers' ability to set prices. Then, after a three-week bench trial, the district court (Cote, J.) concluded that, in order to induce the Publisher Defendants to participate in the iBookstore and to avoid the necessity of itself competing with Amazon over the retail price of ebooks, Apple orchestrated a conspiracy among the Publisher Defendants to raise the price of ebooks—particularly new releases and *New York Times* bestsellers. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013). The district court found that the agreement constituted a *per se* violation of the Sherman Act and, in the alternative, unreasonably restrained trade under the rule of reason. On September 5, 2013, the district court entered final judgment on the liability finding and issued an injunctive order that, *inter alia*, prevents Apple from entering into agreements with the Publisher Defendants that restrict its ability to set, alter, or reduce the price of ebooks, and requires Apple to apply the same terms and conditions to ebook applications sold on its devices as it does to other applications.

On appeal, Apple contends that the district court's liability finding was erroneous and that the provisions of the injunction related to its pricing authority and ebook applications are not necessary to protect the public. *** Because we conclude that the district court did not err in deciding that Apple violated § 1 of the Sherman Act, and because we also conclude that the district court's injunction was lawful and consistent with preventing future anticompetitive harms, we affirm.

BACKGROUND

I. Factual Background

We begin not with Kindles and iPads, but with printed "trade books," which are "general interest fiction and non-fiction" books intended for a broad readership. *Apple*, 952 F. Supp. 2d at 648 n.4. In the United States, the six largest publishers of trade books, known in the publishing world as the "Big Six," are Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. Together, the Big Six publish many of the biggest names in fiction and non-fiction; during 2010, their titles accounted for over 90% of the *New York Times* bestsellers in the United States. *Id.* at 648 n.5.

For decades, trade book publishers operated under a fairly consistent business model. When a new book was ready for release to the public, the publisher would sell hardcover copies to retailers at a "wholesale" price and recommend resale to consumers at a markup, known as the "list" price. After the hardcover spent enough time on the shelves—often a year—publishers would release a paperback copy at lower "list" and "wholesale" prices. In theory, devoted readers would pay the higher hardcover price to read the book when it first came out, while more casual fans would wait for the paperback.

A. Amazon's Kindle

On November 19, 2007, Amazon released the Kindle: a portable electronic device that allows consumers to purchase, download, and read ebooks. At the time, there was only one other ereader available in the emerging ebook market, and Amazon's Kindle quickly gained traction. In 2007, ebook revenue in North America was only $70 million, a tiny amount relative to the approximately $30 billion market for physical trade books. *** Amazon followed a "wholesale" business model similar to the one used with print books: publishers recommended a digital list price and received a wholesale price for each ebook that Amazon sold. In exchange, Amazon could sell the publishers' ebooks on the Kindle and determine the retail price. At least early on, publishers tended to recommend a digital list price that was about 20% lower than the print list price to reflect the fact that, with an ebook, there is no cost for printing, storing, packaging, shipping, or returning the books.

Where Amazon departed from the publishers' traditional business model was in the sale of new releases and *New York Times* bestsellers. Rather than selling more expensive versions of these books upon initial release (as publishers encouraged by producing hardcover books before paperback copies), Amazon set the Kindle price at one, stable figure—$9.99. At this price, Amazon was selling "certain" new releases and bestsellers at a price that "roughly matched," or was slightly lower than, the wholesale price it paid to the publishers. *Apple*, 952 F. Supp. 2d at 649. ***

B. The Publishers' Reactions

Despite the small number of ebook sales compared to the overall market for trade books, top executives in the Big Six saw Amazon's $9.99 pricing strategy as a threat to their established way of doing business. *** In the short term, these members of the Big Six thought that Amazon's lower-priced ebooks would make it more difficult for them to sell hardcover copies of new releases, "which were often priced," as the district court noted, "at thirty dollars or more," *Apple*, 952 F. Supp. 2d at 649, as well as *New York Times* bestsellers. Further down the road, the publishers feared that consumers would become accustomed to the uniform $9.99 price point for these ebooks, permanently driving down the price they could charge for print versions of the books. Moreover, if Amazon became powerful enough, it could demand lower wholesale prices from the Big Six or allow authors to publish directly with Amazon, cutting out the publishers entirely. *** The executives of the Big Six also recognized that their problem was a collective one. ***

The most significant attack that the publishers considered and then undertook, however, was to withhold new and bestselling books from Amazon until the hardcover version had spent several months in stores, a practice known as "windowing." Members of the Big Six both kept one another abreast of their plans to window, and actively pushed others toward the strategy. *** Ultimately, however, the publishers viewed even this strategy to save their business model as self-destructive. Employees inside the publishing companies noted that windowing encouraged piracy, punished ebook consumers, and harmed long-term sales. ***

C. Apple's Entry into the ebook Market

Apple is one of the world's most innovative and successful technology companies. Its hardware sells worldwide and supports major software marketplaces like iTunes and the App Store. But in 2009, Apple lacked a dedicated marketplace for ebooks or a hardware device that could offer an outstanding reading experience. The pending release of the iPad, which Apple intended to announce on January 27, 2010, promised to solve that hardware deficiency.

Eddy Cue, Apple's Senior Vice President of Internet Software and Services and the director of Apple's digital content stores, saw the opportunity for an ebook marketplace on the iPad. *** Jobs approved Cue's plan for an ebook marketplace—which came to be known as the iBookstore—in November 2009. ***

D. Apple's Negotiations with the Publishers

1. Initial Meetings

Apple held its first meetings with each of the Big Six between December 15 and 16. The meetings quickly confirmed Cue's suspicions about the industry. As he wrote to Jobs after speaking with three of the publishers, "[c]learly, the biggest issue is new release pricing" and "Amazon is definitely not liked much because of selling below cost for NYT Best Sellers." J.A. 326-27. Many publishers also emphasized that they were searching for a strategy to regain control over pricing. Apple informed each of the Big Six that it was negotiating with the other major publishers, that it hoped to begin selling ebooks within the next 90 days, and that it was seeking a critical mass of participants in the iBookstore and would launch only if successful in reaching this goal. *** Most importantly for the publishers, however, Cue's team also expressed Apple's belief that Amazon's $9.99 price point was not ingrained in consumers' minds, and that Apple could sell new releases and *New York Times* bestsellers for somewhere between $12.99 and $14.99. In return, Apple requested that the publishers decrease their wholesale prices so that the company could make a small profit on each sale.

These meetings spurred a flurry of communications reporting on the "[t]errific news[,]" as Reidy put it in an email to Leslie Moonves, her superior at parent company CBS Corporation ("CBS"), that Apple "was not interested in a low price point for digital books" and didn't want "Amazon's $9.95 [sic] to continue." *Apple*, 952 F. Supp. 2d at 658 (first alteration in original) (internal quotation marks omitted). Significantly, these communications included numerous exchanges *between* executives at different Big Six publishers who, the district court found, "hashed over their meetings with Apple with one another." *Id.* The district court found that the frequent telephone calls among the Publisher Defendants during the period of their negotiations with Apple "represented a departure from the ordinary pattern of calls among them." *Id.* at 655 n.14.

2. The Agency Model

Meanwhile, Cue, Moerer, and Saul returned to Apple's headquarters to develop a business model for the iBookstore. *** It was at this point that Cue's team, recognizing its opportuni-

ty, abandoned the wholesale business model for a new, agency model. Unlike a wholesale model, in an agency relationship the *publisher* sets the price that consumers will pay for each ebook. Then, rather than the retailer paying the publisher for each ebook that it sells, the publisher pays the retailer a fixed percentage of each sale. In essence, the retailer receives a commission for distributing the publisher's ebooks. Under the system Apple devised, publishers would have the freedom to set ebook prices in the iBookstore, and would keep 70% of each sale. The remaining 30% would go to Apple as a commission.

This switch to an agency model obviated Apple's concerns about negotiating wholesale prices with the Big Six while ensuring that Apple profited on every sale. It did not, however, solve all of the company's problems. Because the agency model handed the publishers control over pricing, it created the risk that the Big Six would sell ebooks in the iBookstore at far higher prices than Kindle's $9.99 offering. If the prices were too high, Apple could be left with a brand new marketplace brimming with titles, but devoid of customers.

To solve this pricing problem, Cue's team initially devised two strategies. First, they realized that they could maintain "realistic prices" by establishing price caps for different types of books. J.A. 359. Of course, these caps would need to behigher than Amazon's $9.99 price point, or Apple would face the same difficult price negotiations that it sought to avoid by switching away from the wholesale model. But at this point Apple was not content to open its iBookstore offering prices higher than the competition. ***

Apple next concluded, then, as the district court found, that "[t]o ensure that the iBookstore would be competitive at higher prices, Apple . . . needed to eliminate all retail price competition." *Id.* at 659. Thus, rather than simply agreeing to price caps above Amazon's $9.99 price point, Apple created a second requirement: publishers must switch all of their other ebook retailers—including Amazon—to an agency pricing model. ***

On January 4 and 5, Apple sent essentially identical emails to each member of the Big Six to explain its agency model proposal. Each email described the commission split between Apple and the publishers and recommended three price caps: $14.99 for hardcover books with list prices above $35; $12.99 for hardcover books with list prices below $35; and $9.99 for all other trade books. The emails also explained that, "to sell ebooks at realistic prices . . . all [other] resellers of new titles need to be in [the] agency model" as well. J.A. 360. Or, as Cue told Reidy, "all publishers" would need to move "all retailers" to an agency model. J.A. 2060.

3. The "Most-Favored-Nation" Clause

Cue's thoughts on the agency model continued to evolve after the emails on January 4 and 5. Most significantly, Saul—Cue's in-house counsel—devised an alternative to explicitly requiring publishers to switch other retailers to agency. This alternative involved the use of a "most-favored nation" clause ("MFN Clause" or "MFN"). In general, an MFN Clause is a contractual provision that requires one party to give the other the best terms that it makes available to any competitor. In the context of Apple's negotiations, the MFN Clause mandated that, "[i]f, for any particular New Release in hardcover format, the . . . Customer Price [in the iBookstore] at any time is or becomes higher than a customer price offered by any

other reseller . . ., then [the] Publisher shall designate a new, lower Customer Price [in the iBookstore] to meet such lower [customer price].” J.A. 559. Put differently, the MFN would require the publisher to offer any ebook in Apple’s iBookstore for no more than what the same ebook was offered elsewhere, such as from Amazon.

On January 11, Apple sent each of the Big Six a proposed eBook Agency Distribution Agreement (the “Contracts”). As described in the January 4 and 5 emails, these Contracts would split the proceeds from each ebook sale between the publisher and Apple, with the publisher receiving 70%, and would set price caps on ebooks at $14.99, $12.99, and $9.99 depending on the book’s hardcover price. But unlike the initial emails, the Contracts contained MFN Clauses in place of the requirement that publishers move all other retailers to an agency model. Apple then assured each member of the Big Six that it was being offered the same terms as the others.

The Big Six understood the economic incentives that the MFN Clause created. Suppose a new hardcover release sells at a list price of $25, and a wholesale price of $12.50. With Amazon, the publishers had been receiving the wholesale price (or a slightly lower digital wholesale price) for every ebook copy of the volume sold on Kindle, even if Amazon ultimately sold the ebook for less than that wholesale price. Under Apple’s initial agency model—with price caps but no MFN Clause—the publishers already stood to make *less* money per ebook with Apple. Because Apple capped the ebook price of a $25 hardcover at $12.99 and took 30% of that price, publishers could only expect to make $8.75 per sale. But what the publishers sacrificed in short-term revenue, they hoped to gain in long-term stability by acquiring more control over pricing and, accordingly, the ability to protect their hardcover sales.

The MFN Clause changed the situation by making it imperative, not merely desirable, that the publishers wrest control over pricing from ebook retailers generally. Under the MFN, if Amazon stayed at a wholesale model and continued to sell ebooks at $9.99, the publishers would be forced to sell in the iBookstore, too, at that same $9.99 price point. The result would be the worst of both worlds: *lower* short-term revenue and *no* control over pricing. The publishers recognized that, as a practical matter, this meant that the MFN Clause would force them to move Amazon to an agency relationship. *** Apple understood this dynamic as well. *** Cue bluntly put it, “any decent MFN forces the model” away from wholesale and to agency. *Id.* (internal quotation marks omitted). ***

Thus, the terms of the negotiation between Apple and the publishers became clear: Apple wanted quick and successful entry into the ebook market and to eliminate retail price competition with Amazon. In exchange, it offered the publishers an opportunity “to confront Amazon as one of an organized group . . . united in an effort to eradicate the $9.99 price point.” *Id.* at 664. Both sides needed a critical mass of publishers to achieve their goals. The MFN played a pivotal role in this *quid pro quo* by “stiffen[ing] the spines of the [publishers] to ensure that they would demand new terms from Amazon,” and protecting Apple from retail price competition. *Id.* at 665.

4. Final Negotiations

The proposed Contracts sparked intense negotiations as Cue's team raced to assemble enough publishers to announce the iBookstore by January 27. *** In a set of meetings between January 13 and 14, the majority of the Big Six expressed a general willingness to adopt an agency model, but refused to do so with the price limits Apple demanded. Cue responded by asking Jobs for permission to create a more lenient price cap system. Under this new regime, *New York Times* bestsellers could sell for $14.99 if the hardcover was listed above $30, and for $12.99 if listed below that price. As for new releases, a $12.99 cap would apply to hardcovers priced between $25 and $27.50; a $14.99 cap would apply to hardcovers selling for up to $30; and, if the hardcover sold for over $30, publishers could sell the ebook for between $16.99 and $19.99. Jobs responded that he could "live with" the pricing "as long as [the publishers] move Amazon to the agen[cy] model too." J.A. 499.

Cue proposed this new pricing regime to the Big Six on January 16 and, with only 11 days remaining before the iPad launch, turned up the pressure. *** By January 22, two publishers—Simon & Schuster and Hachette—had verbally committed to join the iBookstore, while a third, Penguin, had agreed to Apple's terms in principle. *** To make matters worse, "[p]ress reports on January 18 and 19 alerted the publishing world and Amazon to the Publishers' negotiations with Apple," *Apple*, 952 F. Supp. 2d at 670-71, and Amazon learned from Random House that it was facing "pressure from other publishers . . . to move to [the] agency model because Apple had made it clear that unless all of the Big Six participated, they wouldn't bother with building a bookstore," J.A. 1520. Representatives from Amazon descended on New York for a set of long-scheduled meetings with the publishers. As the district court found, "[i]n separate conversations on January 20 and over the next few days, the Publisher Defendants all told Amazon that they wanted to change to an agency distribution model with Amazon." *Apple*, 952 F. Supp. 2d at 672. ***

HarperCollins was the fifth, and final, publisher to agree in principle to Apple's proposal. Murray, its CEO, "remained unhappy over the size of Apple's commission and the existence of price caps." *Id.* at 673 n.39. Unable to negotiate successfully with Murray, Cue asked Jobs to contact James Murdoch, the CEO of the publisher's parent company, and "tell him we have 3 signed so there is no leap of faith here." *Id.* at 675 (internal quotation marks omitted). After a series of emails, Jobs summarized Apple's position to Murdoch:

> [W]e simply don't think the ebook market can be successful with pricing higher than $12.99 or $14.99. Heck, Amazon is selling these books at $9.99, and who knows, maybe they are right and we will fail even at $12.99. But we're willing to try at the prices we've proposed. . . . As I see it, [HarperCollins] has the following choices: (1) Throw in with [A]pple and see if we can all make a go of this to create a real mainstream ebooks market at $12.99 and $14.99. (2) Keep going with Amazon at $9.99. You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying you 70% of $9.99. They have shareholders too. (3) Hold back your books from Amazon. Without a way for customers to buy your ebooks, they will steal them.

Id. at 677. Cue also emailed Murray to inform him that four other publishers had signed their agreements. Murray then called executives at both Hachette and Macmillan before agreeing to Apple's terms.

As the district court found, during the period in January during which Apple concluded its agreements with the Publisher Defendants, "Apple kept the Publisher Defendants apprised about who was in and how many were on board." *Id.* at 673. The Publisher Defendants also kept in close communication. As the district court noted, "[i]n the critical negotiation period, over the three days between January 19 and 21, Murray, Reidy, Shanks, Young, and Sargeant called one another 34 times, with 27 calls exchanged on January 21 alone." *Id.* at 674.

By the January 27 iPad launch, five of the Big Six—Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster—had agreed to participate in the iBookstore. The lone holdout, Random House, did not join because its executives believed it would fare better under a wholesale pricing model and were unwilling to make a complete switch to agency pricing. Steve Jobs announced the iBookstore as part of his presentation introducing the iPad. When asked after the presentation why someone should purchase an ebook from Apple for $14.99 as opposed to $9.99 with Amazon or Barnes & Noble, Jobs confidently replied, "[t]hat won't be the case . . . the price will be the same. . . . [P]ublishers will actually withhold their [e]books from Amazon . . . because they are not happy with the price." A day later, Jobs told his biographer the publishers' position with Amazon: "[y]ou're going to sign an agency contract or we're not going to give you the books." J.A. 891 (internal quotation marks omitted).

E. Negotiations with Amazon

Jobs's boast proved to be prophetic. While the Publisher Defendants were signing Apple's Contracts, they were also informing Amazon that they planned on changing the terms of their agreements with it to an agency model. However, their move against Amazon began in earnest on January 28, the day after the iPad launch. That afternoon, John Sargent flew to Seattle to deliver an ultimatum on behalf of Macmillan: that Amazon would switch its ebook sales agreement with Macmillan to an agency model or suffer a seven-month delay in its receipt of Macmillan's new releases. Amazon responded by removing the option to purchase Macmillan's print and ebook titles from its website.

Sargent, as the district court found, had informed Cue of his intention to confront Amazon before ever leaving for Seattle. *Apple*, 952 F. Supp. 2d at 678. On his return, he emailed Cue to inform him about Amazon's decision to remove Macmillan ebooks from Kindle, adding a note to say that he wanted to "make sure you are in the loop." J.A. 640. Sargent also wrote a public letter to Macmillan's authors and agents, describing the Amazon negotiations. Hachette's Arnaud Nourry emailed the CEO of Macmillan's parent company to express his "personal support" for Macmillan's actions and to "ensure [him] that [he was] not going to find [his] company alone in the battle." J.A. 643. A Penguin executive wrote to express similar support for Macmillan's position.

The district court found that while Amazon was "opposed to adoption of the agency model and did not want to cede pricing authority to the Publishers," it knew that it could not prevail in this position against five of the Big Six. *Apple*, 952 F. Supp. 2d at 671, 680. When Amazon told Macmillan that it would be willing to negotiate agency terms, Sargent sent Cue an email titled "URGENT!!" that read: "Hi Eddy, I am gonna need to figure out our final agency terms of sale tonight. Can you call me please?" J.A. 642. Cue and Sargent spoke that night and, while Cue denied at trial that the conversation concerned Macmillan's negotiations with Amazon, the district court found that "his denial was not credible." *Apple*, 952 F. Supp. 2d at 681 n.52. By February 5, Amazon had agreed to agency terms with Macmillan.

The other publishers who had joined the iBookstore quickly followed Macmillan's lead. *** Once again, Apple closely monitored the negotiations with Amazon. The Publisher Defendants would inform Cue when they had completed agency agreements, and his team monitored price changes on the Kindle. ***

F. Effect on Ebook Prices

As Apple and the Publisher Defendants expected, the iBookstore price caps quickly became the benchmark for ebook versions of new releases and *New York Times* bestsellers. In the five months following the launch of the iBookstore, the publishers who joined the marketplace and switched Amazon to an agency model priced 85.7% of new releases on Kindle and 92.1% of new releases on the iBookstore at, or just below, the price caps. *Apple*, 952 F. Supp. 2d at 682. Prices for *New York Times* bestsellers took a similar leap as publishers began to sell 96.8% of their bestsellers on Kindle and 99.4% of their bestsellers on the iBookstore at, or just below, the Apple price caps *Id.* During that same time period, Random House, which had not switched to an agency model, saw virtually no change in the prices for its new releases or *New York Times* bestsellers.

*** Based on data from February 2010—just before the Publisher Defendants switched Amazon to agency pricing—to February 2011, an expert retained by the Justice Department observed that the weighted average price of the Publisher Defendants' new releases increased by 24.2%, while bestsellers increased by 40.4%, and other ebooks increased by 27.5%, for a total weighted average ebook price increase of 23.9%. Indeed, even Apple's expert agreed, noting that, over a two-year period, the Publisher Defendants increased their average prices for hardcovers, new releases, and other ebooks. ***

II. Apple's Liability Under § 1

This appeal requires us to address the important distinction between "horizontal" agreements to set prices, which involve coordination "between competitors at the same level of [a] market structure," and "vertical" agreements on pricing, which are created between parties "at different levels of [a] market structure." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012) (internal quotation marks omitted). Under § 1 of the Sherman Act, the former are, with limited exceptions, per se unlawful, while the latter are unlawful only if an assessment of market effects, known as a rule-of-reason analysis, reveals that they unreasonably restrain trade. ***

Apple characterizes its Contracts with the Publisher Defendants as a series of parallel but independent vertical agreements, a characterization that forms the basis for its two primary arguments against the district court's decision. *** For the reasons set forth below, we reject these arguments. On this record, the district court did not err in determining that Apple orchestrated an agreement with and among the Publisher Defendants, in characterizing this agreement as a horizontal price fixing-conspiracy, or in holding that the conspiracy unreasonably restrained trade in violation of § 1 of the Sherman Act.

A. The Conspiracy with the Publisher Defendants

Section 1 of the Sherman Act bans restraints on trade "effected by a contract, combination, or conspiracy." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (internal quotation marks omitted). The first "crucial question in a Section 1 case is therefore whether the challenged conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (alteration in original) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

Identifying the existence and nature of a conspiracy requires determining whether the evidence "reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (internal quotation marks omitted). Parallel action is not, by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of "coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Twombly*, 550 U.S. at 556 n.4 (internal quotation marks omitted). Indeed, parallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive. Accordingly, to prove an antitrust conspiracy, "a plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987).

*** Because of the risk of condemning parallel conduct that results from independent action and not from an actual unlawful agreement, the Supreme Court has cautioned against drawing an inference of conspiracy from evidence that is equally consistent with independent conduct as with illegal conspiracy—or, as the Court has called it, "ambiguous" evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 n.21 (1986).

*** Apple's basic argument is that because its Contracts with the Publisher Defendants were fully consistent with its independent business interests, those agreements provide only "ambiguous" evidence of a § 1 conspiracy, and the district court therefore erred under *Matsushita* and *Monsanto* in inferring such a conspiracy.

We disagree. At the start, Apple's benign portrayal of its Contracts with the Publisher Defendants is not persuasive—not because those Contracts themselves were independently unlawful, but because, in context, they provide strong evidence that Apple consciously orchestrated a conspiracy among the Publisher Defendants. As explained below, and as the district court concluded, Apple understood that its proposed Contracts were attractive to the Pub-

lisher Defendants *only* if they collectively shifted their relationships with Amazon to an agency model—which Apple knew would result in higher consumer-facing ebook prices. In addition to these Contracts, moreover, ample additional evidence identified by the district court established both that the Publisher Defendants' shifting to an agency model with Amazon was the result of express collusion among them and that Apple consciously played a key role in organizing that collusion. The district court did not err in concluding that Apple was more than an innocent bystander.

Apple offered each Big Six publisher a proposed Contract that would be attractive only if the publishers acted collectively. Under Apple's proposed agency model, the publishers stood to make less money per sale than under their wholesale agreements with Amazon, but the Publisher Defendants were willing to stomach this loss because the model allowed them to sell new releases and bestsellers for more than $9.99. Because of the MFN Clause, however, each new release and bestseller sold in the iBookstore would cost only $9.99 as long as Amazon continued to sell ebooks at that price. So in order to receive the perceived benefit of Apple's proposed Contracts, the Publisher Defendants had to switch Amazon to an agency model as well—something no individual publisher had sufficient leverage to do on its own. Thus, each Publisher Defendant would be able to accomplish the shift to agency—and therefore have an incentive to sign Apple's proposed Contracts—only if it acted in tandem with its competitors. By the very act of signing a Contract with Apple containing an MFN Clause, then, each of the Publisher Defendants signaled a clear commitment to move against Amazon, thereby facilitating their collective action. ***

The Supreme Court has defined an agreement for Sherman Act § 1 purposes as "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764 (internal quotation marks omitted). Plainly, this use of the promise of higher prices as a bargaining chip to induce the Publisher Defendants to participate in the iBookstore constituted a conscious commitment to the goal of raising ebook prices. *** Nor was the Publisher Defendants' joint action against Amazon a result of parallel decisionmaking. *** That the Publisher Defendants were in constant communication regarding their negotiations with both Apple and Amazon can hardly be disputed. Indeed, Apple never seriously argues that the Publisher Defendants were not acting in concert.

*** Apple's involvement in the conspiracy continued even past the signing of its agency agreements. Before Sargent flew to Seattle to meet with Amazon, he told Cue. Apple stayed abreast of the Publisher Defendants' progress as they set coordinated deadlines with Amazon and shared information with one another during negotiations. ***

Apple responds to this evidence—which the experienced judge who oversaw the trial characterized repeatedly as "overwhelming"—by explaining how each piece of evidence standing alone is "ambiguous" and therefore insufficient to support an inference of conspiracy. We are not persuaded. *** Combined with the unmistakable purpose of the Contracts that Apple proposed to the publishers, and with the collective move against Amazon that inevitably followed the signing of those Contracts, the emails and phone records demonstrate that Apple *agreed* with the Publisher Defendants, within the meaning of the Sherman Act, to raise con-

sumer-facing ebook prices by eliminating retail price competition. The district court did not err in rejecting Apple's argument that the evidence of its orchestration of the Publisher Defendants' conspiracy was "ambiguous."

*** In short, we have no difficulty on this record rejecting Apple's argument that the district court erred in concluding that Apple "conspir[ed] with the Publisher Defendants to eliminate retail price competition and to raise e-book prices." *Apple*, 952 F. Supp. 2d at 691. Having concluded that the district court correctly identified an agreement between Apple and the Publisher Defendants to raise consumer-facing ebook prices, we turn to Apple's and the dissent's arguments that this agreement did not violate § 1 of the Sherman Act.

B. Unreasonable Restraint of Trade

"Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' [the Supreme] Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).***

In antitrust cases, "*[p]er se* and rule-of-reason analysis are . . . two methods of determining whether a restraint is 'unreasonable,' *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). *** Horizontal price-fixing conspiracies traditionally have been, and remain, the "archetypal example" of a *per se* unlawful restraint on trade. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). By contrast, the Supreme Court in recent years has clarified that vertical restraints—including those that restrict prices—should generally be subject to the rule of reason.

In this case, the district court held that the agreement between Apple and the Publisher Defendants was unlawful under the *per se* rule; in the alternative, even assuming that a rule-of-reason analysis was required, the district court concluded that the agreement was still unlawful.

1. Whether the *Per Se* Rule Applies

a. Horizontal Agreement

In light of our conclusion that the district court did not err in determining that Apple organized a price-fixing conspiracy among the Publisher Defendants, Apple and the dissent's initial argument against the *per se* rule—that Apple's conduct must be subject to rule-of-reason analysis because it involved merely multiple independent, vertical agreements with the Publisher Defendants—cannot succeed.

"The true test of legality" under § 1 of the Sherman Act "is whether the *restraint imposed* is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918) (emphasis added). By agreeing to orchestrate a horizontal price-fixing conspiracy, Apple committed itself to "achiev[ing] [that] unlawful objective," *Monsanto*, 465 U.S. at 764 (internal quotation marks omitted): namely, collusion with and among the Publisher Defendants to set ebook prices. This type of agreement, moreover, is a restraint "that

would always or almost always tend to restrict competition and decrease output." *Leegin*, 551 U.S. at 886 (internal quotation marks omitted).

The response, raised by Apple and our dissenting colleague, that Apple engaged in "vertical conduct" that is unfit for *per se* condemnation therefore misconstrues the Sherman Act analysis. It is the type of restraint Apple agreed to impose that determines whether the *per se* rule or the rule of reason is appropriate. These rules are means of evaluating "whether [a] *restraint* is unreasonable," not the reasonableness of a particular defendant's role in the scheme. *Atl. Richfield*, 495 U.S. at 342 (emphasis added) (internal quotation marks omitted).

Consistent with this principle, the Supreme Court and our Sister Circuits have held all participants in "hub-and-spoke" conspiracies liable when the objective of the conspiracy was a *per se* unreasonable restraint of trade. ***

Because the reasonableness of a restraint turns on its anticompetitive effects, and not the identity of each actor who participates in imposing it, Apple and the dissent's observation that the Supreme Court has refused to apply the *per se* rule to certain vertical agreements is inapposite. The rule of reason is unquestionably appropriate to analyze an agreement between a manufacturer and its distributors to, for instance, limit the price at which the distributors sell the manufacturer's goods or the locations at which they sell them. *See Leegin*, 551 U.S. at 881; *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 (1977). These vertical restrictions "are widely used in our free market economy," can enhance interbrand competition, and do not inevitably have a "pernicious effect on competition." *Cont'l T.V.*, 433 U.S. at 57-58 (internal quotation marks omitted). But the relevant "agreement in restraint of trade" in this case is not Apple's vertical Contracts with the Publisher Defendants (which might well, if challenged, have to be evaluated under the rule of reason); it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices. As explained below, horizontal agreements with the purpose and effect of raising prices are *per se* unreasonable because they pose a "threat to the central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); that threat is just as significant when a vertical market participant organizes the conspiracy. Indeed, as the dissent notes, the Publisher Defendants' coordination to fix prices is uncontested on appeal. The competitive effects of that *same restraint* are no different merely because a different conspirator is the defendant.

Accordingly, when the Supreme Court has applied the rule of reason to vertical agreements, it has explicitly distinguished situations in which a vertical player organizes a horizontal cartel. ***

A horizontal conspiracy can use vertical agreements to facilitate coordination without the other parties to those agreements knowing about, or agreeing to, the horizontal conspiracy's goals. *** But there is no such possibility for confusion in the hub-and-spoke context, where the vertical organizer has not only committed to vertical agreements, but has also agreed to participate in the horizontal conspiracy. In that situation, the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is "and ought to be, *per se* unlawful." *Id.*

In short, the relevant "agreement in restraint of trade" in this case is the price-fixing conspiracy identified by the district court, not Apple's vertical contracts with the Publisher Defendants. How the law might treat Apple's vertical agreements in the absence of a finding that Apple agreed to create the horizontal restraint is irrelevant. Instead, the question is whether the vertical organizer of a horizontal conspiracy designed to raise prices has agreed to a restraint that is any less anticompetitive than its co-conspirators, and can therefore escape *per se* liability. We think not. Even in light of this conclusion, however, we must address two additional arguments that Apple raises against application of the *per se* rule.

b. "Enterprise and Productivity"

Apple seeks refuge from the *per se* rule by invoking a line of cases in which courts have permitted defendants to introduce procompetitive justifications for horizontal price-fixing arrangements that would ordinarily be condemned *per se* if those agreements "when adopted could reasonably have been believed to promote 'enterprise and productivity.'" Apple Br. at 50 (quoting *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1011 (7th Cir. 2012)) (internal quotation mark omitted). ***

Put differently, a participant in a price-fixing agreement may invoke only certain, limited *kinds* of "enterprise and productivity" to receive the rule of reason's advantages. As the Supreme Court has explained—including in *BMI* itself, *see* 441 U.S. at 8 & n.11—the *per se* rule would lose all the benefits of being "*per se*" if conspirators could seek to justify their conduct on the basis of its purported competitive benefits in every case. Here, there was no joint venture or other similar productive relationship between any of the participants in the conspiracy that Apple joined. Apple also does not claim, nor could it, that creating an ebook retail market is possible only if the participating publishers coordinate with one another on price.

c. Price-Fixing Conspiracy

As noted, the Supreme Court has for nearly 100 years held that horizontal collusion to raise prices is the "archetypal example" of a *per se* unlawful restraint of trade. *Catalano*, 446 U.S. at 647. If successful, these conspiracies concentrate the power to set prices among the conspirators, including the "power to control the market and to fix arbitrary and unreasonable prices." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). And even if unsuccessful or "not . . . aimed at complete elimination of price competition," the conspiracies pose a "threat to the central nervous system of the economy" by creating a dangerously attractive opportunity for competitors to enhance their power at the expense of others. *Socony-Vacuum Oil*, 310 U.S. at 224 n.59 (1940).***

Apple and its amici argue that the horizontal agreement among the publishers was not actually a "price-fixing" conspiracy that deserves *per se* treatment in the first place. But it is well established that *per se* condemnation is not limited to agreements that literally set or restrict prices. Instead, any conspiracy "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se," and the precise "machinery employed . . . is immaterial." *Socony-Vacuum Oil*, 310 U.S. at 223. The

conspiracy among Apple and the Publisher Defendants comfortably qualifies as a horizontal price-fixing conspiracy.

As we have already explained, the Publisher Defendants' primary objective in expressly colluding to shift the entire ebook industry to an agency model (with Apple's help) was to eliminate Amazon's $9.99 pricing for new releases and bestsellers, which the publishers believed threatened their short-term ability to sell hardcovers at higher prices and the long-term consumer perception of the price of a new book. They had grown accustomed to a business in which they rarely competed with one another on price and could, at least partially, control the price of new releases and bestsellers by releasing hardcover copies before paperbacks. Amazon, and the ebook, upset that model, and reduced prices to consumers by eliminating the need to print, store, and ship physical volumes. Its $9.99 price point for new releases and bestsellers represented a small loss on a small percentage of its sales designed to encourage consumers to adopt the new technology.

Faced with downward pressure on prices but unconvinced that withholding books from Amazon was a viable strategy, the Publisher Defendants—their coordination orchestrated by Apple—combined forces to grab control over price. Collectively, the Publisher Defendants accounted for 48.8% of ebook sales in 2010. J.A. 1571. Once organized, they had sufficient clout to demand control over pricing, in the form of agency agreements, from Amazon and other ebook distributors. This control over pricing facilitated their ultimate goal of raising ebook prices to the price caps. In other words, the Publisher Defendants took by collusion what they could not win by competition. And Apple used the publishers' frustration with Amazon's $9.99 pricing as a bargaining chip in its negotiations and structured its Contracts to coordinate their push to raise prices throughout the industry. A coordinated effort to raise prices across the relevant market was present in every chapter of this story.

This conspiracy to raise prices also had its intended effect. Immediately after the Publisher Defendants switched Amazon to an agency model, they increased the Kindle prices of 85.7% of their new releases and 96.8% of their *New York Times* bestsellers to within 1% of the Apple price caps. They also increased the prices of their other ebook offerings. Within two weeks of the move to agency, the weighted average price of the Publisher Defendants' ebooks—which accounted for just under half of all ebook sales in 2010—had increased by 18.6%, while the prices for Random House and other publishers remained relatively stable.

This sudden increase in prices reduced ebook sales by the Publisher Defendants and proved to be durable. One analysis compared two-week periods before and after the Publisher Defendants took control over pricing and found that they sold 12.9% fewer ebooks after the switch. Another expert for Plaintiffs conducted a regression analysis, which showed that, over a six-month period following the switch, the Publisher Defendants sold 14.5% fewer ebooks than they would have had the price increases not occurred. Nonetheless, ebook prices for the Publisher Defendants over those six months, controlling for other factors, remained 16.8% higher than before the switch. And even Apple's expert produced a chart showing that the Publisher Defendants' prices for new releases, bestsellers, and other offerings remained elevated a full two years after they took control over pricing.

Apple points out that, in the two years following the conspiracy, prices across the ebook market as a whole fell slightly and total output increased. However, when the agreement at issue involves price fixing, the Supreme Court has consistently held that courts need not even conduct an extensive analysis of "market power" or a "detailed market analysis" to demonstrate its anticompetitive character. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986). The district court's assessment of Apple's and the Publisher Defendants' motives, coupled with the unambiguous increase in the prices of their ebooks, was sufficient to confirm that price fixing was the goal, and the result, of the conspiracy.

Moreover, Apple's evidence regarding long-term growth and prices in the ebook industry is not inconsistent with the conclusion that the price-fixing conspiracy succeeded in actually raising prices. *** No court can presume to know the proper price of an ebook, but the long judicial experience applying the Sherman Act has shown that "[a]ny combination which tampers with price structures . . . would be directly interfering with the free play of market forces." *Socony-Vacuum Oil*, 310 U.S. at 221. By setting new, durable prices through collusion rather than competition, Apple and the Publisher Defendants imposed their view of proper pricing, supplanting the market's free play. This evidence, viewed in conjunction with the district court's findings as to and analysis of the conspiracy's history and purpose, is sufficient to support the conclusion that the agreement to raise ebook prices was a *per se* unlawful price-fixing conspiracy.

2. Rule of Reason

As explained above, neither Apple nor the dissent has presented any particularly strong reason to think that the conspiracy we have identified should be spared *per se* condemnation. My concurring colleague would therefore affirm the district court's decision on that basis alone. I, too, believe that *per se* condemnation is appropriate in this case and view Apple's sloganeering references to "innovation" as a distraction from the straightforward nature of the conspiracy proven at trial. Nonetheless, I am mindful of Apple's argument that the nascent ebook industry has some new and unusual features and that the *per se* rule is not fit for "business relationships where the economic impact of certain practices is not immediately obvious." *Leegin*, 551 U.S. at 887 (internal quotation marks omitted). I therefore assume, for the sake of argument, that it is appropriate to apply the rule of reason and to analyze the competitive effects of Apple's horizontal agreement with the Publisher Defendants.

Notably, however, the ample evidence here concerning the purpose and effects of Apple's agreement with the Publisher Defendants affects the scope of the rule-of-reason analysis called for in this case. Under a prototypically robust rule-of-reason analysis, the plaintiff must demonstrate an "*actual* adverse effect" on competition in the relevant market before the "burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (internal quotation marks omitted). The factfinder then weighs the competing evidence "to determine if the effects of the challenged restraint tend to promote or destroy competition."*Id.* at 507. ***

Apple's initial argument that its agreement with the Publisher Defendants was procompetitive (an argument presented principally in an amicus brief adopted wholeheartedly by the dissent) is that by eliminating Amazon's $9.99 price point, the agreement enabled Apple and other ebook retailers to enter the market and challenge Amazon's dominance. But this defense—that higher prices enable more competitors to enter a market—is no justification for a horizontal price-fixing conspiracy. ***

From this perspective, the dissent's contention that Apple could not have entered the ebook retail market without the price-fixing conspiracy, because it could not have profited either by charging more than Amazon or by following Amazon's pricing, is a complete non sequitur. The posited dilemma is the whole point of competition: if Apple could not turn a profit by selling new releases and bestsellers at $9.99, or if it could not make the iBookstore and iPad so attractive that consumers would pay more than $9.99 to buy and read those ebooks on its platform, then there was no place for its platform in the ebook retail market. Neither the district court nor Plaintiffs had an obligation to identify a "viable alternative" for Apple's profitable entry because Apple had no entitlement to enter the market on its preferred terms.

*** In actuality, the district court's fact-finding illustrates that Apple organized the Publisher Defendants' price-fixing conspiracy not because it was a necessary precondition to market entry, but because it was a convenient bargaining chip. Apple was operating under a looming deadline and recognized that, by aligning its interests with those of the Publisher Defendants and offering them a way to raise prices across the ebook market, it could gain quick entry into the market on extremely favorable terms, including the elimination of retail price competition from Amazon. But the offer to orchestrate a horizontal conspiracy to raise prices is not a legitimate way to sweeten a deal.

*** To summarize, the district court made no finding that a horizontal conspiracy to eliminate price competition in the ebook retail market was necessary to bring more retailers into the market to challenge Amazon, nor does the record evidence support this conclusion. More importantly, even if there *were* such evidence, the fact that a competitor's entry into the market is contingent on a horizontal conspiracy to raise prices only means (absent monopolistic conduct by the market's dominant firm, which cannot lawfully be challenged by collusion) that the competitor is inefficient, *i.e.*, that its entry will not enhance consumer welfare. For these reasons, I would reject the argument that Apple's entry into the market represented an important procompetitive benefit of the horizontal price-fixing conspiracy it orchestrated.

*** Accordingly, I agree with the district court's decision that, under the rule of reason, the horizontal agreement to raise consumer-facing ebook prices that Apple orchestrated unreasonably restrained trade. But given the clear applicability of the *per se* rule in this context, the analysis here is largely offered in response to the dissent. I also confidently join with my concurring colleague in affirming the district court's conclusion that Apple committed a *per se* violation of § 1 of the Sherman Act.

CONCLUSION

We have considered the appellants' remaining arguments and find them to be without merit. Because we conclude that Apple violated § 1 of the Sherman Act by orchestrating a horizontal conspiracy among the Publisher Defendants to raise ebook prices, and that the injunctive relief ordered by the district court is appropriately designed to guard against future anticompetitive conduct, the judgment of the district court is AFFIRMED.

LOHIER, Circuit Judge, Concurring in part and Concurring in the judgment: I join in the majority opinion except for part II.B.2 relating to the application of the rule of reason. In my view, Apple's appeal rises or falls based on the application of the *per se* rule. That rule clearly applies to the central agreement in this case (and the only agreement alleged to be unlawful): the publishers' horizontal agreement to fix ebook prices. ***

DENNIS JACOBS, Circuit Judge, Dissenting. I respectfully dissent. This appeal is taken by Apple Inc. from a judgment in the United States District Court for the Southern District of New York (Cote, J.), awarding an antitrust injunction in favor of the United States, 31 states, the District of Columbia, and the Commonwealth of Puerto Rico. The plaintiffs' claims are premised on Apple's conduct as a prospective retailer of e-books. I vote to reverse. *** In the course of this litigation, three theories have been offered for how Apple could have entered the e-book market on less restrictive terms. Each theory misapprehends the market or the law, or both. The absence of alternative means bespeaks the reasonableness of the measures Apple took.

Theory 1: Apple could have competed with Amazon on Amazon's terms, using wholesale contracts and below-cost pricing.

This was never an option. The district court found as fact that: a new entrant into the e-book retail market "would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive," *Apple I*, 952 F. Supp. 2d at 658; Apple was "not willing" to engage in below-cost pricing, *Id.* at 657; and Apple could have avoided this money-losing price structure simply by forgoing entry to the market, see *Id.* at 659. Even if Apple had been willing to adopt below-cost pricing, the result at best would have been duopoly, and the hardening of the existing barrier to entry. Antitrust law disfavors a durable duopoly nearly as much as monopoly itself.

Theory 2: Apple could have entered the e-book retail market using the wholesale model and charged higher prices than Amazon's.

The district court foreclosed this theory as well; it found that Apple refused to impair its brand by charging "what it considered unrealistically high prices." *Apple I*, 952 F. Supp. 2d at 659. Even if Apple had been willing to tarnish its brand by offering bad value for money, the notion that customers would actually have bought e-books from Apple at the higher price defies the law of demand. Higher prices may stimulate sales of certain wines and perfumes—not e-books.

Nor could Apple justify higher prices for the e-books by competing on the basis of its new hardware, the iPad, because there is inter-operability among platforms. And if Apple had attempted to pursue this hardware-based competition by programming its iPad to run the

iBookstore but to reject Amazon's Kindle application, Apple might have been exposed to an entirely different antitrust peril. See *United States v. Microsoft Corp.*, 253 F.3d 34, 50-80 (D.C. Cir. 2001) (en banc); Google Android, No. 40099 (Eur. Comm'n Apr. 15, 2015) (antitrust proceedings brought by European Commissioner for Competition against Google for favoring Google's own applications on mobile devices that use Google's operating system).

Theory 3: Apple could have asked the Department of Justice to act against Amazon's monopoly.

Counsel for the United States actually proposed this at oral argument. At the same time, however, he conceded that the Department of Justice had already "noticed" Amazon's e-book pricing and had chosen not to challenge it because the government "regarded it as good for consumers." Any request from Apple would therefore have been futile. True, Apple could not have known that the Antitrust Division would have adopted the position that below-cost pricing is not a concern of antitrust policy: who could have guessed that the government would adopt a policy that is primitive as a matter of antitrust doctrine and illiterate as a matter of economics? Nevertheless, hindsight reveals that government antitrust enforcement against Amazon was not an option.

More fundamentally, litigation is not a *market* alternative. This observation has especial force in markets that are undergoing rapid technological advance, where the competitive half-life of a product is considerably more brief than the span of antitrust litigation. A requirement that potential market entrants litigate instead of enter the market on restrictive (but legal and reasonable) terms, would license monopoly for the duration.

Apple took steps to compete with a monopolist and open the market to more entrants, generating only minor competitive restraints in the process. Its conduct was eminently reasonable; no one has suggested a viable alternative. "What could be more perverse than an antitrust doctrine that discouraged new entry into highly concentrated markets?" *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 874 (7th Cir. 2015).

Application of the rule of reason easily absolves Apple of antitrust liability. That is why at oral argument the government analogized this case to a drug conspiracy, in which every player is a criminal—at every level, on every axis, whether big or small, whether new entrant or recidivist. The government found the analogy useful—and necessary—because in an all-criminal industry there is no justification or harbor under a rule of reason. ***

European Commission - Statement

Statement by Commissioner Vestager on antitrust decisions concerning Google

Brussels, 15 April 2015

*** Check against delivery ***

The Commission has today sent a Statement of Objections to Google. It outlines our preliminary view that Google's favourable treatment of its comparison shopping service, currently called "Google Shopping", is an abuse of Google's dominant position in general internet search. Google now has 10 weeks to respond. I will carefully consider its response before deciding how to proceed.

In parallel, on the basis of an initial investigation, the Commission has also today launched a formal in-depth investigation of Google's conduct as regards the mobile operating system Android, apps and services.

My goal is to ensure that consumers and innovative companies can benefit from a competitive environment in Europe. Where concerns are expressed about Google's conduct that can be addressed by EU competition law, I will approach the issues in a fair and objective way, on the basis of the evidence and in accordance with our rules.

Today's Statement of Objections

Since I took office last November, I have given high priority to the Google antitrust investigations. Given that we are dealing with fast moving markets, I have first updated the information in our files to make sure they reflect latest market developments. I have also met a broad range of players active in many markets, including Google. I am fully aware of the importance of these investigations and their relevance to consumers and market players. Let me say right away that one out of four individual companies that complained in this case is a US company. Companies from the US also play a major role in complaining business associations.

Google has had market shares of more than 90% in general internet search in most EU Member States for many years.

Dominance is, as such, not a problem under EU competition law. However, dominant companies have a responsibility not to abuse their powerful market position by restricting competition, either in the market where they are dominant or in neighbouring markets.

Today's Statement of Objections focuses on the preferential treatment by Google in its general search results of one of Google's own products: Its comparison shopping service, which allows consumers to search for products on online shopping websites and compare prices between different vendors.

Our preliminary view in the Statement of Objections is that in its general internet search results, Google artificially favours its own comparison shopping service and that this constitutes an abuse. Our investigation so far has shown that, when a consumer enters a shopping-related query in Google's search engine, Google's comparison shopping product is systematically displayed prominently at the top of the search results. This display is irrespective of whether it is the most relevant response to the query. Thus, Google's commercial product is not subject to the same algorithms as other comparison shopping services. Google has engaged in this conduct in a broad number of Member States since 2008, and continues to do so.

The commercial importance of appearing prominently in Google's general search results is obvious. I am concerned that Google has artificially boosted its presence in the comparison shopping market, with the result that consumers may not necessarily see the most relevant results in response to their queries, and Google's competitors may not get the commercial opportunities that their innovations deserve.

Therefore, our preliminary findings indicate that in the present case, dominance in one market is used to create an advantage in a related market. The advantage in the related market does not appear to reflect the merits of Google's comparison shopping service, but rather results from Google using its considerable power on the market in which it is dominant.

Our preliminary view is that to remedy this conduct, Google should treat its own comparison shopping service the same way in its general search results as its rivals. To be clear, we would not want to

interfere with Google's design choices or how its algorithms work. Rather, the purpose of such a potential remedy would be to ensure that consumers see the best comparison shopping results. They should not just be shown Google's own shopping results, if they are not the most relevant response to a particular query.

Today's Statement of Objections focuses on comparison shopping because that is the area where Google has been favouring its products in its search results for the longest period. However, we continue to look at the ways in which Google may also favour its other specialised search services. If an infringement is proven, a case focusing on comparison shopping could potentially establish a broader precedent for enforcing EU competition rules in other instances of Google favouring its own services over competing services.

The Commission has previously also expressed three other concerns as regards Google's conduct, namely its copying of rivals' web content (known as 'scraping'), exclusivity in its agreements with advertising partners and undue restrictions of advertisers' ability to use competing advertising platforms. We will continue our investigations into these concerns.

The Android investigation

As I mentioned, we are also launching a separate in-depth investigation regarding Android.

In recent years, smartphones and tablets have changed the way that consumers access the internet and the way that many companies do business. Mobile internet usage is growing rapidly and there is no reason to think that this will change in the coming years. I want consumers to benefit from the broadest range of mobile services and innovation in the sector.

The Commission has received complaints and also carried out an initial investigation on its own initiative. Today's launch of an in-depth investigation will give us the opportunity to examine in detail the allegations raised, in particular as regards three concerns:

1. We will look into Google allegedly requiring or incentivising smartphone and tablet manufacturers to exclusively pre-install Google's own applications or services, in particular Google's search engine;
2. We will look at the alleged bundling together of certain Google products with other apps and services;
3. We will investigate if Google is hindering the ability of manufacturers of smartphones or tablets, who want to use the Android operating system, from being able to use and develop other open-source versions of Android (so-called "Android forks").

These are issues distinct from the Google comparison shopping case, and their investigation will be separate.

Conclusion

Of course, there is great public interest in the Google antitrust cases because it affects so many people and companies. It is a great responsibility to be in charge of these investigations, and I can assure you that I am taking this very seriously. Needless to say, competition investigations are independent from politics and commercial interests. We will be exclusively guided by the facts, the evidence and by the EU's antitrust rules.

STATEMENT/15/4785

Press contacts

Ricardo CARDOSO (+32 2 298 01 00)
Yizhou REN (+32 2 299 48 89)
Carolina LUNA GORDO (+32 2 296 83 86)

General public inquiries:

Europe Direct by phone 00 800 67 89 10 11 or by email

European Commission - Fact Sheet

Antitrust: Commission sends Statement of Objections to Google on comparison shopping service

Brussels, 15 April 2015

The European Commission has sent a Statement of Objections to Google outlining the Commission's preliminary view that the company is abusing a dominant position, in breach of EU antitrust rules, by systematically favouring its own comparison shopping product in its general search results pages in the European Economic Area (EEA). The Commission is concerned that users do not necessarily see the most relevant results in response to queries – to the detriment of consumers and rival comparison shopping services, as well as stifling innovation.

Google has a dominant position in providing general online search services throughout the EEA, with market shares above 90% in most EEA countries.

Since 2002, Google has also been active in providing comparison shopping services, which allow consumers to search for products on online shopping websites and compare prices between different vendors. The first product it offered, "Froogle", was replaced by "Google Product Search", which in turn was replaced by its current product "Google Shopping".

The Statement of Objections outlines that the markets for general search and comparison shopping are two separate markets. In the latter market, Google faces competition from a number of alternative providers.

The Commission's preliminary conclusions in the Statement of Objections

The Statement of Objections alleges that Google treats and has treated more favourably, in its general search results pages, Google's own comparison shopping service "Google Shopping" and its predecessor service "Google Product Search" compared to rival comparison shopping services.

Google's conduct may therefore artificially divert traffic from rival comparison shopping services and hinder their ability to compete, to the detriment of consumers, as well as stifling innovation.

More specifically, the preliminary conclusions are:

- Google systematically **positions and prominently displays** its comparison shopping service in its general search results pages, **irrespective of its merits**. This conduct started in 2008.
- Google does not apply to its own comparison shopping service the **system of penalties**, which it applies to other comparison shopping services on the basis of defined parameters, and which can lead to the lowering of the rank in which they appear in Google's general search results pages.
- Froogle, Google's first comparison shopping service, did not benefit from any favourable treatment, and performed poorly.
- As a result of Google's **systematic favouring of its subsequent comparison shopping services** "Google Product Search" and "Google Shopping", both experienced **higher rates of growth**, to the detriment of rival comparison shopping services.
- Google's conduct has a **negative impact on consumers and innovation**. It means that users do not necessarily see the most relevant comparison shopping results in response to their queries, and that incentives to innovate from rivals are lowered as they know that however good their product, they will not benefit from the same prominence as Google's product.

The Statement of Objections takes the preliminary view that in order to remedy the conduct, Google should **treat its own comparison shopping service and those of rivals in the same way**. This would not interfere with either the algorithms Google applies or how it designs its search results pages. It would, however, mean that when Google shows comparison shopping services in response to a user's query, the most relevant service or services would be selected to appear in Google's search results pages.

Sending a Statement of Objections does not prejudge the outcome of the investigation. Google now has the opportunity to respond to the Commission's allegations outlined in the Statement of Objections within ten weeks. It can also seek an oral hearing to present comments. The Commission will fully respect Google's rights of defence and carefully consider its comments before taking a decision.

The Commission has previously outlined four concerns as regards Google's conduct. Today's Statement of Objections relates to the first of those concerns. In the context of that concern, the Commission continues to actively investigate Google's conduct as regards the alleged more favourable treatment of other specialised search services. The Commission also continues to actively investigate Google's conduct with regard to the other three concerns (copying of rivals' web content (known as 'scraping'), advertising exclusivity and undue restrictions on advertisers). The sending of a Statement of Objections in relation to comparison shopping does not in any way prejudge the outcome of the Commission's investigation of the other three concerns.

Procedural background on antitrust investigations

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits anticompetitive agreements and decisions of associations of undertakings. Article 102 TFEU prohibits the abuse of a dominant position which may affect trade and prevent or restrict competition. The implementation of these provisions is defined in the Antitrust Regulation (Council Regulation No 1/2003), which can be applied by the Commission and by the national competition authorities of EU Member States.

A statement of objections is a formal step in Commission investigations into suspected violations of EU antitrust rules. The Commission informs the parties concerned in writing of the objections raised against them. The addressees can examine the documents in the Commission's investigation file, reply in writing and request an oral hearing to present their comments on the case before representatives of the Commission and national competition authorities. The Commission takes a final decision only after the parties have exercised their rights of defence.

There is no legal deadline for the Commission to complete antitrust inquiries into anticompetitive conduct. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which the undertaking concerned cooperates with the Commission and the exercise of the rights of defence.

MEMO/15/4781

General public inquiries:
Europe Direct by phone 00 800 67 89 10 11 or by email

European Commission - Fact Sheet

Antitrust: Commission opens formal investigation against Google in relation to Android mobile operating system

Brussels, 15 April 2015

The European Commission has opened formal proceedings against Google to investigate in-depth if the company's conduct in relation to its Android mobile operating system as well as applications and services for smartphones and tablets has breached EU antitrust rules. The Commission will assess if, by entering into anticompetitive agreements and/or by abusing a possible dominant position, Google has illegally hindered the development and market access of rival mobile operating systems, mobile communication applications and services in the European Economic Area (EEA). This investigation is distinct and separate from the Commission investigation into Google's behaviour in internet search.

Since 2005, Google has led the development of the Android mobile operating system. In recent years, Android has become the leading operating system for smart mobile devices in the EEA, to the extent that today, the majority of smartphones in Europe are based on Android. Other mobile operating systems include Apple's iOS (which is proprietary to Apple and runs only on iPhones and iPads) and Windows Phone (which is used on Microsoft's and other manufacturers' smartphones and tablets).

Android is an open-source mobile operating system, meaning that it can be freely used and developed by anyone. The majority of smartphone and tablet manufacturers, however, use the Android operating system in combination with a range of Google's proprietary applications and services. In order to obtain the right to install these applications and services on their Android devices,manufacturers need to enter into certain agreements with Google.

The scope of the Commission's formal investigation

Following the receipt of two complaints, as well as an initial investigation carried out by the Commission on its own initiative, the Commission has now opened a formal investigation to assess if certain conditions in Google's agreements associated with the use of Android and Google's proprietary applications and services breach EU antitrust rules.

More specifically, on the basis of the information currently available to the Commission, the investigation will at this stage focus on the following three allegations:

1. whether Google has illegally hindered the development and market access of rival mobile applications or services by requiring or incentivising smartphone and tablet manufacturers to **exclusively pre-install Google's own applications or services**;
2. whether Google has prevented smartphone and tablet manufacturers who wish to install Google's applications and services on some of their Android devices from developing and marketing **modified and potentially competing versions of Android** (so-called "Android forks") on other devices, thereby illegally hindering the development and market access of rival mobile operating systems and mobile applications or services;
3. whether Google has illegally hindered the development and market access of rival applications and services by **tying or bundling certain Google applications and services** distributed on Android devices with other Google applications, services and/or application programming interfaces of Google.

The opening of formal proceedings does not prejudge the outcome of the investigation.

Procedural background

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits anticompetitive agreements and decisions of associations of undertakings.

Article 102 TFEU prohibits the abuse of a dominant position, which may affect trade and prevent or restrict competition. The Antitrust Regulation (Council Regulation No 1/2003) sets out how the Commission and the national competition authorities apply this provision.

Article 11(6) of the Antitrust Regulation provides that once the Commission has opened proceedings the national competition authorities can no longer apply the EU competition rules to the practices concerned. Moreover, Article 16(1) of the Antitrust Regulation provides that national courts must not

take any decision, which would conflict with a decision contemplated by the Commission in the context of formally opened proceedings.

There is no legal deadline to complete inquiries into anti-competitive conduct. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which the undertaking concerned cooperates with the Commission and the exercise of the rights of defence.

The Commission has informed Google and the national competition authorities that it has opened proceedings in this case.

MEMO/15/4782

General public inquiries:
Europe Direct by phone 00 800 67 89 10 11 or by email

European Commission - Press release

Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications

Brussels, 20 April 2016

The European Commission has informed Google of its preliminary view that the company has, in breach of EU antitrust rules, abused its dominant position by imposing restrictions on Android device manufacturers and mobile network operators.

The Commission's preliminary view is that Google has implemented a strategy on mobile devices to preserve and strengthen its dominance in general internet search. First, the practices mean that Google Search is pre-installed and set as the default, or exclusive, search service on most Android devices sold in Europe. Second, the practices appear to close off ways for rival search engines to access the market, via competing mobile browsers and operating systems. In addition, they also seem to harm consumers by stifling competition and restricting innovation in the wider mobile space.

The Commission's concerns are outlined in a Statement of Objections addressed to Google and its parent company, Alphabet. Sending a Statement of Objections does not prejudge the outcome of the investigation.

Commissioner Margrethe Vestager, in charge of competition policy, said: "*A competitive mobile internet sector is increasingly important for consumers and businesses in Europe. Based on our investigation thus far, we believe that Google's behaviour denies consumers a wider choice of mobile apps and services and stands in the way of innovation by other players,* in breach of EU antitrust rules. These rules apply to all companies active in Europe. *Google now has the opportunity to reply to the Commission's concerns.*"

Smartphones and tablets account for more than half of global internet traffic, and are expected to account for even more in the future. About 80% of smart mobile devices in Europe and in the world run on Android, the mobile operating system developed by Google. Google licenses its Android mobile operating system to third party manufacturers of mobile devices.

The Commission opened proceedings in April 2015 concerning Google's conduct as regards the Android operating system and applications. At this stage, the Commission considers that Google is dominant in the markets for **general internet search services**, **licensable smart mobile operating systems** and **app stores for the Android mobile operating system**. Google generally holds market shares of more than 90% in each of these markets in the European Economic Area (EEA).

In today's Statement of Objections, the Commission alleges that Google has breached EU antitrust rules by:

- requiring manufacturers to **pre-install Google Search and Google's Chrome browser** and requiring them to set Google Search as default search service on their devices, as a condition to license certain Google proprietary apps;
- preventing manufacturers from selling smart mobile devices **running on competing operating systems** based on the Android open source code;
- giving **financial incentives** to manufacturers and mobile network operators on condition that they exclusively pre-install Google Search on their devices.

The Commission believes that these business practices may lead to a further consolidation of the dominant position of Google Search in general internet search services. It is also concerned that these practices affect the ability of competing mobile browsers to compete with Google Chrome, and that they hinder the development of operating systems based on the Android open source code and the opportunities they would offer for the development of new apps and services.

In the Commission's preliminary view, this conduct ultimately harms consumers because they are not given as wide a choice as possible and because it stifles innovation.

The Commission's concerns

Licensing of Google's proprietary apps

The Commission's investigation showed that it is commercially important for manufacturers of devices using the Android operating system to pre-install on those devices the Play Store, Google's app store for Android. In its contracts with manufacturers, Google has made the licensing of the Play Store on Android devices conditional on Google Search being pre-installed and set as default search service. As a result, rival search engines are not able to become the default search service on the significant majority of devices sold in the EEA. It has also reduced the incentives of manufacturers to pre-install competing search apps, as well as the incentives of consumers to download such apps.

Similarly, in its contracts with manufacturers Google also required the pre-installation of its Chrome mobile browser in return for licensing the Play Store or Google Search. Thereby, Google has also ensured that its mobile browser is pre-installed on the significant majority of devices sold in the EEA. Browsers represent an important entry point for search queries on mobile devices. Thus, by reducing manufacturers' incentives to pre-install competing browser apps and consumers' incentives to download those apps, competition in both mobile browsers and general search has been adversely affected.

Anti-fragmentation

Android is an open-source system, meaning that it can be freely used and developed by anyone to create a modified mobile operating system (a so-called "Android fork"). However, if a manufacturer wishes to pre-install Google proprietary apps, including Google Play Store and Google Search, on any of its devices, Google requires it to enter into an "Anti-Fragmentation Agreement" that commits it not to sell devices running on Android forks.

Google's conduct has had a direct impact on consumers, as it has denied them access to innovative smart mobile devices based on alternative, potentially superior, versions of the Android operating system. For example, the Commission has found evidence that Google's conduct prevented manufacturers from selling smart mobile devices based on a competing Android fork which had the potential of becoming a credible alternative to the Google Android operating system. In doing so, Google has also closed off an important way for its competitors to introduce apps and services, in particular general search services, which could be pre-installed on Android forks.

Exclusivity

Google has granted significant financial incentives to some of the largest smartphone and tablet manufacturers as well as mobile network operators on condition that they exclusively pre-install Google Search on their devices.

Google has thereby reduced the incentives of manufacturers and mobile network operators to pre-install competing search services on the devices they market. In fact, the Commission has evidence that the exclusivity condition affected whether certain device manufacturers and mobile network operators pre-installed competing search services.

Background

For further details please see Factsheet.

This investigation is distinct and separate from the Commission's ongoing formal investigation under EU antitrust rules of other aspects of Google's behaviour in the EEA, including on the favourable treatment by Google in its general search results of its own other specialised search services, and concerns with regard to copying of rivals' web content (known as 'scraping'), advertising exclusivity and undue restrictions on advertisers.

Procedural background

Article 102 Treaty on the Functioning of the European Union (TFEU) prohibits the abuse of a dominant position which may affect trade and prevent or restrict competition. The implementation of this provision is defined in the Antitrust Regulation (Council Regulation No 1/2003), which can be applied by the Commission and by the national competition authorities of EU Member States.

Today, the Commission adopted a Decision to initiate proceedings in the Google Android investigation also against Alphabet Inc., Google's parent company, which was created after proceedings had been initiated against Google. The Statement of Objections summarised above is addressed to both Google and Alphabet Inc.

A statement of objections is a formal step in Commission investigations into suspected violations of EU antitrust rules. The Commission informs the parties concerned in writing of the objections raised against them. The addressees can examine the documents in the Commission's investigation file, reply in writing and request an oral hearing to present their comments on the case before representatives of the Commission and national competition authorities. Sending a Statement of Objections does not prejudge the outcome of the investigation, as the Commission takes a final decision only after the parties have exercised their rights of defence.

There is no legal deadline for the Commission to complete antitrust inquiries into anticompetitive conduct. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which the undertaking concerned cooperates with the Commission and the exercise of the rights of defence.

More information is available on the Commission's competition website, in the public case register under the case number 40099.

IP/16/1492

Press contacts:

Ricardo CARDOSO (+32 2 298 01 00)
Yizhou REN (+32 2 299 48 89)

General public inquiries: Europe Direct by phone 00 800 67 89 10 11 or by email

Attachments

Google_Android_infographic EN.pdf

Photos & Videos

image EN

European Commission - Fact Sheet

Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications – Factsheet

Brussels, 20 April 2016

The European Commission has informed Google of its preliminary view that the company has, in breach of EU antitrust rules, abused its dominant position by imposing restrictions on Android device manufacturers and mobile network operators.

The Commission's preliminary view is outlined in a Statement of Objections addressed to Google. It is also addressed to Alphabet, as it is standard practice for objections to also be addressed to the relevant parent company.

This Factsheet summarises key elements of the Commission's preliminary view set out in the Statement of Objections.

Sending a Statement of Objections does not prejudge the outcome of the investigation. Please also see press release.

Google's alleged market dominance

The Commission considers that Google is dominant in the markets for **general internet search services**, **licensable smart mobile operating systems** and **app stores for the Android mobile operating system**.

The Commission has considered a number of factors, including the following:

General internet search services

Google has market shares of 90% and above in most Member States.

*Licensable smart mobile operating systems****[1]***

- Google's market shares in the EEA for licensable mobile operating systems exceed 90%. Android is used on virtually all smartphones and tablets in the lower price range, which are bought by the majority of customers.
- There are a number of barriers to entry that protect Google's position, including so-called network effects (that is, the more consumers adopt an operating system, the more developers write apps for that system).
- Finally, Android users who wish to switch to other operating systems would face significant switching costs, such as losing their apps, data and contacts.

App stores for the Android mobile operating system

- The Play Store accounts for more than 90% of apps downloaded on Android devices in the EEA.
- Manufacturers find it commercially important to pre-install the Play Store on their devices. It is pre-installed on the large majority of Android devices in the EEA and is not available for download by end users. Also, end users cannot download other app stores from the Play Store.
- Android users would generally not switch to app stores for other operating systems as they would have to purchase a new device and would face significant switching costs.

[1]Android is a licensable operating system meaning that third party handset manufacturers can use it for their devices; as opposed to operating systems exclusively used by vertically integrated developers

The Commission's concerns

Licensing of Google's proprietary apps

The Commission's investigation showed that Google obliges manufacturers, who wish to pre-install Google's app store for Android, Play Store, on their devices, to also pre-install Google Search, and set it as the default search provider on those devices. In addition, manufacturers who wish to pre-install Google's Play Store or Search, also have to pre-install Google's Chrome browser. Thereby, Google has ensured that **Google Search and Google Chrome are pre-installed on the significant majority of devices sold in the EEA**.

Smartphone and tablet manufacturers should of course be able to provide consumers with an 'out-of-box' experience by selling their devices with a bundle of apps pre-installed. The Commission seeks to ensure that **manufacturers are free to choose which apps they pre-install on their devices**. This is especially important since the Commission's analysis has shown that consumers rarely download applications that would provide the same functionality as an app that is already pre-installed (unless the pre-installed app is of particularly poor quality).

In this context, the Commission's preliminary conclusion is that by imposing the above-mentioned conditions on manufacturers, Google limits manufacturers' freedom to choose the most appropriate apps to pre-install. This strategy appears to protect and strengthen Google's dominant position in general internet search, and adversely affect competition in the market for mobile browsers. The Commission has evidence that smartphone manufacturers would wish to source at least some of the apps that they pre-install from other parties than Google.

Anti-fragmentation

Android is an open-source system, meaning that it can be freely used and developed by anyone to create a modified mobile operating system (a so-called "Android fork"). The open-source model of course does not raise competition concerns – on the contrary. The Commission's concerns relate to the conditions for use of Google's proprietary apps and services on Android devices, which are not open source.

In particular, if a manufacturer wishes to pre-install Google proprietary apps, including Google Play Store and Google Search, on any of its devices, Google requires it to enter into an "Anti-Fragmentation Agreement" that **commits it not to sell devices running on Android forks**.

EU antitrust rules allow dominant companies to put in place restrictions only when they are objectively justified. However, to date, Google has not been able to show this in relation to the restrictions in the "Anti-Fragmentation Agreements".

Google's conduct has had a direct impact on consumers, as it has denied them access to innovative smart mobile devices based on alternative, potentially superior, versions of the Android operating system. The Commission has found evidence that Google's conduct prevented manufacturers from selling smart mobile devices based on a competing Android fork which had the potential of becoming a credible alternative to the Google Android operating system. In doing so, **Google has also closed off an important way for its competitors to introduce apps and services, in particular general search services,** which could be pre-installed on Android forks.

Exclusivity

Google has granted significant financial incentives to some of the largest smartphone and tablet manufacturers as well as mobile network operators on condition that they **exclusively pre-install Google Search** on their devices.

The Commission takes issue not with financial incentives in general but with the **conditions** associated with Google's financial incentives, in particular with the condition that the financial incentive is not paid if any other search provider than Google Search is pre-installed on smart mobile devices.

MEMO/16/1484

Press contacts:

Ricardo CARDOSO (+32 2 298 01 00)
Yizhou REN (+32 2 299 48 89)

General public inquiries: Europe Direct by phone 00 800 67 89 10 11 or by email

Clicks and More

Three quick items that may be of interest:

- *Google*. In early January, 2013, the U.S. Federal Trade Commission resolved its investigation of Google's search practices. While Google agreed to alter its practices in some ways, it avoided a formal FTC order.
- *Mergers*. Section 7 of the Clayton Act sets out the substantive statutory framework that applies to mergers in the United States. U.S. merger policy changed in important ways with the passage of the Hart-Scott-Rodino Act of 1976, which created a regime of pre-merger notification to the federal government of sizable merger transactions. The new act turned merger regulation away from litigation towards administrative negotiation. The Antitrust Division of the Department of Justice and the U.S. Federal Trade Commission have promulgated guidelines regarding how they evaluate mergers.