

Antitrust on the ‘G string’ What’s behind the Commission’s investigations of Google and Gazprom?

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The past few weeks have marked a shift of gear in EU antitrust enforcement. First, the new European Commissioner for Competition Margarethe Vestager announced on April 15th that the Commission had sent a Statement of Objections to Google, arguing that the giant IT company abused its dominant position in the “general Internet search” market and also in the market for mobile operating systems, apps and services. Exactly one week later, she also sent a Statement of Objections to Gazprom for having created artificial barriers to trade between certain EU countries, preventing gas flows and competition across national borders and charging unfair prices in five Central and Eastern European countries. It is indeed hard to recall any other time in which two investigations of this size – both potentially leading to billions of euros of fines – have been launched almost simultaneously. And commentators have also observed that both cases deal with non-EU companies and have been ongoing for several years before the Statements of Objections were actually filed. All this is happening at a time in which the European Commission, under the leadership of Jean Claude Juncker, is targeting the digital single market and the energy sector with large-scale industrial policy initiatives such as the new Digital Single Market Strategy, the Energy Union and of course the Juncker Plan. Does this signal that the European Commission is promoting a revival of protectionism, by using competition law as a sword against non-EU firms?

Let’s look at the facts first. In the case of Google, for more than four years, the previous Competition Commissioner Joaquim Almunia had tried to settle the case with the IT company, by asking it to offer commitments that would mitigate the Commission’s concerns and then testing them with Google’s market rivals. All attempts to settle the case have failed, notwithstanding repeated rounds of commitments presented by Google, some of which would have led to a major redesign of its search page to accommodate the results of competing vertical search providers. Four years down the road, only a subset of the early allegations formulated by Almunia seems to have survived in the Statement of Objections presented by the Commission, although the Commissioner has not excluded a broadening of the investigation. Ms Vestager, at least for now, is “only” accusing Google of having

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awarded preferential treatment to its own online comparison shopping service, to the detriment of competing services. By exploiting its very large share of the general search market, Google has thus allegedly leveraged its market power into a neighbouring market, thus foreclosing competitors from such market and thwarting competition on the merits.

In the case of Gazprom, things are even more serious, as the Commissioner argued that, based on preliminary evidence, “Gazprom’s overall strategy is abusive”. The giant gas company is accused of having partitioned the EU Single Market, through different territorial restrictions, including in contracts with its customers and also through other measures. Abusive conduct includes cases in which contracts prohibited Gazprom customers from re-exporting gas into other Member states; unfair (exploitative) pricing of gas in at least five member states (*Bulgaria, Estonia, Latvia, Lithuania and Poland*); and making gas supplies to Poland (concerning the Yamal-pipeline) and to Bulgaria (concerning the South-Stream pipeline) conditional on obtaining unrelated commitments from wholesalers concerning gas-transport infrastructure. As reported by the European Commission in its quarterly report on European Gas Markets, Gazprom’s gas prices significantly differ from country to country (for instance Lithuania paid 90% more than the Czech Republic in the first half of 2014)¹. This difference might result from: 1) different pricing formulae reflecting different market conditions and/or 2) the misuse of pricing formulae by Gazprom (for instance by resisting pressures to modify them in line with changing market realities, such as hub prices).

The two ‘Big Gs’ will now have the last chance to put forward their counter-arguments before the Commission takes a decision, arguably before the summer break. Both have rejected all allegations, claiming that they have been acting in conformity with EU rules. But the European Commission has never really changed its mind on any Article 102 TFEU case, nor has it ever accepted any counter-argument based on the efficiency of specific conduct, and seems unlikely to do so now. Accordingly, there are strong reasons to expect that both will receive heavy sanctions in a few weeks’ time.

But will these sanctions be truly based on competition law decisions? Or industrial policy decisions?

As a matter of fact, those who want to see, behind the two antitrust investigations, the very visible hand of government industrial policy will have abundant evidence to cite. In the case of Google, it is difficult to disentangle the current investigation from a number of recent events, which can only be briefly outlined in this commentary. Since last year, French and German institutions have repeatedly called on the European Commission to take action to split Google into two companies, as the European Parliament also recommended in November of last year. Second, the newly launched Digital Single Market strategy of the European Commission contains several provisions that are officially motivated by the need to reduce the power of the so-called “Internet monopolies”, starting with Google. Third, the French telecoms regulator has vigorously called for legislation that would impose neutrality obligations on large Internet platforms, starting obviously with Google but then reaching all the so-called GAFTAM (Google, Amazon, Facebook, Twitter, Apple, Microsoft). And the European Commission has now launched a sector inquiry into e-commerce, mostly focusing on whether large companies like Amazon are creating artificial barriers that prevent Europeans from buying goods from other member states. Not to mention ongoing tax investigations and allegations of privacy violation being charged against Facebook, Amazon, Apple and others. Even President Barack Obama joined the chorus a few weeks ago by explicitly stating that Europe seems to be behaving strategically against US tech giants,

¹ Special thanks go to CEPS Research Assistant Gergely Molnar for providing this information.

strangely enough as the two blocs are now negotiating a comprehensive free trade agreement (the TTIP).

For what concerns Gazprom, many have noticed that the Statement of Objections reached the Russian company's CEO when he was visiting Athens, and possibly offering Greece a key role in the Turkish Stream pipeline and potentially easing some of the pressure put on Greece by the Troika. Others have voiced the view that the investigation and the likely multi-billion euro fine adds to the already conspicuous sanctions imposed on Russia since the beginning of the Ukrainian crisis. Indeed, Gazprom has been under observation for its contractual practices in Eastern Europe for more than a decade, and a formal investigation has been in place since 2012, but still the Statement of Objections reached the giant gas company just as the EU launched its ambitious Energy Union, and in the middle of one of the worst economic crises in the recent history of Russia, which is making Gazprom weaker than usual vis-à-vis its biggest client (the EU).

The coming weeks will shed light on the real nature of these initiatives. To be sure, the two cases appear very different on their merits alone. On the one hand, there is amply documented, hardly surprising, almost 'smoking gun' evidence of Gazprom's misconduct, and if anything this raises concerns about the timing of the investigation, rather than its merit. On the other hand, the Google investigation will force the Commission into a complex and controversial probe, in which antitrust principles are likely to be stretched beyond their original scope, and which will likely stimulate a lively debate on the role of antitrust in cyberspace in the coming years. Absent proof to the contrary, one would conclude that these are going to be pure, "technical" antitrust cases, with no contamination from other policy domains. An alternative interpretation is that the EU institutions are taking a tougher stance against any large company that attempts to partition the Single Market to maximise profit, whether in e-commerce, gas or any other sector. Finally, a third hypothesis, certainly more scary but often explicitly invoked by EU politicians, is that this is the beginning of a revival of protectionism, albeit masked as competition law enforcement. Place your bet: the jury is still out.