

A REAL GOOGLE HIT! GOOGLE FINED BILLIONS FOR MISUSE OF MARKET POWER.

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Last month, the European Union's competition watchdog hit Google with a record €2.4 billion fine (AUD \$3.6 billion) following a landmark seven-year investigation into its online price-comparison shopping service. Given the reliance we have on huge digital players and market makers like Google and Amazon, it's important to look into this a little and see what we can learn from the investigation, the fine, and the way digital platforms operate.

What did Google do?

Google was found by the European Commission to have manipulated the search results appearing in their own search engine to favour their own price-comparison shopping service by demoting search results from rivals to areas where potential buyers were less likely to click (i.e. on page four of search results and beyond). Unsurprisingly, traffic to Google's products increased significantly, whilst rivals suffered substantial losses of traffic.

The European Commission found Google's practice of giving its own products an advantage by prominently displaying them on page one of search results was in breach of antitrust rules because it denied other companies the chance to compete on the merits and denied consumers genuine choice by steering them to Google's own shopping platform.

You may be thinking, "so what?" Isn't Google a public company, not a charity? Nobody is forcing consumers to use Google's products? These are fair questions, but there are also important considerations at law designed to protect consumers from misuse of market dominance by companies (FYI – in Australia we have "Misuse of Market Power" legislation, predominately covered by section 46 of the *Competition and Consumer Act 2010* (Cth)). Market dominance itself is not illegal under EU antitrust rules. However, like in Australia and elsewhere, market-dominant companies have a special responsibility not to abuse their powerful position by unfairly restricting or eliminating competition.

While the record fine is unlikely to put a huge dent in Google's \$90 billion cash stores (and we are yet to see if Google will appeal the ruling), it does send a message that the internet is not the Wild Wild West, and that regulators are making the most of their powers to more significantly shape company behaviour on the Internet – including for giants like Google, who now must redesign how search results are presented, or face the prospect of further significant fines.

The ruling also opens the door to legal action being taken against Google by competitors who were disadvantaged as a result of Google's conduct and we are yet to see if any companies will use this as an opportunity to take action.

What does this mean for Australia?

The Australian Competition and Consumer Commission (**ACCC**) regulates the *Competition and Consumer Act* – which as flagged above is the Australian equivalent of Europe's antitrust regulations – and is likely to have watched the Google case closely, having already challenged Google in recent years up to the High Court of Australia on its argument that Google's *Adwords* practices were misleading.

In contrast to the billion-dollar Google penalty, the ACCC acknowledges that the penalties it is able to attain in Australia are much more limited. As part of its compliance and enforcement priorities for 2017, the ACCC stated that it is working to ensure that penalties are sufficiently high, particularly against large companies in order to deter them from

breaching the law. In this respect, the ACCC has also taken a more aggressive approach in recent years to appeal Court-ordered penalties it considers too low.

As far as anti-competitive conduct in Australia is concerned, the ACCC has been somewhat hampered from pursuing such conduct because of laws considered deficient and inadequate to enable prosecutions to succeed.

Potential changes coming

Last year, the Turnbull Government introduced a package of legislation to amend Australian competition law following an investigation known as the Harper Review. One of the high-profile changes to the *Competition and Consumer Act* is to the “misuse of market power” provision in section 46, and the change is still before the Parliament.

Under the current section 46, corporations with substantial market power are prohibited from ‘taking advantage’ of that power for the purpose of eliminating or substantially damaging a competitor, preventing entry into a market, or deterring or preventing a person from engaging in competitive conduct. The Harper Review found that the ‘taking advantage’ element gave rise to difficulties in interpretation as it is uncertain, and additionally, not a useful test to distinguish competitive from anti-competitive conduct. Indeed, many of the section 46 cases that the ACCC has lost have turned on its failure to prove the ‘take advantage’ element. The current provision also does not meet the policy objectives of the Act as a whole, as it is directed towards harm to individual companies, rather than harm to the competitive process.

The new, re-framed section 46 would remove the ‘take advantage’ element and instead include a prohibition upon corporations with substantial market power from engaging in conduct which has the purpose, effect, or likely effect of substantially lessening competition in that or any other market. The effect of this change is that the ACCC no longer has to prove a company is taking advantage of its market power, or that its purpose is to reduce competition, but more simply, that its practices have the effect of reducing competition. If the Bill is passed (which seems likely as it is now before the Senate), the introduction of the changes to section 46 will make Australian laws more effective and potentially encourage the ACCC to bring relatively large actions in Australia against large corporations for misuse of market power. ACCC chairman Rod Sims has stated that the ACCC will be putting a special focus on making sure the new law is complied with, and will be monitoring this area very closely, looking for an opportunity to test out the new provision. This is certainly a ‘watch this space’ situation for now and we will be sure to let you know if changes are ultimately made.

What this means for you

As the ACCC continually gears up to pursue larger businesses, corporations that have a large footprint should seek advice about conduct likely to attract the regulator’s interest. Practices that can impact competitors or reduce consumers’ choice, like below cost or excessive pricing, refusals to deal, exclusivity or other similar conduct, should be considered closely to ensure companies are not at risk investigation or prosecution by the ACCC.

Contact us

If you have any concerns regarding your competitive strategy, get in touch with one of our experts below.

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