

Legal Regulation & Education: Doing the Right Thing?

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WHEN THE INVISIBLE HAND BECOMES VISIBLE: WHAT ROLE SHOULD COMPETITION LAW RULES PLAY IN SHAPING THE INTERNET?

The European Commission has taken numerous enforcement actions against high profile technology companies in recent years. Its action against Microsoft for failing to provide interoperability information for Windows OS to its competitors and for bundling Windows Media Player with Windows OS provoked severe criticism. In particular, it was argued that the European Commission was protecting competitors rather than competition by erroneously extended the circumstances in which a company with significant market power must trade with its competitors. More recently, in its pending investigation against Google, the European Commission alleges that Google is abusing its dominant position by, inter alia, departing from the 'blue links' format and displaying its own vertical search services in a different manner to those of competitors. From a consumer welfare perspective – the guiding standard in EU Competition law – the harm to consumers is difficult to articulate. In particular, the potential case against Google does not fit neatly into existing categories of abuse under Article 102 TFEU. Moreover, as the European Commission has resorted to the 'Commitment Decision' procedure in this instance, it is under no procedural obligation to articulate the claim against Google. Indeed, the commitments extracted to date bear a strong resemblance to regulatory requirements begging the question of whether the Competition rules are being used to circumvent the legislative procedure.

This paper will examine the merits of an action against Google on existing Competition Law grounds. It will be demonstrated that from a Competition law perspective, the Commission's case is weak as the likelihood of consumer harm is minimal. Implicit in the Commission's investigation of Google is the idea that Google is an essential facility. This paper will therefore examine whether the law in this instance is doing the 'right thing': should Google be treated as an essential facility for the purposes of Competition law? While from a fundamental rights perspective strong arguments exist for regulating the actions of Internet giants such as Google and Facebook, is Competition Law the correct instrument to achieve these desired outcomes?