



# Competition Policy, Innovation, and Growth

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## The link between competition and growth

Competition



Productivity



Growth

Competition (antitrust enforcement, liberalisation, market integration) contributes to productivity and economic growth.

- Internal productivity: competition induces firms to become more efficient to stay ahead of rivals.
- Sectoral productivity: competition allows high-productivity firms to replace laggards.
- Dynamic efficiency: competition pushes firms to invest and innovate.



## How does competition policy affect this scheme?

**Competition advocacy:** Promote market liberalisation and removal of entry barriers; foster a competition-friendly market culture.

### **Enforcement and deterrence:**

- Anticompetitive agreements and cartels (agreements among competitors raise prices but also decrease innovations)
- Abuse of dominance (internal growth is good but the level-playing field should be guaranteed) – *focus of this talk*
- Merger control (external growth should be allowed if efficiency gains outweigh market power effects)
- State Aid policy (correct market failure; avoid crowding out of private funds and distortions of the internal market)



## Abuse of dominance: Finding the right balance

Investments and innovations are driven by the desire of firms to make profits and be better than rivals

Important to avoid policies which may deprive innovators of their expected fruits; else, incentives to innovate are reduced/eliminated

But also, need to guarantee that other companies could later challenge today's innovators

(IPRs laws are themselves the product of this balancing exercise)

Competition policy should respect innovators' rights, but be vigilant, and intervene in exceptional circumstances (cfr. case-law on refusal to license; also, rare excessive price actions).



## Some examples of Art. 102 investigations at DG Comp

Pay for delay (*Cephalon, Lundbeck, Servier*)

Standard-Essential Patents (*Samsung, Motorola*)

Potential foreclosure of rivals (*Google*)



## Pay-for-delay (reverse payments) cases

Several cases in US and Europe: a pharmaceutical company holding a patent on a pharmaceutical product pays a rival generic company to settle a patent litigation, with the latter committing not to enter the market (or delay entry)

EU: *Cephalon, Lundbeck, Servier (and Fentanyl, but not patent litigation)*

US Supreme Court: in *FTC v. Actavis*, it rejected the 'scope-of-the-patent test' (under which agreement would be legal if terms fell within the exclusionary potential of patent), because patent are *probabilistic*, i.e., may be invalid.

Relevant evidence: if the amount paid is much higher than the patent holder's expected litigation costs, and than the generic's expected market profit, difficult not to infer that the potential competitor is paid off to exit the market.

Expected strength of patent may also be an indicator.



## Standard-Essential Patents (SEP) cases

Cases where the holder of a Standard-Essential Patent seeks (or threatens) an injunction against another firm, to extract higher payments

EU: *Samsung, Motorola*

Standards can be extremely beneficial: they create economies of scale and reduce barriers to entry by fostering interoperability.

But a firm which owns a SEP could hold up users. For this reason, owners of SEP should commit to license under FRAND (Fair, Reasonable, and Non-Discriminatory) terms.

By threatening an injunction to a willing licensee (which is ready to accept FRAND determination by a court or arbitrator), a SEP-holder contradicts its FRAND commitment.



## Google, I: anti-competitive concerns

Google's business practices under investigation concerned vertical search (see more below) and online advertising (exclusivity agreements and restrictions on advertisers)

- Specialised search services ("vertical" search) such as product, hotel, restaurant, flight, search engines: Google displayed own services more prominently than competitors', even if latter very relevant to consumers
- Concern that lower visibility would divert internet traffic away from Google's competitors, and may affect negatively consumers depriving them of new and better rivals' products





## Google, II: remedies

Commitment decision to restore competition in a fast-moving market

- Vertical search: Google commits to display three rival links in a comparable way to its own services (e.g., pictures)
  - Dynamic remedy (applies to changes in presentation)
  - Future proofing: any new vertical search services developed by Google will also be subject to the commitment
  - This restores visibility of competitors without need to interfere unduly with Google's property right and algorithm.
- Content providers have extensive opt-out from use of their content (so far, Google copied content without restrictions, benefiting e.g. from reviews made by rivals' customers)
- Online advertising: no exclusivity in agreements with publishers; advertisers can port campaigns on rival search advertising platforms
- Independent monitoring trustee will check compliance



## Google, III: Payment for inclusion of rivals

- When Google does not charge merchants for inclusion in its specialised search, natural search will select the three rivals
- When it does, the three rivals will be selected by a keyword-based real-time auction mechanism (combination of the *bid* and the *pCTR*, i.e., the predicted Click-Through Rate, an index of quality of the sites)
  - (i) Minimum bid at a low level
  - (ii) minimum quality requirement reasonable
  - (iii) pCTR computed by an objective machine-learning procedure – also supervised by the Trustee
- Per-click payment (no need of large fixed costs to win space)



## Google, IV: Payment, cont'd

- Auction is efficient mechanism to select among rival links
- Payment, to avoid the principle that rivals could have access for free to the dominant firm's property (rivals will have space that Google would have otherwise monetised)
- Auction is payment mechanism used in this industry
- If Google right from the beginning had auctioned off space to rival links, the complaints would have likely been dismissed immediately



## Google, V: Other preoccupations

- Google has attracted criticisms for other reasons
- Some may be dealt with Art. 102 provisions:
  - Preliminary investigation on Android
  - Decision on Motorola expected in the coming months
- Others are legitimate but competition provisions can do little or nothing about them:
  - Privacy concerns
  - Too little taxes paid; problem tax treatment of multi-nationals in general through tax rulings. We sent questionnaires to MSs (fact-finding exercise) to see if companies have selective advantages through taxation (state aid control)
  - Use of content of magazines and newspapers is covered by opt-out in remedies; other issues such as payments are copyright law/regulation issues



## CONCLUSIONS

- Competition (and competition enforcement) helps innovations and productivity
- I have focused on Art. 102 TFEU enforcement
- Important to intervene so as to maintain level-playing field, while respecting dominant firms' (intellectual) property rights as much as possible