

## Decision in case 1041/2015/OV on the European Commission's handling of a complaint relating to an alleged abuse of a dominant position by Google

Decision

**Case** 1041/2015/OV - **Opened on** 18/09/2015 - **Decision on** 26/10/2016 - **Institutions concerned** European Commission ( No maladministration found ) | European Commission ( Settled by the institution ) |

### Some terms used in this decision

**“Antitrust investigations”** are investigations carried out by the European Commission (DG Competition) into anticompetitive practices by companies on the EU market, such as abuse of a dominant position or cartels between competitors [1] . The applicable rules are set out in Regulation 1/2003 [2] (better known as the “Antitrust Regulation”) and the “Implementing Regulation” 773/2004 [3] .

**“Main investigation”** - refers to the investigation against Google concerning an alleged abuse by Google of its dominant position in “online search” including its “vertical search service”. This investigation was opened by the European Commission (under reference **COMP/AT.39740**) in November 2010 and was still ongoing at the date of the conclusion of this Ombudsman inquiry.

**“Market test”** - is a consultation procedure in competition cases (antitrust, merger and State aid) whereby interested parties are invited to submit comments within certain deadlines. Market tests are published in the Official Journal of the European Communities [\[4\]](#) [\[Link\]](#).

**“Pre-rejection letter”** is a letter whereby the Commission i) informs a complainant in an antitrust investigation that it has provisionally concluded that there are insufficient grounds to act on its complaint and ii) invites the complainant to submit observations or supplementary information within a set time-limit (Article 7(1) of Regulation 773/2004).

**“ Statement of objections”** is the letter whereby the Commission informs the company/companies investigated of the objections raised against them. It gives the companies the possibility to exercise their rights of defence (Article of Regulation 773/2004).

### The background to the complaint



1. The complainant, a French IT company which has developed an online search service called Woxxo, complained to the Ombudsman about how the European Commission was dealing with its complaint regarding the alleged abuse of a dominant position by Google.

2. The Commission had opened an investigation into an alleged abuse by Google of its dominant position in "online search" including its "vertical search services" (case **COMP/AT.39740**, the "main investigation"), in November 2010. In January 2011 the French company made a separate complaint to the Commission alleging that Google had abused its dominant position. The Commission registered the complaint under reference **COMP/C-3/39.885** and later informed the company that its complaint did not concern the practices covered by the main investigation.

3. In the context of the main investigation and in order to address the Commission's concerns, Google submitted three successive sets of proposed commitments to the Commission. In February 2014, on the basis of the feedback on the market tests on the first two sets of commitments, the then Commissioner for Competition announced that the Commission would move towards a decision on these commitments and send pre-rejection letters to the complainants in its main investigation. In parallel, the Commission on several occasions informed the French company that it would send it a pre-rejection letter on its complaint; it also stated that its complaint did not concern the practices covered by the main investigation. In March 2015, the company submitted a new complaint to the Commission. This complaint concerned the Commission's main investigation as well as the Commission's investigation of the French company's own earlier complaint. In April 2015, under the new Commissioner for Competition, the Commission sent a Statement of Objections to Google alleging that it had abused its dominant position in general internet search services. In May 2015, the Commission replied to the company's allegations and informed it again that it would send a pre-rejection letter. In June 2015, by which time it had not received any such letter, the company complained to the Ombudsman.

## The inquiry

4. The Ombudsman opened an inquiry into this complaint and identified the following six allegations:

- 1) There was a lack of transparency both in the Commission's main Google investigation and in its investigation of the French IT company's complaint;
- 2) The Commission refused to give the French company access to Google's observations on the company's complaint;
- 3) The Commission refused to take account of the company's views regarding Google's second set of commitments proposed in the context of the main Google investigation;



- 4) The Commission publicly released erroneous information;
  - 5) There were disproportionate and unjustified delays by the Commission in the handling of the company's complaint and in the sending of a pre-rejection letter;
  - 6) The former Competition Commissioner had been biased in his involvement in the main investigation as well as in the investigation of the company's complaint.
5. On 15 October 2015, the Ombudsman inspected the Commission's file. Shortly afterwards, the Commission sent a pre-rejection letter to the company (on 16 November 2015) and a further letter (on 18 November 2015) in which it explained why it considered that the company's complaint was not covered by the Commission's main investigation.

## 1) Alleged lack of transparency

6. The company alleged that, over a period of more than four years, the Commission had not kept it informed on how its complaint was being handled. In addition, the company alleged that the Commission i) never updated the list of the formal complainants in the main Google investigation, ii) failed to release the full version of its Preliminary Assessment in the main investigation, iii) failed to release Google's second and third sets of proposed commitments and iv) released different documents to the different "complainants" which meant that the parties had different levels of access to the relevant information.
7. The Ombudsman found that, throughout the period in question, the Commission had kept the complainant informed about the follow-up to its complaint. She also found that i) the relevant rules did not require the Commission to make public the names of complainants, ii) the full version of the Commission's Preliminary Assessment was not to be released to the complainant under the applicable rules, iii) the Commission did not commit maladministration by not making public Google's second and third sets of proposed commitments and iv) the Commission had given a reasonable explanation as to why all of the complainants in the main investigation had not been given the same documents. The Ombudsman thus found no maladministration with regard to this allegation.

## 2) Alleged refusal to grant access to Google's observations on the company's complaint

8. The company alleged that the Commission did not grant it access to Google's observations on its complaint.
9. The Ombudsman found that, when the Commission finally sent its pre-rejection letter to the company on 16 November 2015, it attached a copy of Google's observations on its complaint. The Ombudsman concluded that this allegation had thus been settled by the Commission.



### 3) Alleged refusal to take account of the company's views on Google's second set of commitments

**10.** The company alleged that the Commission did not give it the opportunity to respond to the second set of commitments proposed by Google in the context of the main investigation and therefore did not take its views into account.

**11.** The Ombudsman found that nothing prevented the company from submitting observations once the second set of commitments became public. Since the company had not submitted a reply to the first market test, the Ombudsman also found it reasonable that the Commission had not sent it the questionnaire relating to the second market test. Thus, the Ombudsman found no maladministration with regard to this allegation.

### 4) Alleged public release of erroneous information

**12.** The company alleged that a statement in a Commission Memo of 5 February 2014 was erroneous and false. In the Memo it was stated that "[t]he Commission asked feedback on that second proposal from all parties who had replied to the market test, and in addition all complainants and all other parties showing an interest in the case" (emphasis by the company). The company claimed that it had reacted to the market test but nevertheless was not asked for feedback on Google's second set of proposed commitments.

**13.** The Ombudsman found that the company had not sent a specific, formal reply to the market test. She therefore did not consider that the Commission's statement of 5 February 2014 was erroneous and accordingly found no maladministration concerning this allegation.

### 5) Alleged disproportionate and unjustified delays

**14.** The company argued that the investigation of its complaint should have been a priority for the Commission. The company alleged that 20 months after the Commission had first said it would send a pre-rejection letter, the letter had still not been sent. When the letter was finally sent, on 16 November 2015, the company maintained its view that there had been a disproportionate and unjustified delay.

**15.** The Ombudsman found that on several occasions (on 10 October 2013, 7 April 2014, 3 June 2014 and on 13 May 2015), the Commission had told the company that it would send it a pre-rejection letter. The Ombudsman raised this specific point during the inspection of the Commission's file on 15 October 2015 and one month later, on 16 November 2015, the Commission finally sent the pre-rejection letter to the company. It had therefore taken the Commission more than four and a half years to inform the company of the outcome of the complaint. The Ombudsman appreciated the company's concern that there had been an unjustified delay.



16. On the question of whether the Commission had informed the company of its position on the company's complaint within a reasonable timeframe, the Ombudsman noted that as early as 10 October 2013, the Commission had informed the company that it envisaged sending it a pre-rejection letter. This implied that the Commission had already formed a view on the complaint in the autumn of 2013. It is clearly regrettable that it took a further two years before a pre-rejection letter was finally sent. However, the Ombudsman also notes that the company's complaint was complex and that the Commission's limited resources were taken up with the main priority investigation which is still ongoing (in late 2016). The Commission's argument, that the timetable for non-priority cases was to a certain extent dependent on that of the priority cases, is reasonable. However, despite this, the Commission could have, at the very least, explained in greater detail, why the pre-rejection letter could not be sent. After the Ombudsman's intervention, the Commission finally sent the company the pre-rejection letter. The Ombudsman thus concluded that the Commission did take measures to resolve the problem albeit belatedly.

## 6) Alleged bias on the part of the former Competition Commissioner

17. The company alleged that the former Commissioner had abused his position by taking a biased view in the Google investigation, thus jeopardising the handling of that investigation as well as of the company's own complaint.

18. The Ombudsman found that the company did not put forward any tangible evidence to support its view that the Commissioner was biased. She thus found no evidence of maladministration as regards this allegation.

## Conclusions

On the basis of her inquiry into this complaint, the Ombudsman closes it with the following conclusions:

**There has been no maladministration by the Commission with regard to allegations 1), 3), 4) and 6).**

**Allegations 2) and 5) have been dealt with and resolved by the Commission.**

Emily O'Reilly

European Ombudsman

[1] [Link] [http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html)

[2] [Link] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the



rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], OJ 2003 L 1, p. 1.

[3] [\[Link\]](#) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123, p. 18.

[4] [\[Link\]](#) Article 27(4) of the Antitrust Regulation.

## Summary of Decision in case 1041/2015/OV on the European Commission's handling of a complaint relating to an alleged abuse of a dominant position by Google

*The complaint concerns how the European Commission dealt with a complaint from a French IT company about the alleged abuse of a dominant position by Google.*

### Some terms used in this decision

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**“ Statement of objections”** is the letter whereby the Commission informs the



company/companies investigated of the objections raised against them. It gives the companies the possibility to exercise their rights of defence (Article of Regulation 773/2004).

## The background to the complaint

1. The complainant, a French IT company which has developed an online search service called Woxxo, complained to the Ombudsman about how the European Commission was dealing with its complaint regarding the alleged abuse of a dominant position by Google.

2. The Commission had opened an investigation into an alleged abuse by Google of its dominant position in "online search" including its "vertical search services" (case **COMP/AT.39740**, the "main investigation"), in November 2010. In January 2011 the French company made a separate complaint to the Commission alleging that Google had abused its dominant position. The Commission registered the complaint under reference **COMP/C-3/39.885** and later informed the company that its complaint did not concern the practices covered by the main investigation.

3. In the context of the main investigation and in order to address the Commission's concerns, Google submitted three successive sets of proposed commitments to the Commission. In February 2014, on the basis of the feedback on the market tests on the first two sets of commitments, the then Commissioner for Competition announced that the Commission would move towards a decision on these commitments and send pre-rejection letters to the complainants in its main investigation. In parallel, the Commission on several occasions informed the French company that it would send it a pre-rejection letter on its complaint; it also stated that its complaint did not concern the practices covered by the main investigation. In March 2015, the company submitted a new complaint to the Commission. This complaint concerned the Commission's main investigation as well as the Commission's investigation of the French company's own earlier complaint. In April 2015, under the new Commissioner for Competition, the Commission sent a Statement of Objections to Google alleging that it had abused its dominant position in general internet search services. In May 2015, the Commission replied to the company's allegations and informed it again that it would send a pre-rejection letter. In June 2015, by which time it had not received any such letter, the company complained to the Ombudsman.

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4. The Ombudsman opened an inquiry into this complaint and identified the following six allegations:

1) There was a lack of transparency both in the Commission's main Google investigation and in its investigation of the French IT company's complaint;

2) The Commission refused to give the French company access to Google's observations on



the company's complaint;

3) The Commission refused to take account of the company's views regarding Google's second set of commitments proposed in the context of the main Google investigation;

4) The Commission publicly released erroneous information;

5) There were disproportionate and unjustified delays by the Commission in the handling of the company's complaint and in the sending of a pre-rejection letter;

6) The former Competition Commissioner had been biased in his involvement in the main investigation as well as in the investigation of the company's complaint.

5. On 15 October 2015, the Ombudsman inspected the Commission's file. Shortly afterwards, the Commission sent a pre-rejection letter to the company (on 16 November 2015) and a further letter (on 18 November 2015) in which it explained why it considered that the company's complaint was not covered by the Commission's main investigation.

## **1) Alleged lack of transparency**

6. The company alleged that, over a period of more than four years, the Commission had not kept it informed on how its complaint was being handled. In addition, the company alleged that the Commission i) never updated the list of the formal complainants in the main Google investigation, ii) failed to release the full version of its Preliminary Assessment in the main investigation, iii) failed to release Google's second and third sets of proposed commitments and iv) released different documents to the different "complainants" which meant that the parties had different levels of access to the relevant information.

7. The Ombudsman found that, throughout the period in question, the Commission had kept the complainant informed about the follow-up to its complaint. She also found that i) the relevant rules did not require the Commission to make public the names of complainants, ii) the full version of the Commission's Preliminary Assessment was not to be released to the complainant under the applicable rules, iii) the Commission did not commit maladministration by not making public Google's second and third sets of proposed commitments and iv) the Commission had given a reasonable explanation as to why all of the complainants in the main investigation had not been given the same documents. The Ombudsman thus found no maladministration with regard to this allegation.

## **2) Alleged refusal to grant access to Google's observations on the company's complaint**

8. The company alleged that the Commission did not grant it access to Google's observations on its complaint.





9. The Ombudsman found that, when the Commission finally sent its pre-rejection letter to the company on 16 November 2015, it attached a copy of Google's observations on its complaint. The Ombudsman concluded that this allegation had thus been settled by the Commission.

### **3) Alleged refusal to take account of the company's views on Google's second set of commitments**

10. The company alleged that the Commission did not give it the opportunity to respond to the second set of commitments proposed by Google in the context of the main investigation and therefore did not take its views into account.

11. The Ombudsman found that nothing prevented the company from submitting observations once the second set of commitments became public. Since the company had not submitted a reply to the first market test, the Ombudsman also found it reasonable that the Commission had not sent it the questionnaire relating to the second market test. Thus, the Ombudsman found no maladministration with regard to this allegation.

### **4) Alleged public release of erroneous information**

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Commission's file on 15 October 2015 and one month later, on 16 November 2015, the Commission finally sent the pre-rejection letter to the company. It had therefore taken the Commission more than four and a half years to inform the company of the outcome of the complaint. The Ombudsman appreciated the company's concern that there had been an unjustified delay.

16. On the question of whether the Commission had informed the company of its position on the company's complaint within a reasonable timeframe, the Ombudsman noted that as early as 10 October 2013, the Commission had informed the company that it envisaged sending it a pre-rejection letter. This implied that the Commission had already formed a view on the complaint in the autumn of 2013. It is clearly regrettable that it took a further two years before a pre-rejection letter was finally sent. However, the Ombudsman also notes that the company's complaint was complex and that the Commission's limited resources were taken up with the main priority investigation which is still ongoing (in late 2016). The Commission's argument, that the timetable for non-priority cases was to a certain extent dependent on that of the priority cases, is reasonable. However, despite this, the Commission could have, at the very least, explained in greater detail, why the pre-rejection letter could not be sent. After the Ombudsman's intervention, the Commission finally sent the company the pre-rejection letter. The Ombudsman thus concluded that the Commission did take measures to resolve the problem albeit belatedly.

## **6) Alleged bias on the part of the former Competition Commissioner**

17. The company alleged that the former Commissioner had abused his position by taking a biased view in the Google investigation, thus jeopardising the handling of that investigation as well as of the company's own complaint.

18. The Ombudsman found that the company did not put forward any tangible evidence to support its view that the Commissioner was biased. She thus found no evidence of maladministration as regards this allegation.

## **Conclusions**

On the basis of her inquiry into this complaint, the Ombudsman closes it with the following conclusions:

**There has been no maladministration by the Commission with regard to allegations 1), 3), 4) and 6).**

**Allegations 2) and 5) have been dealt with and resolved by the Commission.**

Emily O'Reilly



European Ombudsman

[1] [http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html)

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], OJ 2003 L 1, p. 1.

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[4] Article 27(4) of the Antitrust Regulation.

## **FULL DECISION in case 1041/2015/OV on the European Commission's handling of a complaint relating to an alleged abuse of a dominant position by Google**

### **The background to the complaint**

1. The complainant, a French IT company, which developed an online search service called Woxxo, complained to the Ombudsman about the European Commission's handling of its complaint about the alleged abuse of a dominant position by Google.
2. The Commission had opened an investigation into an alleged abuse by Google of its dominant position in "online search" services, including its "vertical search services", on 30 November 2010, following a number of complaints from other IT companies. (case **COMP/AT.39740** ).
3. In January 2011, the French IT company lodged a separate complaint to the Commission alleging that Google had abused its dominant position. Its complaint mainly concerned the advertising system "AdWords" and the alleged artificial lowering of the "quality score" of search services that competed with Google. On 1 April 2011, the Commission acknowledged receipt of the complaint under reference **COMP/C-3/39.885 (Interactive Lab/Google)** . This was a separate registration number to that of the main investigation. The Commission told the French IT company that its complaint did not concern the practices covered by its main investigation.
4. After receiving Google's observations on the French IT company's complaint, the



Commission wrote to the company on 15 March 2012 requesting it to reply to a questionnaire relating to "AdWords". The company replied on 2 April 2012.

**5.** In the context of its main investigation, the Commission asked Google to offer remedies/commitments, which would allow the Commission to resolve its concerns through the adoption of a "commitment decision", rather than a decision imposing fines and remedies. In March 2013, the Commission sent Google a preliminary assessment setting out its concerns in the context of its main investigation and asked Google to propose commitments that would address these concerns.

**6.** The French IT company sent further material to the Commission in March 2013 and wrote to the Commission calling for a more holistic approach to Google's practices in the context of its investigation.

**7.** On 25 April 2013, a summary of Google's commitments was published in the Official Journal, with a full version on the dedicated webpage of the Commission's Directorate

General for Competition [1]. The Commission also launched a "market test" on that date, in which it invited complainants, third parties and members of the public to comment on the proposed commitments.

**8.** The French IT company wrote an e-mail to the Commission on 26 April 2013, asking whether the proposed commitments related to its complaint. The Commission replied on 8 May 2013 that the proposed commitments did not directly concern the French IT company's complaint, which was being investigated independently. The company responded that it would not reply in detail to the market test but that its letter of 28 March 2013 to the Commission summarised its position on the consultation.

**9.** The Commission announced on 28 May 2013 that the results of the market test were negative and that Google would have to improve its commitments in order to satisfy the Commission's competition concerns.

**10.** In a telephone conversation of 10 October 2013, the Commission informed the French IT company that it intended to send a "pre-rejection letter" relating to the company's complaint in the following weeks.

**11.** On 21 October 2013, Google submitted a revised set of commitments to the Commission, following which the Commission sent a request for observations to 125 addressees (not including the French IT company). This market test was not open to all and was not published in the Official Journal; neither were the revised commitments. However, the commitments and the questionnaire were made public by some of those who were consulted. On 20 December 2013, the Commission announced that the revised commitments were unsatisfactory and would have to be improved.

**12.** A third revision of Google's proposed commitments was submitted on 31 January 2014 but



this was not published by the Commission. In February, the then Commissioner for Competition, Mr Almunia, stated that this revision addressed the core concerns and could be the basis for a decision based on commitments. The Commission considered that the views of the relevant stakeholders were already sufficiently known from the previous two consultations/market tests and that there was therefore no need for a new market test. As a result the Commission engaged solely with the 18 formal complainants in the case (not including the French IT company). On 14 February 2014, Google published its third set of commitments on its official blog, expressing satisfaction that an agreement had been found.

**13.** On 28 March and 4 April 2014, the French IT company asked the Commission to inform it about the timing of the pre-rejection letters. On 7 April 2014, the Commission replied that it could not provide a precise timetable. The French IT company repeated its request on 16 May and 2 June 2014. On 3 June 2014, the Commission replied that the company's complaint did not concern the practices covered by the main investigation and that it would therefore not receive a pre-rejection letter in that context, but one related to its own specific complaint. The Commission then sent pre-rejection letters only to the 18 complainants in the main investigation.

**14.** On 12 September 2014, the Commission stated that it had received significant new arguments from third parties on the proposed commitments that needed to be analysed.

**15.** A new Commission took office on 1 November 2014, with Ms Vestager appointed Commissioner for Competition, replacing Mr Almunia.

**16.** On 11 February 2015, the French IT company submitted an initial complaint to the Ombudsman ( **291/2015/AN** ). At that time, the Commission had not yet sent it a pre-rejection letter. The company made the following six allegations with several corresponding claims:

1) *Lack of transparency* : It alleged that the Commission's main Google investigation was not transparent as the Commission had not released either the full version of its preliminary assessment or the second and third sets of proposed commitments. It also complained that the Commission had released different documents to different complainants.

2) *Failure to grant access to fundamental documents* : The company stated that when the Commission requested further information from the company on 15 March 2012, it had failed to enclose Google's observations on its complaint.

3) *Failure to give the company an opportunity to express its views (with regard to the second set of commitments)* : The Commission failed to give the company the opportunity to make observations in the context of the Commission's request for information of 28 October 2013 on the second set of commitments in the main investigation, in spite of the company being concerned, indirectly at least.

4) *Public release of erroneous information*: The company alleged that the Commission's statement of 5 February 2014 - namely that "[t]he Commission asked feedback on that second proposal from all parties who had replied to the market test, and in addition all complainants



and all other parties showing an interest in the case" (emphasis by the company) - was erroneous and false, since the company had not been asked for feedback.

5) *Disproportionate and unjustified delays* : The company alleged that it had not been informed about the outcome of the complaint it had submitted four years earlier (in January 2011) and had not yet received the pre-rejection letter of which it had been notified.

6) *Bias on the part of the former Commissioner* : The company claimed that the Commissioner had abused his position by taking a biased view in the main investigation as well as in the investigation of its complaint.

17. The Ombudsman informed the company that its complaint was inadmissible as it had not first put the complaint to the Commission.

18. The company therefore asked the new Competition Commissioner to respond to its allegations and claims on 19 March 2015. On 13 May 2015, the Commission sent the French IT company the following detailed comments on the six allegations and the claims:

*1) Alleged lack of transparency:*

The Commission's response stated that Regulation 1/2003 and Implementing Regulation 773/2004 impose legal obligations on the Commission as regards its communications with complainants. The Commission also follows the practices set out in the *Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU Communication* [2] . The Commission noted that the company had not referred to any provision of these rules and guidelines which had allegedly been infringed.

The Commission denied the company's allegation that the Commission had been in contact with it only on two occasions since January 2011 (namely the acknowledgement of receipt of 1 April 2011 and the request for further information of 15 March 2012). It stated that it had numerous e-mail exchanges with the company about the complaint.

Regarding its position that the company's complaint was not covered by the main Google investigation, the Commission said that it had made clear that its investigation concerned practices linked to "vertical search services" only. Since the French IT company does not offer such a service, the main investigation was not relevant to it.

The Commission further argued that its investigation was carried out in a very transparent manner and went beyond the Commission's obligations in such cases (the Commission's antitrust procedures are normally not conducted publicly). The Commission noted that:

- The Commission's policy is not to reveal the names of complainants in antitrust procedures;
- The Commission's preliminary assessment is not made public during the investigation;



- The second and third set of commitments were made public and are available on the internet;
- Given the specificity of each complaint, it is normal that complainants who received a pre-rejection letter (under Article 7(1) of the Implementing Regulation) did not all receive the same document, since, under Article 8(1) "Access to information" of the Implementing Regulation, the Commission informs the complainants of the documents on which it bases its provisional assessment.

*2) Alleged failure to grant access to fundamental documents:*

The Commission noted that it had already apologised for this mistake. On the question of whether Google's observations should have been communicated to the company, the Commission stated that there is no legal basis for this. It added that the Commission's investigation is not an adversarial procedure between the complainant and the company subject to a complaint. It is for the Commission to decide how to investigate.

*3) Alleged failure to give the company an opportunity to express its views:*

The Commission stated that since the second set of commitments had been made public, nothing prevented the company from submitting observations.

Regarding the company's statement that the commitments could concern its complaint, the Commission noted that it had made clear, in its e-mail reply to the company on 8 May 2013, that the commitments did not directly concern the company's complaint. The Commission stated that there was a clear distinction between the two cases. The Commission's main Google investigation related only to "vertical search services", which the company did not offer, thus the commitments were not relevant to the company.

*4) Public release of allegedly erroneous information:*

The Commission stated that its press release of 5 February 2014, announcing a third set of commitments from Google, correctly presented the facts. The Commission therefore did not publish erroneous information. The Commission pointed out that the company had not replied to the market test and is not a formal complainant in the main investigation.

*5) Disproportionate and unjustified delays:*

The Commission stated that an antitrust investigation is dependent on available resources. The Commission had received many complaints about Google's practices and none of the resulting inquiries – including those considered urgent - have yet been finalised. The IT company was therefore not treated unfairly.

*6) Bias on the part of the former Commissioner:*

The Commission stated that this allegation concerned the Commissioner in his private capacity.



It pointed out that the Commissioner had left the Commission and that the Commission could not take a position on his behalf. However, the Commission stated its view that the former Commissioner had exercised his functions diligently and impartially.

**19.** As regards the company's complaint against Google, the Commission stated that it had properly examined the case and determined it was not a priority case. It said that it intended to reject the complaint and that, in the coming months, it would send a pre-rejection letter. It also noted that the timing of non-priority cases was, to a certain extent, set by the progress of priority cases.

**20.** On 20 May 2015, the company challenged the Commission's claim that the main investigation into vertical search services did not concern it. The company asked the Commission to explain why its Woxxo service was not considered a vertical search service. On 12 June 2015, the Commission replied that it would take a view on the matter shortly.

**21.** The company submitted a new complaint ( **1041/2015/OV** ) to the Ombudsman on 19 June 2015 reiterating the six allegations in its initial complaint, with some modifications.

## The inquiry

**22.** On 18 September 2015, the Ombudsman opened an inquiry into this complaint and identified - in summary [3] - the following six allegations:

- 1) There was a lack of transparency in the Commission's main Google investigation and its investigation of the French IT company's complaint;
- 2) The Commission failed to grant access to Google's observations on the company's complaint;
- 3) The Commission failed to give the company an opportunity to express its views with regard to the second set of commitments in the context of the main investigation;
- 4) The Commission publicly released erroneous information;
- 5) There were disproportionate and unjustified delays by the Commission in the handling of the company's complaint and in the sending of a pre-rejection letter;
- 6) The former Competition Commissioner was biased in the conduct of the main investigation as well as in the investigation of the company's complaint.

**23.** At the outset of her investigation, the Ombudsman pointed out to the Commission that the company had still not received a pre-rejection letter, despite being informed on numerous occasions in 2013-14 that it would. The Ombudsman proceeded to inspect the Commission's file on the company's complaint against Google (COMP/C-3/39.885) on 15 October 2015. In





November, the Commission sent two letters to the company: a pre-rejection letter [4] and a letter explaining why it considered that the complaint was not covered by the Commission's main investigation [5]. On 20 November 2015, the company sent its observations to the Ombudsman and, on 14 December 2015, its comments on the Commission's pre-rejection letter. On 11 March 2016, the Commission told the company that it could not provide a date for the next stage in its investigation of its complaint, which would take place in the coming months.

#### Preliminary remarks

**24.** The Ombudsman will deal only with the six allegations put forward by the company in its complaint of 19 June 2015, and which relate to the handling of the complaint from a procedural point of view. The Commission's main investigation is still ongoing. The complainant's extensive comments concerning the substance of the Commission's legal assessment of its complaint are not covered by the initial complaint and are not part of this inquiry.

**25.** The Ombudsman notes that the relevant procedural rules applying to complainants in antitrust procedures are set out in four documents: i) EU Antitrust Regulation 1/2003; ii) Implementing Regulation 773/2004; iii) the *Commission Notice on the handling of complaints by the Commission under Articles [101 and 102 TFEU]* ('Commission Notice on the handling of complaints'); and iv) the *Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU* ('Commission Notice on best practices').

**26.** The Ombudsman notes that the French IT company is not, according to the Commission, a formal complainant [6] in the context of the Commission's main Google investigation opened on 30 November 2010 (case COMP/AT.39740). This means that, for the Commission, the French IT company is a complainant only in case COMP/C-3/39.885 (Interactive Lab/Google). The consequence of not being considered by the Commission as a formal complainant [7] in case COMP/AT.39740 is that the French IT company does not have corresponding rights regarding access to information.

## 1) Alleged lack of transparency

#### Arguments presented to the Ombudsman

**27.** The company alleged that the Commission did not keep it informed of the follow-up to its complaint for more than four years, with the exception of the acknowledgement of receipt of 1 April 2011 and the request for further information of 15 March 2012.

**28.** The company also claimed that the Commission: i) never updated the list of the formal complainants in the main Google investigation; ii) failed to release the full version of its Preliminary Assessment; iii) failed to release Google's second and third set of proposed commitments; and iv) released different documents to the different complainants, which meant not all parties had access to the same information.



## The Ombudsman's assessment

**29.** The Ombudsman finds that the Commission did keep the company informed about the follow-up to its complaint, notably via its e-mails/letters of 15 March 2012, 8 May 2013, 7 and 15 October 2013, 7 April 2014, 8 May 2014, 3 June 2014 and 19 December 2014. Therefore, the Ombudsman does not agree that there was a lack of transparency on the part of the Commission in this regard.

**30.** Regarding *the alleged failure to update the list of formal complainants* in the main investigation, the Commission states that its policy is not to reveal the names of complainants in antitrust procedures. The Ombudsman notes that Regulation 1/2003 and the Implementing Regulation do not require the Commission to make the names of complainants public. The Ombudsman also notes that complainants in antitrust cases are entitled to expect that their identities are kept confidential, especially given the risk of retaliatory action. The Ombudsman thus finds no maladministration in this regard.

**31.** Regarding *the alleged failure to release the full version of the Commission's Preliminary Assessment*, the Commission argued that Preliminary Assessments are not made public during investigations. According to the Commission Notice on best practices, the Preliminary Assessment is sent only to the party (undertaking) under investigation [8] and not to the complainants. Thus, even if the French IT company were a complainant in Case COMP/AT.39740, it would have no formal right of access to the Preliminary Assessment. Furthermore, the Ombudsman notes that the company did not make a request for public access to the document under Regulation 1049/2001, nor did it request a review of the Commission's letter of 13 May 2015. In addition, the Commission issued a press release on 21 May 2012 setting out the main competition concerns identified by the Commission [9], which were likely drawn from its Preliminary Assessment. The Ombudsman considers that this voluntary release of information was reasonable and thus finds no maladministration in this regard.

**32.** Regarding *the alleged failure to release Google's second and third set of proposed commitments*, the Ombudsman finds the Commission's statement, that they were made public and are available on the internet, to be slightly misleading. This statement could be understood to imply that the Commission itself published the commitments. However, the second and third sets of commitments were not made public by the Commission, but by other parties (namely by some of the addressees of the questionnaire and/or by Google itself).

**33.** Under the applicable rules and guidelines [10], the Commission was clearly obliged to publish the main content of the first set of commitments when it launched the market test, an obligation it complied with. However, as regards whether the Commission itself should have published (the main content of) the second and third sets of commitments, as it did when it launched the market test on the first set of commitments, the applicable rules and guidelines are not explicit [11]. It would appear that the full market test procedure needs to be repeated only if the initial commitments are altered in nature/scope.

**34.** In the present case, the second set of commitments was not subjected to a full market test



but to a request for further information, sent on 28 October 2013 to 125 addressees. Similarly, in his statement of 5 February 2014, the then Commissioner pointed out that there was no requirement to conduct a new market test on the third set of commitments, since the structure of the commitments remained unchanged. Against this background, and in the absence of any evidence put forward by the company that the second and third sets of commitments altered the nature/scope of the Commission's investigation, the Ombudsman finds that the Commission did not commit any maladministration by not publishing the second and third sets of commitments.

**35.** As regards *the allegation that the Commission released different documents to different complainants*, the Ombudsman is satisfied that there was no maladministration in this regard. The Commission gives the reasonable explanation that, given the specificity of each complaint, it is normal to send a pre-rejection letter tailored to the specific issues raised by the different recognised complainants.

## 2) Alleged failure to grant access to Google's observations on the company's complaint

### Arguments presented to the Ombudsman

**36.** The company alleged that the Commission had acted unfairly in failing to enclose Google's observations on its complaint when it requested further information from the company on 15 March 2012. The company argued that, although there is no legal basis obliging the Commission to transmit the observations on its complaint, neither is there any prohibition on doing so.

**37.** The Commission released Google's observations on the company's complaint as an annex to its pre-rejection letter of 16 November 2015. In its observations on the pre-rejection letter, the company stated that this part of its complaint was now settled.

### The Ombudsman's assessment

**38.** While complainants have certain formal rights of access to information throughout the proceedings, these rights are not absolute [12]. Outside of these formal requirements, the Commission has broad discretion as regards the extent to which it keeps complainants informed throughout the procedure. The Commission may ask complainants to comment on specific information during an investigation procedure, but it is not formally obliged to do so [13]. There is no requirement on the Commission to communicate the observations received from the undertaking(s) complained about to the complainant during the investigation. Since the investigation in question is not adversarial in nature, the Ombudsman considers it reasonable that the observations received from the undertaking complained about were not communicated to the company complaining.

**39.** When the Commission finally sent its pre-rejection letter to the company on 16 November 2015, it also attached a copy of Google's observations on its complaint. As the company



considered that this part of its allegation had been resolved, the Ombudsman concludes that this matter has been settled.

### 3) Alleged failure to give the company the opportunity to express its views with regard to Google's second set of commitments

Arguments presented to the Ombudsman

**40.** The company alleged that the Commission never published or sent it Google's second set of commitments or the related questionnaire, which was sent to the 125 addressees. As a result, the company could not make any comments on the second set of commitments, unlike the 125 addressees to whom the questionnaire was sent. The company stated that it had asked to be consulted on the second set of commitments because the remedies proposed had a bearing on its own complaint. It claimed that DG Competition wished to prevent it from taking part in the consultation of interested parties and that, by not being consulted on the second set of commitments, it was not treated objectively, in violation of the Charter of Fundamental Rights and the European Code of Good Administrative Behaviour.

The Ombudsman's assessment

**41.** The Commission was not obliged to publish the amended/second set of commitments or to organise a new market test, thereby inviting the company to submit observations at the same time as the complainants in the main investigation. As pointed out by the Commission, once the second set of commitments became public, there was nothing to prevent the company from submitting observations. However, the company considers that, by not having received the questionnaire sent by Commission to 125 addressees (on 28 October 2013), it was denied its "right to be heard". Under EU competition rules [14], the "right to be heard" applies solely to undertakings under investigation by the Commission, which the French IT company was not.

**42.** As regards whether the Commission acted reasonably in not sending the amended/second set of commitments to the company, the Ombudsman notes that the company did not submit a specific reply to the first market test after the Commission had informed it that the commitments did not directly concern its complaint, as this was being investigated independently from the market test. Based on the available evidence, this would seem to be the reason the Commission did not send the second questionnaire to the company (the Commission's Memo of 5 February 2014 stated that the questionnaire was sent to all parties who had replied to the first market test). The Commission's actions were thus reasonable and the Ombudsman finds no maladministration with regard to this allegation.

### 4) Alleged public release of erroneous information

Arguments presented to the Ombudsman



**43.** The company alleged that the Commission's Memo of 5 February 2014 - namely that "[t]he Commission asked feedback on that second proposal from all parties who had replied to the market test, and in addition all complainants and all other parties showing an interest in the case" (emphasis by the company) - was erroneous and false, because it allegedly did react to the market test but was not asked for feedback on Google's second set of proposed commitments.

The Ombudsman's assessment

**44.** The Commission claims that the company did not react to the market test. In its e-mail of 22 May 2013, the company explicitly stated that "it would not react in detail on the market test " [15] , but that its letter to the Commissioner of 28 March 2013 summarised its position on the ongoing consultation. The company claims that this e-mail and letter constituted its reaction to the market test. However, this email cannot be considered to constitute a reaction to the market test, since the letter of 28 March 2013 predates the launching of the market test (25 April 2013), which raised four particular competition concerns.

**45.** Thus, the Ombudsman does not consider that the Commission's statement of 5 February 2014 is erroneous and finds no maladministration concerning this allegation.

## 5) Alleged disproportionate and unjustified delays

Arguments presented to the Ombudsman

**46.** The company argued that investigating its complaint should have been a priority for the Commission. The company alleged that 20 months after the Commission had first said it would send such a pre-rejection letter, the letter had still not been sent and in the meantime the company remained ignorant of the basis for the proposed rejection of its complaint.

**47.** On 16 November 2015, the Commission sent a pre-rejection letter to the company and, on 18 November 2015, a further letter explaining why the company's complaint was not relevant to the main investigation. The company thanked the Ombudsman for the successful intervention and said that the pre-rejection letter receipt issue was now settled. However, it argued that the Ombudsman should still investigate the reasons for the disproportionate and unjustified delay and seek a formal apology from the Commission. The company argued that the reasons given by the Commission for not pursuing its complaint, in its pre-rejection letter of 16 November 2015, were already known to the Commission more than four years earlier.

The Ombudsman's assessment

**48.** The Commission did comply with the four month time frame for initially responding to the complainant [16] , taking several steps to inform the company that it would pursue its complaint in this period. In its e-mail of 17 March 2011, the Commission cleared confidentiality issues with



the company in order to send its complaint to Google for observations. Then, on 1 April 2011, the Commission informed the company of the registration of its complaint and also forwarded the complaint to Google for observations.

**49.** As regards whether the Commission informed the company within a reasonable time of its position on the complaint, the Ombudsman understands the company's concern about an unjustified delay. The Commission informed the company that its complaint was being investigated independently from the main investigation by e-mail on 8 May 2013. The Ombudsman notes that the Commission subsequently told the company that it would send it a pre-rejection letter on the basis of Article 7(1) of the Implementing Regulation 773/2004 on several occasions (on 10 October 2013, on 7 April 2014, 3 June 2014 and on 13 May 2015). The Ombudsman raised this specific point during the inspection of 15 October 2015. One month later, on 16 November 2015, the Commission finally sent the pre-rejection letter to the company.

**50.** It therefore took the Commission more than four and a half years to inform the company of the outcome of its complaint and over two years from the moment it informed the company its complaint was being investigated independently. This is clearly regrettable. However, the Ombudsman also notes that the company's complaint was complex, requiring technical expertise and an analysis of internet traffic related data. It is also clear that the Commission's limited resources were taken up with the main priority investigation which is still ongoing. The Commission's argument, that the timetable for non-priority cases was to a certain extent dependent on that of the priority cases, is reasonable but the Commission could have explained in greater detail why the pre-rejection letter could not have been sent earlier.

**51.** After the Ombudsman's intervention, the Commission finally sent the company the pre-rejection letter. The Ombudsman thus concludes that the Commission did take measures to resolve the problem, albeit belatedly.

## 6) Alleged bias on the part of the former Competition Commissioner

Arguments presented to the Ombudsman

**52.** The company alleged that the former Commissioner had abused his position by taking a biased view in the Google investigation, thus undermining the handling of the investigation and of the company's case. The company disagreed with the Commission's view that this allegation concerned the Commissioner in his private capacity.

The Ombudsman's assessment

**53.** The Ombudsman does not agree with the Commission's argument that the Commissioner was acting in his private capacity. The allegation concerns the Commissioner acting in his professional capacity as the Commissioner responsible for competition matters. In this context, he was empowered to take decisions and give directions with regard to the investigative steps



and overall handling of the investigation. Thus, it is incorrect to suggest that the Commissioner acted in his private capacity and, in fact, it would have been inappropriate for him to do so in this case or in any other case.

**54.** However, the Ombudsman notes that the company has put forward no evidence to support its claim that the Commissioner was biased. The Ombudsman notes also that the main Google investigation is still ongoing under the new Competition Commissioner Vestager, who took office on 1 November 2014.

**55.** In light of the above, the Ombudsman finds no evidence of maladministration as regards this allegation.

## Conclusions

On the basis of her inquiry into this complaint, the Ombudsman closes it with the following conclusions:

**There has been no maladministration by the Commission with regard to allegations 1), 3), 4) and 6).**

**Allegations 2) and 5) have been settled by the Commission.**

The complainant company and the Commission will be informed of this decision.

Emily O'Reilly

European Ombudsman

Strasbourg, 26/10/2016

[1] [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_8608\\_5.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_8608_5.pdf) [Link]

[2] OJ 2011C 308, p. 6.

[3] As with its first complaint 291/2015/AN, the French IT company's second complaint to the Ombudsman is long and detailed.

[4] 16 November 2015 - The Commission stated that, even if more resources were allocated to the investigation of the company's complaint, the probability of finding an infringement of Article 102 TFEU was limited. The Commission argued that assessing the veracity of the company's allegations would necessitate a systematic analysis of the adequacy of Google's calculation method of the quality score of advertising candidates and of the "*taux de clic prédit*" ("*pCTR*").





The Commission pointed out that the calculation of this type of parameter constitutes one of the fields of technical expertise of Google and that such an analysis would be complex and require significant resources.

[5] 18 November 2015 - The Commission explained that the site [www.woxxo.com](http://www.woxxo.com) [Link] was not a specialised *search* engine, but a service to connect providers and clients through advertisements. The Commission referred to the company's own description that " *Woxxo est un service de sélection de prestataires B to B dans le secteur de l'informatique et de la communication* ".

[6] Paragraph 51 of the Commission's letter of 13 May 2015.

[7] Article 5 of Regulation 773/2004 states that "[n] *atural and legal persons shall show a **legitimate interest** in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation 1/2003* " (emphasis added).

[8] See Sections 4.2 " *Preliminary assessment* " and 4.3 " *Submission of the commitments* ", points 121-126, as well as footnote 23, of the Commission Notice on best practices.

[9] [http://europa.eu/rapid/press-release\\_SPEECH-12-372\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm) [Link]

[10] Article 27(4) of the Regulation 1/2003 provides that "[w] *here the Commission intends to adopt a decision pursuant to Article 9..., it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested parties may submit their observations within a time frame which is fixed by the Commission in its publication* ". The Commission Notice on best practices contains precise rules in this respect (point 129). It provides that the Commission " *must publish in the Official Journal of the EU a notice (market test notice) containing a concise summary of the case and the **main content of the commitments** , ... it will **also publish** on the Directorate-General for Competition's website the **full text of the commitments** .... In order to enhance the transparency of the process, the Commission will **also publish a press release** setting out the key issues of the case and the proposed commitments. If the case is based on a complaint, the Commission will at this stage also inform the complainant about the market test and invite the complainant to submit comments* " (emphasis added).

[11] The Commission Notice on best practices merely states that "[w] *here the Commission is of the view, on the basis of the results of the market test ... that the competition concerns identified have not been addressed or that changes in the text of the commitments are necessary to make them effective, this will be brought to the attention of the undertakings offering the commitments. If the latter are willing to address the problems identified by the Commission, they should submit an amended version of the commitments. If the amended version of the commitments alters the very nature or scope of the commitments, a new market test will be conducted* ..." (point 133).

[12] Article 6 of Regulation 773/2004 requires that, where the Commission issues a statement





of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections. In addition, where the Commission considers that there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons (Article 7 of Regulation 773/2004). Article 8 of Regulation 773/2004 states that, where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7 of Regulation 773/2004, the complainant may request access to the documents on which the Commission bases its provisional assessment (with the exception of business secrets and other confidential information belonging to other parties involved in the proceedings).

[13] Point 59 of the Commission Notice on the handling of complaints clearly states that "[t]hroughout the procedure, complainants benefit from a range of rights as provided in particular in Articles 6 to 8 of Regulation 773/2004. However, proceedings of the Commission in competition cases do not constitute adversarial proceedings between the complainant on the one hand and the companies which are the subject of the investigation on the other hand. Accordingly, the procedural rights of complainants are less far-reaching than the right to a fair hearing of the companies which are the subject of an infringement procedure".

[14] See Article 27(1) of the EU Antitrust Regulation 1/2003 and point 3.1 of the Commission Notice on best practices

[15] In French: " *Nous ne réagissons donc pas de façon détaillée à ce test de marché pour le moment* ".

[16] The Commission Notice on the handling of complaints has a section on the " *Indicative time limit for informing the complainant of the Commission's proposed action* " (points 60-63). Point 60 provides that "[t]he Commission is under an obligation to decide on complaints within a reasonable time. What is a reasonable duration depends on the circumstances of each case and in particular, its context, the various procedural steps followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved". Point 61 provides that "[t]he Commission will in principle endeavour to inform complainants of the action that it proposed to take on a complaint within an indicative time frame of four months from the reception of the complaint. Thus, subject to the circumstances of the individual case and in particular the possible need to request complementary information from the complainant or third parties, the Commission will in principle inform the complainant within four months whether or not it intends to investigate its case further. This time-limit does not constitute a binding statutory term" (emphasis added).