

A PRELIMINARY ASSESSMENT OF THE EUROPEAN COMMISSION'S *GOOGLE ANDROID* DECISION



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I. INTRODUCTION

The European Commission's second infringement decision against Google in roughly a year was announced in July 2018, with a record-breaking fine of \$5.1 billion in Google Android. For competition lawyers and economists, the *Google Android* decision is presumably a more conventional, and therefore a more easily comprehensible, case than the preceding decision in *Google Search (Shopping)*, a decision which the current author likened to "fitting a square peg into a round hole" in relation to its fit with the EU prohibition of an abuse of a dominant position.² In *Google Android* one can at least envisage a *potentially* robust antitrust theory of harm. If a dominant undertaking ties its products together to exclude effective competition in some of these markets or if it pays off customers to exclude access by its efficient competitors to consumers, competition law intervention may, indeed, be justified and may conform to existing case law. The central question in *Google Android* is whether on the available facts this appears to have happened. Given that there is at least a potentially robust theory of harm in *Google Android*, much depends on the intricate facts of the case. As the full decision may take months to be published, this article merely offers the author's initial thoughts on some pertinent aspects of the decision on the basis of the publicly available information.

This article will not discuss any further the eye-watering fine mentioned above (which together with the fine of \$2.7 billion in the *Google Shopping* decision from last year would – according to one estimate – suffice to fund for almost one year the additional yearly public spending necessary to eradicate *world hunger* by 2030).³ This is because the fine is assumed to have been duly calculated on the basis of the Commission's relevant Guidelines,⁴ and, from a legal and commercial point of view, the absolute size of the fine is not as important as the infringing conduct and the remedy Google will need to adopt to comply with the decision.

This article proceeds on the premise that the aim of competition law is to prevent the exclusion of competitors that are (at least) as efficient as the dominant incumbent, whose exclusion would ultimately harm consumers. At one point in time at least, this also seemed to be the guiding principle of the Commission's enforcement priorities in the area of abuse of dominance, as expressed in the Guidance on Article 102,⁵ which appears to have lost (or never gained) favor as far as the Commission's actual

2 P. Akman, "The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law," [2017] (2) *Journal of Law, Technology and Policy* 301, available at <http://illinoisjlt.com/journal/wp-content/uploads/2017/12/Akman.pdf>.

3 See D. Laborde et al., "Ending Hunger: What Would it Cost?," International Institute for Sustainable Development Briefing Note, October 2016, available at <https://www.iisd.org/sites/default/files/publications/ending-hunger-what-would-it-cost.pdf>.

4 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.

5 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.

decisional practice is concerned.⁶

II. THE FACTS IN BRIEF

In *Google Android*, the Commission found Google to be dominant on three different relevant markets and to have engaged in three types of abusive conduct. According to the Commission, Google is dominant on the relevant markets for: (1) general internet search services; (2) licensable smart mobile operating systems; and, (3) app stores for the Android mobile operating system. The three types of conduct found abusive, as expressed by the Commission, are: (1) illegal tying of Google's search and browser apps; (2) illegal payments to device manufacturers and mobile network operators conditional on exclusive pre-installation of Google Search; and, (3) illegal obstruction of development and distribution of competing Android operating systems.

III. MARKET DEFINITION AND COMPETITIVE CONSTRAINTS

The premise of the case is that Google used its dominance in the Google Play Store (which enables users to download apps onto their Android phones) to “cement Google's dominant position in general internet search.”⁷

It is interesting that the case appears to concern a dominant undertaking leveraging its dominance from a market in which it is dominant (app stores for the Android mobile operating system) into another market in which it is *also* dominant (internet search).⁸ As far as this author is aware, most (if not all) previous cases of tying in the EU to date concerned tying where the dominant undertaking leveraged its dominance in one market to distort or eliminate competition in another, otherwise competitive market. Thus, for example, in *Microsoft (Windows Operating System → media players)*, *Hilti* (patented cartridge strips → nails), and *Tetra Pak II* (packaging machines → non-aseptic cartons), the tied market was actually or potentially competitive, and this was *why* the tying was alleged to have eliminated competition on the separate market for the tied product.⁹ It will be interesting to see which case the Commission uses as precedent in its decision. The question of precedent will be returned to later.

A “tying” theory of harm would have made more sense had the Commission argued that Google Play Store is the “tying product” while the Google Search App and Chrome App were the “tied products.” This would have required the Commission to have defined separate markets for these three products, but as noted above, these do not appear to be the relevant markets as defined by the Commission.

It is also noteworthy that the Commission does not appear to have defined a separate *mobile search* market that would have been competitive *but for* Google's alleged leveraging. The market has been defined as the *general internet search* market. So, according to the Commission, the Google Search App and Google Search engine appear to be one and the same thing, and desktop and mobile devices are equivalent (or substitutable). Finding mobile and desktop devices to be equivalent to one another may have implications for other cases including the ongoing appeal in *Google Shopping* where, for example, the Commission found that “[m]obile [apps] are not a viable alternative for replacing generic search traffic from Google's general search results pages” for comparison shopping services.¹⁰ The argument that mobile apps and mobile traffic are fundamental aspects of the search market in *Google Android* but trivial in *Google Shopping* may not play out favorably for the Commission before the Court of Justice of the EU. These two different interpretations of the same set of facts cannot both be simultaneously correct.

6 See P. Akman, “The Reform of the Application of Article 102 TFEU: Mission Accomplished?,” (2016) 81 Antitrust Law Journal 145 for the (lack) of use of the Guidance in decisional practice; and see P. Akman, “The European Commission's Guidance on Article 102 TFEU: From *Inferno* to *Paradiso*?,” (2010) 73(4) Modern Law Review 605 for an assessment of the Guidance.

7 European Commission Press Release “Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine,” July 18, 2018, available at http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

8 This point would be valid if the theory was the other way around, too. Namely, if the theory of harm was the Google was leveraging its dominance in internet search into the market for app stores for Android.

9 Case COMP/C-3/37.792 *Microsoft* (March 24, 2004) http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf; Case IV/30.787 and 31.488 *Eurofix-Bauco v. Hilti* (December 22, 1987) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31988D0138>; Case IV/31043 *Tetra Pak II* (July 24, 1991) <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31992D0163>.

10 Case AT.39740 *Google Search (Shopping)* (June 27, 2017) http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf [568].

Another interesting market definition point is that the Commission has found Apple not to be a competitor to Google in the relevant market defined by the Commission: the market for “licensable smart mobile operating systems.” Apple does not fall within that market *because* Apple does not license its mobile operating system to anyone: Apple’s business model itself eliminates all possibility of competition from the start and is by definition exclusive.

Although there is some internal logic in the Commission’s exclusion of Apple from the upstream market that it has defined (which relates to the licensing of Android to device manufacturers), it represents a definitional stop. Once the Commission defined the market as that of “licensable smart mobile operating systems,” it was a given that Apple was not going to be part of the same market. This is because Apple allows only itself to use its operating system on devices that only Apple itself manufactures. Real markets do not come defined, and the market definition that the Commission appears to have adopted was certainly not the only feasible market definition possible. Had the market been defined as the market for smart mobile operating systems, Apple would have been found to be part of the same market. The realistic possibility of an equally valid, alternative market definition arises out of the fact that even the Commission itself considers there to be some competition between Apple and Android devices at the level of consumers.¹¹

The Commission does not consider the level of competition for end users (downstream) to be sufficient to constrain Google’s market power for licensing of Android at the upstream, manufacturer level. The Commission reaches this conclusion mainly through an assessment of factors related to consumers’ decisions in choosing an Android versus Apple device (such as price, branding, switching costs, etc.). However, all of these factors relate to, first, competition between devices, as well as between operating systems, which oversimplifies the facts of competition on the market as Google only manufactures a small fraction of Android devices whereas Apple manufactures all of Apple devices. Thus, the factors listed by the Commission which relate to a choice between an Android device and an Apple device is more complicated than presented because numerous other manufacturers with their numerous different brands, prices ranges, etc. play a role in that competition on the downstream market. In fact, the factors listed in order to establish whether Google’s market power upstream is constrained by competition on the downstream market include factors that are endogenous to the players on the upstream market against whom the Commission is arguably measuring Google’s market power (such as the device brand, hardware features, price range, etc.). The point is that to measure Google’s market power against device manufacturers on the upstream level, one would need to consider Apple as a potential threat to Google on the *upstream* level, not on the downstream level. This requires an assessment of supply-side substitutability, not demand-side substitutability as the Commission’s assessment appears to adopt. Therefore, the pertinent question is whether Apple constrains Google on the upstream, manufacturer level in that *if* Apple iOS became an alternative to Android for third-party device manufacturers, this would constrain Google’s market power on the upstream level.

Although the Commission prioritizes demand-side substitutability in market definition, its own guidance on the topic notes that

[s]upply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term. . . .¹²

Apple could – presumably – rather immediately and at minimal cost produce and market a version of iOS for use on third-party device makers’ devices. By the Commission’s own definition, it would seem to make sense to include Apple in the relevant market. Nevertheless, it has apparently not done so here. If this is a finding based on evidence, namely that Apple could not within a reasonable time period offer a licensable version of iOS to third-party manufacturers, then the market definition may, indeed, be correct. If, however, the Commission’s finding is based on a categorical rejection of Apple as a potential upstream competitor on the basis of characteristics of the downstream market (which mix factors related to consumers’ purchasing decisions with factors related to manufacturers’ endogenous decisions), then, conceptually, the market definition reached in the case would be problematic.¹³

¹¹ See Press Release, *supra* note 7.

¹² Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03) [1997] OJ C372/5, [20].

¹³ See also the Commission’s listing of the fact that Google Search is the default search engine on Apple devices and thus, users’ switching from Android to Apple devices having a limited impact on Google’s core business as a factor which shows that competition downstream does not constrain Google’s market power upstream. It is difficult to comprehend what aspect of this fact relates to the potential exercise of Google’s market power upstream (i.e. against the manufacturers) as opposed to relating to a possible outcome of the conduct under investigation (namely Google Search being pre-installed/default search app on the relevant device).

IV. IS *GOOGLE ANDROID* REALLY A TYING CASE AND IS *MICROSOFT* REALLY THE RELEVANT PRECEDENT?

Given that *Google Android* appears to revolve around the idea of tying and leveraging, the EU Commission's infringement decision against Microsoft, which found an abusive tie in Microsoft's tying of Windows Operating System with Windows Media Player, appears to be the most obvious starting point in terms of the relevant precedent, at least for the tying part of the case.

There are, however, potentially important factual differences between the two cases. To take just a few examples:

- Microsoft charged for the Windows Operating System, whereas Google does not;
- Microsoft tied the setting of Windows Media Player as the default to OEMs' licensing of the operating system (Windows), whereas Google ties the pre-installation/setting of Search as the default to device makers' use of other Google apps, while allowing them to use the operating system (Android) without *any* Google apps; and
- Downloading competing media players was difficult due to download speeds and lack of user familiarity, whereas it is trivial and commonplace for users to download apps that compete with Google's.

Moreover, there are also some conceptual hurdles in finding the conduct to be that of tying.

First, the difference between “pre-installed,” “default,” and “exclusive” clearly matters a lot in establishing whether effective competition has been foreclosed. It is one thing for a dominant undertaking to request to be the “exclusive” provider of services and pay for this exclusivity, but it is quite another thing for its services to be pre-installed without requiring exclusivity or default status if competitors' services can also be provided alongside its own. Pre-installation without default status or exclusivity may incentivize (rather than reduce) competition if competitors can also, for example, pay device manufacturers to have their apps pre-installed on their devices. The facts relating to this part of *Android* are not clear from the publicly available information. The Commission's Press Release notes that to *pre-install* Google Play, manufacturers have to also pre-install Google Search App and Google Chrome.¹⁴ It also states that Google Search is the default search engine on Google Chrome. The Press Release does *not* indicate that Google Search App has to be the exclusive or default search app on the relevant device. It is worth noting, however, that the Statement of Objections in *Google Android* did allege that Google violated EU competition rules by requiring Search to be installed as the default.¹⁵ We will have to await the decision itself to see if this was dropped from the case or simply not mentioned in the Press Release.

In fact, the fact that the other infringement found is that of Google's making payments to manufacturers in return for *exclusively* pre-installing the Google Search App indirectly suggests that not every manufacturer pre-installs Google Search App as the exclusive, pre-installed search app. This means that any other search app (provider) can also (request to) be pre-installed on these devices. The same goes for the browser app.

Of course, regardless, even if the manufacturer does not pre-install competing apps, the consumer is free to download any other app – for search or browsing – as they wish, and can do so in seconds.

In short, *pre-installation* on its own does not necessarily foreclose competition, and thus may not constitute an illegal tie under EU competition law. This is particularly so when download speeds are fast (unlike the case at the time of *Microsoft*) and consumers regularly do download numerous apps.

What may, however, potentially foreclose effective competition is where a dominant undertaking makes payments to stop its customers, as a practical matter, from selling its rivals' products. Intel, for example, was found to have abused its dominant position through payments to a computer retailer in return for its not selling computers with its competitor AMD's chips, and to computer manufacturers in return for delaying

¹⁴ See Press Release, *supra* note 7.

¹⁵ European Commission Press Release “Commission sends Statement of Objections to Google on Android operating system and applications,” April 20, 2016, available at http://europa.eu/rapid/press-release_IP-16-1492_en.htm.

the launch of computers with AMD chips.¹⁶

In *Google Android*, the *exclusivity* provision that would require manufacturers to pre-install Google Search App exclusively in return for financial incentives may be deemed to be similar to this.

Having said that, unlike in *Intel* where a given computer can only have a CPU from one given manufacturer, even the exclusive pre-installation of the Google Search App would not have prevented consumers from downloading competing apps. In fact, one need not download a search app to search the web, either, as this can be done by using the browser to navigate to one's preferred search site.¹⁷ So, again, in theory effective competition from other search apps need not have been foreclosed.

It must also be noted that just because a Google app is pre-installed does not mean that it generates any revenue to Google – consumers have to actually choose to *use* that app as opposed to another one that they might prefer in order for Google to earn any revenue from it. The Commission seems to place substantial weight on pre-installation, which it alleges creates “a *status quo* bias.”¹⁸

The concern with this approach is that it is not possible to know whether those consumers who do not download competing apps do so out of a preference for Google's apps or, instead, for other reasons that might indicate that competition is not working. Indeed, one hurdle as regards conceptualizing the infringement as tying is that it would require establishing that a significant number of phone users would actually prefer to use Google Play Store (the tying product) without Google Search App (the tied product).

This is because according to the Commission's Guidance Paper, establishing tying starts with identifying two distinct products, and

[t]wo products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier.¹⁹

Thus, if a substantial number of customers would *not* want to use Google Play Store without also *preferring* to use Google Search App, this would cause a conceptual problem for making out a tying claim.

In fact, the conduct at issue in *Google Android* may be closer to a refusal to supply type of abuse. This would imply that the allegedly abusive conduct in question is Google's refusal to supply the Play Store without strings (i.e. apps) attached. For a refusal to supply to be abusive, the dominant undertaking must refuse to supply (without objective justification) an indispensable input, without access to which all competition in the relevant market on the part of the person requesting access is likely to be eliminated.²⁰ Indeed, the Commission notes that the Play Store is a “must-have” app for device manufacturers.²¹ Such a theory of harm may, in fact, also make more sense given the observation above that the case as it stands appears to be built on a theory of a monopolist tying two products over both of which it is a monopolist, which is unusual in terms of existing precedent.

Refusal to supply also seems to make more sense regarding the prevention of the development of Android forks being found to be an abuse. In this context, it will be interesting to see how the Commission overcomes the argument that Android forks can be developed freely and Google may have legitimate business reasons in wanting to associate its own, proprietary apps only with a certain, standardized-quality version of the operating system.

16 Case COMP/37.990 *Intel* (May 13, 2009) http://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_18.pdf.

17 This also raises a question about the relevance of the Commission's statements in relation to users of Windows Mobile devices making less than 25 percent of their searches using Google Search app as it appears that the Commission is only comparing search activity taking place on search apps rather than search activity taking place through the use of navigation to a search site and through the use of the app. In other words, it is possible that even on Windows Mobile devices, more people use Google to search than Bing, if one considers all the means through which the user access a search site. This, obviously, can only be established by empirical data on search conduct. See Press Release, *supra* note 7, in relation to the use of the search app on Windows mobile devices.

18 See Press Release, *supra* note 7.

19 Guidance Paper, *supra* note 5 [51].

20 Case Case C-7/97 *Oscar Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* ECLI:EU:C:1998:569.

21 See Press Release, *supra* note 7.

More importantly, the possible underlying theory in this part of the case is that the Google apps in question – and perhaps even the licensed version of Android – are a “must-have” for device manufacturers, which is close to an argument that they are an essential facility in the context of Android phones. But, that would indeed require a refusal to supply type of abuse to be established, which does not appear to be the Commission’s theory of harm.

V. IMPLICATIONS

In earlier writing, the current author had predicted that Google may start charging for Android as a result of the Commission’s decision.²² That prediction has, indeed, materialized to a degree: Google has recently announced that it will charge for licensing the apps for Android including the Play Store in response to the Commission’s decision.²³ This is not a surprising reaction because unbundling Google Play Store, Google Search App and Google Chrome (to allow manufacturers to pre-install Google Play Store without the latter two) will disrupt Google’s main revenue streams (i.e. ad revenue generated through the use of Google Search App or Google Search within the Chrome app) which funds the free operating system.

The outcome as things stand so far clearly raises questions as to whether the European Commission’s *Google Android* decision will ultimately benefit consumers. Given that the Commission does not seem to think that Apple constrains Google when it comes to dealings with device manufacturers, in theory, Google should be able to charge up to the monopoly level licensing fee to device manufacturers for the apps in question. If that happens, the price of Android smartphones may (but need not) go up depending on how much of this price rise can be passed onto consumers by device manufacturers. Similarly, app developers may face increasing costs due to the forking of Android. It is also possible that there is a new competitor lurking in the woods that will grow and constrain the potential exercise of market power. However, the message that the Commission sends with *Google Android* to that potential entrant is that a walled-garden built on complete vertical integration of proprietary devices bundled with a proprietary app store is a safer place to be in terms of potential competition law scrutiny than providing an open source and freely available product. This message is somewhat ironic as the walled-garden model of Apple is by definition *uncompetitive*. Both the alternative model of the walled-garden and Google’s attempts at generating revenue from an open source model raise important questions about the validity of potential objective justifications that will be raised by undertakings adopting such different business models. None of Google’s proposed justifications appears to have been accepted by the Commission in *Google Android*, and objective justification has a very poor record in abuse of dominance proceedings in Europe. Cases like *Google Android* where conduct takes place on technology markets with different business models of monetization where certain practices are argued to be essential to fund otherwise “free” services and products put new emphasis on the importance of what counts as objective justification in such cases. The role of commercial justifications and their assessment by European authorities, as well as the practical effects of decisions such as *Google Android* on consumers remain interesting developments to watch out for in the coming months and years.

22 See P. Akman, “Will the European Commission’s Google Android Decision Benefit Consumers?,” July 19, 2018, available at <https://truthonthemarket.com/2018/07/19/will-the-european-commissions-google-android-decision-benefit-consumers/>.

23 See H. Lockheimer, “Complying with the EC’s Android decision,” October 16, 2018, available at <https://www.blog.google/around-the-globe/google-europe/complying-ecs-android-decision/>.

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