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The Rise of Precautionary Antitrust: An Illustration with the EU *Google Android* Decision

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Introduction

The *Google Android* decision[2] issued by the European Commission is not only unique in terms of its punitive €4.34 billion fine – but most importantly for its atypical reasoning in a highly complex environment.[3] The Decision concerns numerous and inter-connected products such as the following: smart mobile devices; operating systems ("OS") for smart mobile devices; apps; smart mobile app stores; application programming interfaces ("APIs"); general search services; and web browsers.[4] These products are developed in light of Google's business model, which entails the interaction between online products and services offered (mostly) free of charge for end-users, and online advertising services.[5] Google's ad-funded products and services have shifted from a PC environment to a smartphone environment, illustrated by Google's acquisition and development of the Android mobile OS,[6] in order to effectively compete with Apple's iOS ecosystem. Google's business model involves tying Google's dominant search engine ("Google Search") with its proprietary mobile apps (the "Google Play Store" and "Google Chrome"), together with conditional licensing and exclusivity payments. Google's business model has come under scrutiny[7] and was found to violate Article 102 TFEU in the present *Google Android* decision.

The Abuses: Tying, Conditional Licensing, and Exclusivity Payments

Two types of abusive tying were identified by the European Commission.[8] First, Google tied Google Search, where Google is "super-dominant," with its Google Play Store. Second, Google tied Google Chrome with the Google Play Store and Google Search.

The first instance of abusive tying (of Google Search with the Google Play Store) violated Article 102 TFEU because, absent any objective justification, "(i) the Play Store and the Google Search app are distinct products (…); (ii) Google is dominant in the worldwide market (excluding China) for Android app stores (…); (iii) the Play Store cannot be obtained without the Google Search app (…); and (iv) the tying of the Google Search app with the Play Store is capable of restricting competition (…)."[9]

The second instance of abusive tying (of Google Chrome with the Google Play Store and the Google Search) app was also found to violate Article 102 TFEU because, absent any objective justification thereof, "(i) Google Chrome is a distinct product from the Play Store and the Google Search app (…); (ii) the Play Store and the Google Search app cannot be obtained without Google Chrome (…); (iii) Google is dominant in the worldwide market (excluding China) for Android app stores and in the national markets for general search services (…); and (iv) the tying of Google Chrome with the Play Store and the Google Search app is capable of restricting competition (…)."[10]

Thirdly, Google made the licensing of the Google Play Store and Google Search app conditional on hardware manufacturers complying with anti-fragmentation obligations. This conditional licensing was found to constitute abusive conduct, because "(i) entering into the anti-fragmentation obligations is unrelated to the licensing of the Play Store and the Google Search app (…); (ii) Google is dominant in the worldwide market (excluding China) for Android app stores, and in the national markets for general search services (…); (iii) the Play Store and the Google Search app cannot be obtained without

entering into the anti-fragmentation obligations (…); (iv) the anti-fragmentation obligations are capable of restricting competition (…)."[11]

Finally, the fourth type of abusive conduct the Commission alleged against Google consisted of having designed exclusivity payments in the form of granting revenue share payments to manufacturers conditional on the non-pre-installation of competing general search services on Android devices. Absent any objective justification by Google, the grant of portfolio-based revenue share payments constituted exclusivity payments for abusive default placements. These exclusivity payments were found to constitute abuses of dominant position capable of restricting competition[12] and deterring innovation,[13] with no objective justification.

These types of abusive conduct were all found to be aimed at protecting and strengthening Google's dominant position in general search services, thereby increasing its revenues through search advertisements. Having lasted 2748 days,[14] the single and continuous infringement led the European Commission to find Google liable, jointly and severally with Alphabet Inc. its holding company, for a fine of €4.34 billion.

The Atypical Reasoning: Relevant Markets and Precautionary Antitrust in Big Tech

The reality of these tying arrangements,[15] as well as the absence of objective justification can presumably be disputed, since Google does provide, through Android, a genuine competitor to Apple's historically incumbent iOS. Be that as it may, the Commission decision more fundamentally relies upon one simple, yet highly arguable, assessment: the relevant product market for Android is the narrow market for freely-licensable operating systems, rather than general operating systems.[16] Indeed, on a number of occasions, the Commission's decision denied that Apple's iOS was the main competitor to Google's Android OS.[17]

Nevertheless, as once noted by Prof. Nicolas Petit, the Commission may have had resorted to "antitrust gerrymandering" when defining Google's relevant markets: it is "the idea that if antitrust watchdogs draw markets narrowly enough, every company can be made to look like an evil monopolist."[18] In the Commission's decision, Google Android is said to represent 90 percent of the market for licensable smart mobile OS.[19] The Commission, quite disputably, considered any competition between non-licensable mobile OSs (such as iOS and BlackBerry OS) with licensable mobile OSs (such as Android) to amount to nothing more than "indirect constraint[s]."[20]

Another fundamental aspect of the *Google Android* decision is the lack of proven consumer harm.[21] Harm to end-users is mostly suggested and hinted at, rather than illustrated and proven. Instead, the lessening of competition is the focus of the alleged conduct: the reduction of choice to manufacturers and end-users as well as the deterrence of innovation are, the Commission considers, instances of such lessening of competition. In the Commission's view, the reduction of choices entailed by Google's practices constituted abuses of dominant position. Such alleged reduction of choice can be contested.[22] It is no longer required to show consumer harm in order to be found to infringe Article 102 TFEU: a reduction of choice without demonstrated consumer harm

appears to be sufficient. In light of the complex and highly innovative high-tech sector, such reduction of choice trumps welfare[23] in order to conclude of the abusive nature of the conduct at issue.

The absence of demonstrated consumer harm in order to find antitrust injury is not fortuitous, but represents a fundamental alteration of antitrust enforcement, predominantly when it comes to big tech companies. Coupled with the lack of clear knowledge, a shift in the burden of proof, and the lack of a consumer harm requirement in order to find abuse of dominance all reveal the precautionary approach that the European Commission has now embraced. Underpinning EU law's philosophical traditions,[24] the precautionary principle is being surreptitiously transplanted into antitrust enforcement. This approach holds that the lack of clear knowledge[25] and the lack of evidenced (or foreseeable) harm[26] should not prevent regulatory interventions. These interventions are, from a legal perspective, enabled by both a shift in the burden of proof[27] and *ex ante* measures. In the *Google Android* decision, it is noticeable that the potential for harm to innovation given a reduced number of choices resulting from Google's contractual restraints suggests regulatory intervention is needed in order both to prevent irreversible damages and to design an ideal competitive environment more favorable to rivals and to downstream players who would be relieved from contractual restraints.

Whereas traditional antitrust enforcement relies on antitrust injuries demonstrated *ex post,* including proven consumer harm, precautionary antitrust[28] represents a transformational shift to *ex ante* regulatory measures (interim relief,[29] regulatory design) even in the absence of demonstrated consumer harm, together with a shift of the burden of proof in order to prevent future irreversible damages. Under precautionary antitrust, choice trumps welfare, *ex ante* regulatory interventionism trumps an *ex post* antitrust liability system, the shifted burden of proof prevails over non-presumed fault, and irreversible damages replace demonstrated consumer harm. To a non-negligible extent, the *Google Android* decision illustrates the coming to the fore of a form of precautionary antitrust whereby, even without proven consumer harm, competition authorities are not barred from *ex ante* intervention to protect what can be seen as irreversible damage – an "*effective competitive structure*"[30] – enabling competitors to emerge and compete.

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[2] Case AT.40099, *Google Android*, 18/07/2018.

[3] This fine comes after similar investigations carried out by the Federal Antimonopoly Service of the Russian Federation, the Korean Fair Trade Commission, and the US Federal Trade Commission, and before similar investigations carried out by the Competition Commission of India, Brazilian Administrative Council for Economic Defense, the Australian Competition and Consumer Commission. So far, only the European authority and the Russian authority have fined Google for its Android practices. See Benjamin Edelman & Damien Gerardin, 2016, Android and competition law: exploring and assessing Google's practices in mobile. *European Competition Journal*. Vol.12, pp.159-194, at p.160. See "Russian Antimonopoly Service Fines Google $6.7 Mln," *Russian Legal Information Agency* (11 August 2016).

[4] Case AT.40099, *Google Android*, 18/07/2018, at pp.19-20.

[5] Case AT.40099, *Google Android*, 18/07/2018, at pp.27.

[6] Lisa Eadicicco, "The Rise of Android: How a Flailing Startup Became the World's Biggest Computing Platform," *Business Insider* (27 March 2015), available at https://www.businessinsider.in/THE-STORY-OF-ANDROID-How-a-flailing-startup-became-the-worlds-biggest-computing-platform/articleshow/46717278.cms.

[7] Meaning, the ability for Google to offer, through its two-sided ad-funded business model, a "*Google experience*" alongside an "*Apple experience*" or a "*Microsoft experience*." Google's business model relates to one of the ecosystems in the market for smart mobile devices and services. See Koerber who argues that *"the* (*agreements*) *must be seen in the context of competition among "mobile device eco-systems" (Android, iOS, Windows Phone, Blackberry and others). Most (manufacturers) install the suite of apps on their devices as consumers expect smartphones to come with functionalities and apps "out of the box"....The (agreements) ensures that users - who choose to buy a device with (Google Mobile Services) - get a device with a full set of apps that offer a "Google experience" similar to the "Apple experience" offered by iOS devices or the "Microsoft experience"* offered by Windows Phone device," in Torsten Koerber, 2014, Let's Talk About Android – Observations on Competition in the Field of Mobile Operating Systems, *German Version: NZKart 2014, 378 - 386, July 4, 2014.*

[8] Tying is existential to Android since not only the entire business model of zero-priced Android OS relies on tied revenue-raising services, but also because the alternative is not desired by customers or consumers. Indeed, *"bare Android is not what consumers expect when they purchase modern mobile devices"* as argued by Benjamin Edelman & Damien Geradin, 2016, Android and competition law: exploring and assessing Google's practices in mobile. *European Competition Journal*. Vol.12, pp.159-194, at p.165.

[9] Case AT.40099, *Google Android*, 18/07/2018, at p.167.

[10] Case AT.40099, *Google Android*, 18/07/2018, at p.200.

[11] Case AT.40099, *Google Android*, 18/07/2018, at p.230.

[12] Case AT.40099, *Google Android*, 18/07/2018, at p.272.

[13] Case AT.40099, *Google Android*, 18/07/2018, at p.299.

[14] Case AT.40099, *Google Android*, 18/07/2018, p.307.

[15] The reality of tying can be contested since manufacturers can acquire bare Android – namely without contractual requirements. Indeed, Google's General Counsel in April 2016 argued that Google's *"partner agreements are entirely voluntary - anyone can use Android without Google,"* and Android founder Andy Rubin stated that *"Google will include its apps suite with the platform, but since the platform is open, a manufacturer or operator can remove some or all the applications,"* cited in Benjamin Edelman & Damien Geradin, 2016, Android and competition law: exploring and assessing Google's practices in mobile. *European Competition Journal*. Vol.12, pp.159-194, at p.166-167.

[16] It can be indeed be argued that Google Android does compete with other operating systems, evidenced by the very competitive constraint Google Android exert to its competitors. For instance, because Android is offered for free to manufacturers, competing operating systems such as Symbian and Windows Phone moved from paid operating systems to freely available operating systems. Consequently, the price competition exerted by Android has pushed competitors to bring the price down up to zero in fierce competition with Google Android. See Andreas Constantinou, "Nokia and Symbian to Become One; Royalty-Free, Open Source Roadmap," Vision Mobile (24 June 2008), available at https://www.slashdata.co/blog/nokia-and-symbian-to-become-one-royalty-free-open-source-roadmap. It can therefore be argued that Android has gained dominance worldwide, not only because of technical superiority and app availability, but mostly because of customers' price sensitivity – free (yet contractually constrained) products are often preferred over paid-for products. See Avlonitis, G. J.

& Indounas, K. A. (2006). Pricing Practices of Service Organizations; Journal of Services Marketing, 346–356; Monroe, K. B. & Krishnan, R. (1985) The Effect of Price on Subjective Product Evaluation, in J. Jacoby & J.C. Olson (eds.) Perceived Quality: How Consumers View Stores and Merchandise, pp. 209–32. Lexington, MA. Lexington Books; Dolan, R. J. & Youngme, M. (2000). Pricing and Market Making on the Internet; Journal of Interactive Marketing, 14 (2), 56–73; Bashore, M. (2013); Tucker, S. (1966), *Pricing for Higher Profit: Criteria, Method, Applications*, McGraw-Hill, New York, NY. Factors That Influence Price Sensitivity In The Online Market. Retrieved March 5, 2014, From Www.Shopinventory.Com: Https://Shopventory.Com/Blog/Laws-Of-Price-Strategy/;

[17] For instance, at pp.59-60, the Decision states that "The Commission concludes that non-licensable smart mobile OSs such as iOS and BlackBerry OS do not belong to the same product market as licensable smart mobile OSs. From a demand-side perspective, OEMs cannot obtain a licence to use iOS or BlackBerry OS because Apple and BlackBerry do not grant licences to third parties. From a supply-side perspective, neither Apple nor BlackBerry has licensed or announced its intention to license its smart mobile OS to any third party (…)" at pp.59-60.

[18] Nicolas Petit, 2018, EU Engaged in Antitrust Gerrymandering Against Google. The Hill, available at https://thehill.com/opinion/technology/399742-eu-engaged-in-antitrust-gerrymandering-against-google.

[19] See, for instance, Case AT.40099, *Google Android*, 18/07/2018, p.63.

[20] Case AT.40099, *Google Android*, 18/07/2018, p.61. Moreover, this indirect constraint, exerted by end-users between smartphones and by app developers, is said to "insufficient" (at p.60) because 1) *"there are significant price differences between Google Android and IoS devices";* 2) *"users of Google Android devices would face substantial costs when switching to IoS devices;»* 3) *"user show a significant degree of loyalty to their existing smart mobile OS;»* 4) *"app developers are unlikely to stop developing for Google Android and develop exclusively for IoS*," Case AT.40099, *Google Android*, 18/07/2018, p.107-108.

[21] Google Android does control prices since Android source code are available to manufacturers royalty-free or the level of output, since the Android source code is readily available to manufacturers and app developers.

[22] Google has disrupted the operating systems, which was based on proprietary software code until it entered the market. The number of apps developed for Android is an illustration of choices created rather than reduced. Nevertheless, the requirement to pre-install and exclusively use key Google apps (such as Google Maps, Google Search, etc…) potentially came at the expense of potential competitors' apps. This reduction of choice, justified by the very revenue-raising characteristic of these apps within the Android business model, needs to be counterbalanced with the enhanced choice generated by Android OS as the main competitor to Apple's IoS.

[23] Rather than the opposite, see Joshua D. Wright & Douglas H. Ginsburg, 2013, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham Law Review. 2405.

[24] See, for instance, COM(2000) COMMUNICATION FROM THE COMMISSION on the precautionary principle, COM/2000/0001, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0001&from=EN ; Aurelien Portuese & Julien Pillot, 2018, The Case for an Innovation Principle: A Comparative Law & Economics Analysis. *Manchester Journal of International Economic* Law. Vol.15, pp. 214-237; Ragnar Lofstedt, 2014, The precautionary principle in the EU: why a formal review is long overdue, Risk management, Vol. 16, 3, pp. 137 – 163; Christian Gollier & Nicolas Treich. 2003, Decision-Making under Scientific Uncertainty: The Economics of the Precautionary Principle. Journal of Risk and Uncertainty 27:77–103; Science for environment policy, 2017, Future brief – The precautionary principle: decision-making under uncertainty, September, issue 18 (published by the COM but not written by the COM), http://ec.europa.eu/scienceenvironment-policy .

[25] Here, uncertainties about the level of innovation, the reality of any harm, and the internal functioning of ecosystems constitute the necessary lack of knowledge as fundamental criterion of the precautionary principle.

[26] Here, no consumer harm was demonstrated – only harm to competition because innovation was allegedly deterred. For instance, the decision concludes that "*Google's conduct deters innovation, tends to harm, directly or indirectly, consumers of mobile web browsers and helps to maintain and strengthen Google's dominant position in each national market for general search services*," in Case AT.40099, *Google Android*, 18/07/2018, at p.222. Innovation deterrence is presumably evidenced while consumer harm is only presumed.

[27] See for instance, for the mood of the moment, Emily Craig, 2019, Vestager considers shifting burden of proof for big tech, Global Competition Review, 31st of October 2019, available at https://globalcompetitionreview.com/article/1210348/vestager-considers-shifting-burden-of-proof-for-big-tech. This looming shift has surfaced explicitly, yet applied implicitly occasionally, in the Digital Competition Report. For instance, this Report states that « in the context of highly concentrated markets characterized by strong network effects and high barriers to entry (i.e. not easily corrected by markets themselves), one may want to err on the side of disallowing potentially anticompetitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct. This may be true especially where dominant platforms try to expand into neighboring markets, thereby growing into digital ecosystems, which become ever more difficult for users to leave," at p.4. This burden of proof shift clearly refers to the *Google Android* decision in particular. Also, the Report argues that "(…)w e propose that, to the extent that the platform performs a regulatory function, it should bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets," at p.7 clearly referring to Google Shopping decision of 2017.

[28] We term "*precautionary antitrust*" the application of the philosophical and legal underpinnings attributed to the precautionary principle in antitrust enforcement. See European Parliament, 2017, Applying precautionary measures in antitrust cases, Question for written answer E-004559-17 to the Commission, available at https://www.europarl.europa.eu/doceo/document/E-8-2017-004559_EN.pdf; European Commission, 2017, Answer given by Ms Vestager on behalf of the Commission,

E-004559/2017(ASW), available at https://www.europarl.europa.eu/doceo/document/E-8-2017-004559-ASW_EN.pdf .

[29] See Press Release, 2019, Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets, IP/19/6109, 16th of October 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109; Margrethe Vestager, 2019, Statement by Commissioner Vestager on Commission decision to impose interim measures on Broadcom in TV and modem chipset markets. Available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_6115 (where it is argued that "*Interim measures aim at preventing irreparable harm to competition*").

[30] For a change of standard from the efficiency enhancing consumer welfare standard towards to the precautionary standard of "*effective competitive structure*," see Marshall Steinbaum & Maurice E. Stucke, 2018, The Effective Competition Standard. A New Standard for Antitrust. The Roosevelt Institute, September 2018, available at https://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf .