THE EUROPEAN COMMISSION'S *ANDROID* DECISION AND BROADER LESSONS FOR ARTICLE 102 ENFORCEMENT

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I. INTRODUCTION

The aim of this article is to analyze some of the main issues that arose in the European Commission's recently adopted *Google Android* Decision and to then place these in the context of a number of broader themes that continue to be hotly debated in relation to antitrust enforcement in hi-tech markets.

II. THE DECISION

A. The Importance of Search

The core theme of the Decision is that the different abuses all had the same aim of cementing Google's dominance in search in the mobile space. This element is of key importance. Google already had a search monopoly on desktop when mobile internet emerged in 2007. With the rapid growth of mobile internet traffic meaning that there was a new, commercially important channel where search would take place, Google saw both an opportunity and a threat to which it needed to respond. Against this backdrop, the Decision is about how Google used Android as a vehicle to extend and protect its search dominance in the mobile space (and therefore its main source of revenue, which comes from search advertising).

Android is an open-source smart mobile operating system. Google bought it in 2005 and continued to develop it thereafter under the open-source license, meaning that anyone could copy, modify, or distribute the code to create a different version of Android – a so-called "*Android fork*." Google started providing the core version of Android commercially to smartphone and tablet manufacturers ("OEMs") for free, but included a range of contractual requirements relating to the terms for obtaining Google's associated proprietary apps (e.g. Google's search app) and services. The free and open-source provision of Android was a key part of getting all major OEMs signed up, which led (by 2011) to Google having a dominant position with Android, the associated app store (Play Store), as well as of course in search. The case is about the harmful effects that the different commercial restrictions had on competition once Google was dominant. Contrary to the impression that some seek to paint, it does not call into question Android as such or the open-source model.

B. Market Definition and Dominance

A word first about market definition and dominance. Google has focused a lot of attention on the argument that in finding both Android and the Play Store dominant, the Commission ignored the commercial constraint coming from Apple – indeed, a look at some commentaries could lead to the belief that the Commission had not looked at this issue at all. The reality is different.

As a first step, the Decision defines various markets in the standard way, including upstream markets for smart licensable operating systems and Android app stores. The findings in this regard are the same in the sense that these products are provided to OEMs in an upstream market where Apple is simply not present, since iOS and the Apple App Store are not provided commercially by Apple to OEMs. That is not to say that there is no competition between Android devices and Apple devices downstream, but that is an indirect constraint that must be analyzed in the context of the assessment of Google's dominance.[2]

Against the backdrop of Google's 90 percent-plus market shares and the high barriers to entry in the two upstream markets, the Decision examines in detail the extent to which the downstream device competition, or to be more precise, the possibility of switching from Android devices to Apple devices, is sufficient to constrain Google's dominance upstream. It finds on the basis of a range of factors that it is not, including the fact that: (1) an operating system is only one component among others of a smart mobile device, meaning that it is only a limited, indirect factor that is taken into account by users when considering devices; (2) empirically, there is limited switching between Android and Apple devices, not least due to consumer switching costs; and (3) Apple devices are not present on the mid to low end of the downstream device market.

The Decision's overall conclusion is therefore that both Android and the Play Store are dominant products, and indeed that the Play Store in particular is a must-have product for OEMs, since consumers expect to buy smart mobile devices with an app store pre-installed.

C. The Abuses

The abuses that the Decision concludes took place were the following:

- Tying of the Google Search app to the Play Store
- Tying of Google Chrome to the Play Store and Google Search
- Payments conditional on exclusive pre-installation of Google Search
- Restrictions on OEMs selling Android forks (so called "anti-fragmentation" obligations)

1. Tying

The legal framework applied to the two tying abuses is the standard one from *Hilti*, *Tetra Pak II*, and *Microsoft*. The relevant criteria are that: (1) there is dominance in the tying product; (2) the tying and tied products are separate; (3) the tying product cannot be obtained without the tied product; and (4) there is harm to competition.

The Decision's conclusion that there was harm to competition is in part founded on the fact that there was a significant pre-installation advantage that Google Search and Google Chrome obtained as a result of being pre-installed on virtually all Android devices through the tie. This is not a theoretical proposition but an empirical one for the products concerned.

Google argued that the fact that consumers can easily and do in practice download alternative apps meant that there could be no foreclosure and pointed to the downloads of billions of apps as supposed proof. However, Google's figures related to all apps, and did not focus on the two products concerned – search and browser. For these products, the figures show that downloads are limited and that on devices where Google was not pre-installed (e.g. Windows smartphones), the use of Google search was significantly lower than on Android devices. Market share developments in the two products were fully consistent with the finding that pre-installation mattered, with Google Search maintaining very high market shares and Chrome growing rapidly, with the growth rates higher on mobile devices than on desktop, where Chrome was of course not pre-installed because of any tie by Google.

2 A similar type of analysis was carried out in the context of the European Commission's *Qualcomm (Exclusivity payments)* case as well as in the U.S. Department of Justice *Microsoft* antitrust case.

One argument that Google brought in relation to this point was that any superior market performance from Google's products was due to their superior quality and consumers' preferences (Google made this claim for the other abuses as well). It is a familiar refrain from companies that have abused their dominance that their products are better than those of their rivals and so would have won out anyway – this begs the question of if this were indeed the case, why the need for the restriction in the first place?

In terms of claimed efficiencies, Google argued that Android had brought significant benefits to the mobile ecosystem by providing the market with a free and popular product that was the only effective counterweight to Apple, and that the ties of Search and Chrome were indispensable for Android to be brought to market. Google's claim essentially amounted to arguing that the tie was indispensable for Android and the Play Store to be provided at all – i.e. that the only way that it could be provided was if search (advertising) revenues could be guaranteed through search and browser tying. As a general proposition, it is very difficult to envisage that the least restrictive way that Google could obtain search revenues on mobile was through tying.

In terms of the legal framework, Google argued that by focusing only on one side of the market (i.e. harm to competition in search and browser via the tie), the Commission was ignoring the broader benefits on the other side(s) of the market (operating systems and app stores). This has echoes of arguments that have been made in the U.S. in the *American Express* case. Under EU competition law, the legal framework is clear and while it allows for the assessment of any benefits that would arise from the conduct, there should first be an analysis of any harm to competition in the market concerned arising from the specific conduct at stake (tying). Then, as part of the objective justification analysis, there should be an assessment of whether the specific restrictions concerned are indispensable to achieve any benefit. In this case, that means that it was for Google to demonstrate that the least restrictive way of monetizing Android was by tying search and browser, which is a more targeted question than the more general claims that Google was making about the overall benefits of Android.[3]

Google did not succeed on this point. It did not provide any specific contemporaneous evidence in relation to the need for the specific tying restrictions and indeed, the Decision found that there were a number of other ways that Google was able to monetize the Android ecosystem. In particular, Google obtains billions of dollars in annual revenues through sales of apps on the Play Store (free provision of an app store and monetization through sales of apps is also the business model of other app stores) and it also obtains significant value through the Android ecosystem via the gathering and subsequent monetization of data – in other words, the argument that the tie is necessary in order to be able to invest in and develop the Android ecosystem is not borne out by the facts.

2. Payments conditional on exclusivity

The abuse relating to revenue share payments conditional on exclusivity is closely linked to the tying abuse in the sense that while the tying was about ensuring pre-installation of Google Search and Chrome, this conduct was about ensuring *exclusive* pre-installation of Google Search. As the conduct relates to payments (of a share of search advertising revenues) conditional on exclusivity, the legal framework is based *inter alia* on that of the ECJ's 2017 *Intel* judgment. While there remains a starting presumption that such conduct is abusive, the Decision analyzed in detail its harmful effects (where Google had raised arguments that its conduct was not capable of having anti-competitive effects).

As was the case with January 2018's *Qualcomm* Decision, the *Android* Decision is a further illustration that there is no hierarchy in relation to the elements needed to demonstrate such effects – the *Android* Decision examined *inter alia* the nature and operation of the payments, their market coverage, and contemporaneous evidence from the market which clearly indicated that pre-installing a rival search engine on even one device meant the loss of the Google revenue share across the whole portfolio of an OEM's devices, and that this was a clear disincentive to pre-install rivals.

In addition, the Decision contained a quantitative as-efficient-competitor type analysis which looked at how much a rival search engine with the same revenue per search and cost parameters as Google would have had to compensate a device manufacturer or mobile network operator for the loss of the revenue share payments from Google and still make profits. Based on an analysis of what share of searches would be contestable across the portfolio of devices, the Decision found that a rival would have been unable to offer such compensation and still make profits.

3 In this respect, arguments both before and after the Decision that the Commission should "*define the counterfactual*" are somewhat misguided. The Commission did assess the counterfactual by demonstrating the competition that the tie was capable of preventing, but once it has done this and addressed any arguments that the specific clauses in question were indispensable to achieve a claimed efficiency, it is not for the Commission to speculate in very general terms what the state of the world could have otherwise been.

3. Prohibition on OEMs selling Android forks (anti-fragmentation)

The Decision's foreclosure analysis in relation to the anti-fragmentation abuse is conceptually straightforward. As a condition of taking the Play Store, OEMs were contractually prohibited from developing or selling even a single device running on an Android fork. Such forks were a credible competitive threat to Google's Android and the restriction covered virtually the whole market. There was therefore direct foreclosure of rival open source operating systems – one illustration of this was the fact that a number of large manufacturers had been prevented from developing and selling devices based on Amazon's Android fork ("Fire OS").

Most of Google's arguments related to the objective justification for the anti-fragmentation clauses. Google's claims essentially focused on the need for a "*non-fragmented*" Android experience – it argued that only with a uniform Android experience could app developers have a predictable development platform, and that with non-compatible versions of Android, there would be a bad consumer experience since apps would crash and any such problems would be imputed to Google. Of course, one person's "*fragmentation*" is another person's "*competition*," and Google's claims from a competition standpoint are essentially tantamount to saying that there should only be one commercially successful version of Android in the market – Google's. Indeed, there is a certain irony in Android becoming commercially successful in part because of its open-source nature and Google arguing that the anti-fragmentation restrictions were necessary to minimize the negative consequences for Google resulting from greater competition from Android forks.

On the substance of Google's specific claims, Google brought no convincing evidence that any crashes would occur on devices based on Android forks (indeed, the incentives of an Android fork provider, app developers, and device manufacturers are to ensure that no such crashes occur), and even to the extent that such crashes did occur, Google had the possibility to use a variety of branding methods to ensure that consumers could differentiate between Google's Android and Android forks. It is important in this respect to remember that in terms of the remedy, the Decision does allow Google to set technical specifications for devices which pre-install Google proprietary apps, but does not allow it to prevent device manufacturers from pre-installing Android forks across their whole portfolio of devices.

4. Strategy

While each of the four conducts outlined above were found abusive in their own right, the Decision also concluded that they formed part of a single and continuous strategy with the same objective, namely to protect and strengthen Google's dominant position in search, which remains by far Google's main source of revenue (via search advertising). This is confirmed by contemporaneous evidence from Google which *inter alia* outlines that Android was viewed as a key search monetization vehicle in the mobile space, and there is a clear interplay between the four abuses.

While the tying of search and the payments conditional on exclusive pre-installation of search by definition directly relate to search, the tying of Chrome also leads to search foreclosure since a significant number of searches take place via the browser, and Google Search is the default search engine in Chrome. The anti-fragmentation abuse prevented the growth of Android forks which could have been a credible platform for other search engines. What is more, all the abuses contributed significantly to the collection of data by Google, which is a key parameter to optimize a search engine.

III. CONCLUSION

In today's rapidly evolving digital world, a key challenge for competition policy is to ensure that it remains relevant. Criticisms of competition policy nowadays come from two main, but different directions. The first is that competition policy is ill-equipped to deal with new phenomena in fast-changing hi-tech markets and hence that its tools should be changed or that other policy instruments should deal with certain issues. The second is that competition policy is too intrusive and that the market and technological change will take care of any issues, and hence that enforcement against large players in hi-tech markets will hinder them from bringing innovations to consumers.

In considering these issues, it is first important to keep in mind that competition policy is one complementary part of a broader policy toolkit. While it is designed to make markets work better and ensure that there are commercial opportunities that will bring benefits to consumers, competition enforcement cannot of course answer every problem. The first task for competition enforcers and policymakers is therefore to recognize where the boundaries of competition policy should lie and to identify what kinds of issues are for competition law to deal with and which are not – if there are general problems that can be properly identified beyond competition law, that is something to be looked at by other policy tools, such as data protection or copyright.

Once this recognition and identification have been made, the next task is to define how best to make competition intervention relevant. In this respect, I am optimistic without being complacent. Competition enforcers should always strive to improve the quality of the analytical tools and concepts that they use, but I believe that the core goals and frameworks of competition policy that have served it well for decades remain relevant today, and that the tools are flexible and can be adapted to deal with different issues and market realities.

The *Android* Decision is in my view a good example of this. While one need not slavishly adhere to precedents for the sake of them, the legal framework under which the different abuses were considered is the same as that which was used for cases in the past, while the Decision's analysis in relation to market conditions, harm to competition, and objective justification was able to effectively take into account what some call new phenomena, such as the role of data, "free" products, or the two-sidedness of markets (although many of these phenomena are not in fact so new).

In my view therefore, the main challenge to ensure the relevance and indeed timeliness of competition enforcement is to have a common-sense vision of what is required to demonstrate the capability of a specific conduct to have harmful effects. I often have the impression that certain commentaries go to great lengths in seeking to require a standard of effects which in practice means that there would never be competition intervention against dominant companies. While I believe that demonstrating the capability of a specific conduct to have harmful effects is very important, both as a legal matter but also more broadly for the legitimacy of competition policy, in order not to drift towards a situation where there is risk of under-enforcement, it is also important to ensure that such a demonstration is practical and reasonably grounded in the realities of every specific case rather than becoming too abstract and theoretical.

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