

GOOGLE ANDROID: RECORD-BREAKING FINE ON ANTI-COMPETITIVE PRACTICES UNDER ARTICLE 102 TFEU



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CPI ANTITRUST CHRONICLE DECEMBER 2018

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CPI Antitrust Chronicle December 2018

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I. INTRODUCTION

Since mid-July 2018, there has been no publicly available version of the decision that imposed a record-breaking €4.34 billion fine on Google, which is comparable only with its €2.42 billion previous fine in the *Search (Shopping)* case.² We can only hope for it (the decision, not the fine) to land in our Christmas boxes. Nonetheless, one can still appreciate that the European Commission has a strong case,³ which has been built upon the existing strengths offered by the *Microsoft* ruling. In addition, since *Hilti*, making the sale of a product conditional upon taking another complementary product has been dealt with as an abuse of a dominant position because the practice means the consumer has no choice and is vulnerable to exploitation.⁴ The approach adopted in *Tetra Pak* has been re-affirmed by *Microsoft I* as "settled case-law" in that "even when the tying of two products is consistent with commercial usage or when there is a natural link between the two products in question, it may none the less constitute an abuse" under Article 102 TFEU.⁵

II. ANTI-COMPETITIVE TYING

The first anti-competitive conduct refers to an anti-competitive tying. This will come as no surprise to anyone given the bundle of mobile apps and services that Google offers to mobile manufacturers, which includes Google's Play Store (the official app store of the Android system), Search app, and Chrome browser. All of them are pre-installed on all Android devices. For example, Play Store is a "must-have" app that cannot be downloaded from anywhere else. The adoption of a behavioral economics approach to the pre-installation of such apps follows the *Microsoft* cases, including the Windows Media Player and the Internet Explorer cases. In the latter, users were able to download an alternative browser, but not to remove the Media Player. There were similar concerns that users were locked into the offerings, which were available to them free of charge.

The lock-in effect is now recognized as a "status quo" bias. This unconscious bias means that such users cannot be bothered to search for alternatives on mobile devices. As an alternative to Android, other mobile devices running Windows have pre-installed Microsoft's search engine, Bing. However, in addition to relying on pre-installation, Google had also paid "certain large" manufacturers and mobile operators for them to en-

² See COMP 40099, *Google Android*, July 18, 2018, unpublished (status last checked on December 10, 2018); COMP 39740, *Google Search (Shopping)*, July 27, 2018, published on December 18, 2018.

³ European Commission, IP/18/4581: "Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine," Brussels, July 18, 2018.

⁴ See *Eurofix-Bauco/Hilti* [1988] OJ L 65/19, para 75; Case T-30/89, *Hilti v. Commission* [1991] ECR II-1439 [1992] 4 CMLR 16; appeal dismissed see Case C-53/92 P [1994] ECR I-667 [1994] 4 CMLR 614.

⁵ See Case C-333/94 P, *Tetra Pak International v. Commission* [1996] ECR I-5951, para 37; re-affirmed in Case T-201/04, *Microsoft* [2007] 5 CMLR 11, para 941-2.

sure that its own apps would retain exclusivity. Due to having locked out both users, through unconscious bias, and potential competitors, through consciously made anti-competitive payments, Google meets the high legal standard of anti-competitive exclusionary conduct leading to consumer harm. The outstanding issue is that any consumer harm cannot be quantifiable in monetary terms, as such apps are offered free of charge. However, why would a highly efficient business, such as Google, which competes on its own merit alone, offer large payments to mobile manufacturers? A real premium of this deal is an exclusive pre-installation of Google's apps, which demonstrates an exclusionary conduct of alternative apps.

As a justification, Google attempted to prove that its conduct was necessary to “monetize” Google's investment in Android and “to convince manufacturers and mobile network operators to produce devices for the Android ecosystem.” However, upon examination of the manifold streams of Google's revenues from its Play Store, search, and advertising on Android mobiles, this justification did not convince the Commission. The latter has now – for a second time – recognized the value of data as “a significant stream of revenues” in digital markets. In the *Search (Shopping)* case, the Commission made a specific reference to the monetization of users' data.⁶ Eventually, it would be possible to give the benefit of the doubt and look at such payments as being Google's advertising paid to manufacturers for the promotion of its apps. Why, then, would Google pay for its own advertising in view of its world-wide reputation as a universal search-engine tied to advertising? Such a defense would not pass the threshold of any good logic or common sense. Therefore, Google's strategy of offering exclusive payments for the pre-installation of its own apps is not objectively justifiable.

III. EXCLUSIVITY ARRANGEMENTS

The present case goes beyond both *Microsoft I* and *II*'s unexpected behavioral economics approach to tying, as it involves payments to manufacturers which could be interpreted as excluding similar offerings of browser, search engine and app stores on mobile devices. As has previously been explained, it appears very clear that the Commission has met the standard required of an anti-competitive, exclusionary foreclosure effect on the residual competition from alternative providers of Android operating systems. Due to Google's smart business offering of such apps free of charge, it is impossible to evidence consumer harm in digital markets where pre-installation is free of charge. Thus, Google's payments to manufacturers for an exclusive pre-installation limit technical development under Article 102(b). In all likelihood, such an anti-competitive practice is capable of harming consumers through reducing the amount of choice available in the long run. There is a distinct demand for alternative offerings of search engines, browsers or app stores on mobile devices. Thus, developers of such apps cannot compete effectively if they are unable to match Google's payments. In fact, they are excluded from the market by an exclusivity arrangement, and, ultimately, there is no incentive at all to develop alternative apps for mobile users. However, in this particular case, there is nothing that could remotely be interpreted as being against legal certainty as established by the previous line of case law on tying, exclusivity, and objective justifications.

Another justification used by Google relies on its need to avoid the “fragmentation” of the Android ecosystem.⁷ Again, this was not objectively justified, as Android prevented technological development through its so-called “Android forks,” i.e. any other version of Android that was not approved by Google.

⁶ See *Google Search (Shopping)*, paras 158 and 320, in particular “users do not pay a monetary consideration for the use of general search services; they contribute to the monetisation of the service by providing data with each query.”

⁷ On fragmentation specifically see Anca D. Chirita, “Google's Anti-Competitive and Unfair Practices in Digital Leisure Markets,” 11 (2015) 1, 118 ff.

IV. REFLECTIONS ON THE *GOOGLE II* CASE

Overall, it comes as no surprise that there are fewer relevant and independently reliable sources on the *Google II* case. For example, Etro & Caffara examined whether tying is indeed a profitable strategy that reduces consumer welfare by forcing all or most consumers to use expensive devices with an inferior search app.⁸ They argued that by offering its GPS suite alongside YouTube or Chrome, Google monetizes their value through third party advertisers.⁹ However, one aspect that appears to have been neglected in the specialist literature on *Google II* is the aggregation of large-scale data by third party advertisers and the sharing of such data with big data analytics companies.¹⁰ Some have claimed that mobile applications are able to track users' movements, even without their knowledge, including hearing the user's surroundings.¹¹ Thus, the digital economy would require the identification of new forms of abuse that have never before been considered possible.

Although manufacturers of mobile phones may still be able to pre-install similar rival applications, there is limited space available on mobile devices.¹² In contrast, Todd argued that moving Google's applications from the mobile's screen, or even deleting them, is possible with some cognitive effort, offering the example of Samsung's pre-installed Google Hangouts.¹³ The practicalities of enjoying alternative applications remain rather elusive. Furthermore, as alternative applications do not enjoy exclusivity, they are not given Google's prominent position. This makes such alternatives impracticable. To put it simply, Google's rivals would need to provide both an alternative Play Store, which includes around 1.5 million applications,¹⁴ and a search engine that is pre-installed as a default on mobile devices running with the Android operating system.¹⁵ This is costly for alternative providers.

In this scenario, Etro & Caffara recognized that there is, indeed, a strong default bias because consumers would normally use only applications that are pre-installed on their mobiles. This is even more the case where such applications are displayed prominently on the phone's screen.¹⁶ In contrast, other commentators have suggested that the Commission's approach to default bias towards Google's suite of applications due to their prior pre-installation is purely speculative.¹⁷ Under the U.S. rule of reason, there would possibly be efficiency gains for consumers from the integration of such applications in a bundle rather than an emerging bias against potential rivals, including the exclusion of the latter. While the theory of unconscious bias is based on behavioral economics, the lock-in effect has previously been successfully used in the *Microsoft* cases. Ultimately, it remains to be seen whether this is not an enforcement error as in *Microsoft II* in the sense that being unable to monetize both its applications and the Android operating system, Google would later have insufficient incentives to continue investing in innovation.¹⁸ But is Android really innovative given its many updated versions in a short time?¹⁹

8 See Federico Etro & Cristina Caffara, "On the economics of the Android case," 13 (2017) *European Competition Journal* 2, 284.

9 *Ibid*, 285.

10 See Anca D. Chirita, "Written Evidence to HM Treasury's Digital Competition Expert Panel," December 7, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3297564.

11 See Janice C. Sipior, Burke T. Ward & Linda Volonino, "Privacy Concerns Associated with Smartphone Use," 13 (2014) *Journal of Internet Commerce*, 177.

12 Etro & Caffara (2017), 287.

13 See Patrick F. Todd, "Out of the box: illegal tying and Google's suite of apps for the Android OS," 13 (2017) *European Competition Journal* 1, 80.

14 Sipior et.al (2014), 178. For example Apple's Apps Store meets consumer demand for innovative mobile software.

15 See Dennis W. Carlton & Michael Waldman, "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries," 33 (2002) *RAND Journal of Economics* 2, 194; Etro & Caffara (2017), 291.

16 Etro & Caffara (2017), 293.

17 See Todd (2017), 88.

18 *Ibid*, 90.

19 Others suggest that Android apps were slower to develop, see Gerard Goggin, "Google phone rising: The Android and the politics of open source," 26 (2012) *Journal of Media & Cultural Studies* 5, 747 and 749, where it is suggested that Google's Android has fallen short of its promise to deliver a radically different consumer experience.

Other commentators have gone on to demonstrate that, by offering its GPS free of charge to manufacturers, Google forecloses the market entry of as efficient search engines, which, in turn, decreases consumer welfare.²⁰ It is, however, difficult to compete with Google due to the latter having secured exclusivity from mobile phone manufacturers, which is well-known as a naked restriction of competition. Under the prohibition of abuse of a dominant position, the foreclosure of an as efficient competitor as the dominant undertaking through long-term exclusivity arrangements has long been problematic. Google clearly dominates both the universal search engine and the advertising market, and it is difficult for rival search engines to replicate its large-scale search engine to attract as many users as possible to improve the quality of their search engines.

In the spirit of Schumpeterian creative destruction (“schöpferische Zerstörung”), attempts by developers to innovate on mobile devices do not benefit users in the long run. Failed attempts to innovate are often, inefficiently, too costly for users, who end up paying for the real cost of the race for innovation. One very recent real-life example is offered by the technical requirements expected from EU citizens’ mobile devices for the purpose of applying for settlement in the UK. The devil is in the detail regarding the technical specifications of the pilot scheme run by the Home Office. Higher education employees invited to apply for settlement must comply with the following: “a smartphone or tablet manufactured by Samsung, Google or Sony with Near-Field Communication, running with Google’s Android 6.0 (Marshmallow) or above, including 135 MB and 3G/4G networks.”

As of October 2018, only 21.3 percent of devices with a Play Store run Android 6.0. Furthermore, a Samsung device with an earlier Android version cannot be upgraded to Android 6.0; a new purchase is therefore required. For the above specifications, the following pricing options are ridiculously expensive for one scan and a photo required by the Home Office: Google’s Motorola G6 Play (£129.95 from Argos), Sony’s Xperia (£149.00 from Carphone Warehouse), and Samsung Galaxy’s J6 Android 8.0 (Oreo) (£139.95 from Argos). The cheapest option of all is the SIM-free “bundle” compared to a monthly subscription (Sony’s Android 7.0 (Nougat) (£119.99 from Curry’s)). The oddity of this social experiment is that the bundle is tied to a legal requirement of a pilot scheme application. It is part of an identification process: a scan of the very sensitive biometric chip included in the electronic passport and a photo. An estimated 25,400 EU academics would be paying roughly £3,047.746 for Google’s Android bundle while an estimated 2.29 million of EU citizens, as of May 2018, could pay £274,777.100, that is, more than a quarter of a billion pounds sterling. Is the Commission’s fine on Google Android backfiring on EU citizens? U.S. sources confirm this to be the case because manufacturers can no longer access Android free of charge. In fact, the overwhelming dominance of Android on such mobile devices has brought Google around £17 billion as profit from mobile advertising alone.²¹

In real life, an application that was supposed to be free of charge is yet another tied sale of a Google bundle under pressure, and with too limited a choice of mobile manufacturers. Could the Commission send the bill overseas to Mountain View, California, please?

²⁰ Ibid.

²¹ Source: <https://www.bloomberg.com/news/articles/2016-01-21/google-s-android-generates-31-billion-revenue-oracle-says-ijor8hvt>.



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