

Google Android after Microsoft: Some Thoughts on the Proceedings Brought against Google for Abuse of a Dominant Position

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SUMMARY: 1. Introduction. 2. Background to the Android antitrust proceedings against Google. 3. *Microsoft v Commission*. 4. Assessing *Google Android* in light of *Microsoft*. 5. Conclusion.

ABSTRACT: In April 2015 the European Commission opened an antitrust proceedings against Google with regard to its business practices related to Android, the famous smartphone and tablet operating system. According to the Commission, Google has abused of its dominant position in that it has allegedly required or incentivized smartphone and tablet manufacturers to exclusively pre-install Google's own applications or services, prevented smartphone and tablet manufacturers from developing and marketing modified and potentially competing versions of Android, tied or bundled certain Google applications and services distributed on Android devices with other Google applications, services, and/or application programming interfaces of Google. The purpose of the article is to find a solution to the case in light of the judgment passed by the Court of First Instance of the European Union in *Microsoft* and show that Google's business practice does not amount to a violation of competition rules in that it protects both consumers and free competition.

KEY WORDS: Abuse of a dominant position; European Commission; Google; Android; Court of First Instance of the European Union; Microsoft.

1. Introduction

In a 2014 resolution, the European Parliament noted that the online search market is of particular importance in ensuring competitive conditions within the digital single market, given the potential development of search engines into gatekeepers and the possibility they have of commercialising secondary exploitation of information obtained; therefore, the Commission was urged to enforce EU competition rules in order to ensure remedies that truly benefit consumers, Internet users, online businesses and to consider proposals intended to unbundle search engines from other commercial services.¹

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¹See European Parliament, Resolution of 27 November 2014 on Supporting Consumer Rights in the Digital Single Market, available at

The proceedings brought by the European Commission against Google may be regarded as the most proper case to exemplify the issues that have been put under the spot by the European Parliament with regard to EU competition rules, especially as far as the prohibition of abuse of a dominant position is concerned.²As we intend to show in this article, Google's business practice related to Android could be regarded either as anti-competitive in nature and prejudicial to consumers' rights or intended to protect consumers' needs by ensuring the efficiency of its operating system (OS). It is our opinion that an answer to this dilemma may be found in the judgment passed by the Court of First Instance of the European Union (CFI) in *Microsoft*. In fact, the situation underlying that the antitrust proceedings brought against Google seems to resemble the one which concerned Microsoft more than ten years ago when the company was accused of tying Windows Media Player to its OS, therefore abusing a dominant position. Moving to present days, Google has been accused of doing something really similar with regard to its online search engine (Google Search) and the applications that run on the Android OS for mobile devices.

Thus, provided the background to the Android antitrust proceedings brought against Google (paragraph 2), a swift analysis of *Microsoft* is provided (paragraph 3) and applied to the present issue (paragraph 4) in order to draw some conclusions (paragraph 5).

2. Background to the Android antitrust proceedings against Google

Android is a mobile OS based on the Linux kernel.³ The company was founded in 2003 and Google bought it in 2005. In 2007 the OS was launched and in less than ten years it has achieved huge success. In fact, in 2011 its market share added up to 15.31% while Apple's iOS controlled the clear majority of the market (52.4%). Today, Android's market share adds up to 64.07% while Apple's iOS controls less than 30% of the relevant market (28.64%).⁴ One of Android's main feature is that it is an open-source system, meaning that it can be freely used and developed by anyone in order to create a modified version of the mobile OS which is called an 'Android fork'.⁵

Suspecting that Google could have breached EU rules prohibiting anti-competitive agreements and the abuse of a dominant position, on 15 April 2015 the European Commission opened an antitrust proceedings against the American company with regard to its business practices related to Android. On 20 April 2016 the European Commission initiated an antitrust proceedings against Alphabet, Google's parent company, for the same

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2014-0071&language=EN> (30 September 2016). One may also want to check European Parliament, Resolution of 19 January 2016 on Towards a Digital Single Market Act, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BTA%2BP8-TA-2016-0009%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN> (30 September 2016).

² On the abuse of a dominant position, see WHISH, R., BAILEY, D. *Competition Law*. Oxford University Press, 2015, FAULL, J., NIKPAY, A. (eds) *The EU Law of Competition*. Oxford University Press, 2014, O'DONOGHUE, R., PADILLA, A.J. *The Law and Economics of Article 102 TFEU*. Hart Publishing, 2013, BELLIS, J.F., VAN BAEL, I. *Il Diritto Comunitario Della Concorrenza*. G. Giappichelli editore, 2009.

³The kernel is the central component of an OS.

⁴See <http://www.netmarketshare.com> (30 September 2016).

⁵As a general rule, a fork happens when a developer uses the source code of a software and create a distinct piece of software. For further information, see: <http://www.androidcentral.com/what-fork-fork> (30 September 2016).

reason.⁶

Since manufacturers enter into agreements with Google to obtain the right to install Google applications on their smartphones and tablets, the Commission's investigation has focused on whether Google's conduct has been in breach of EU antitrust rules in that it might have hindered the development and market access of rival mobile OSs, applications and services. According to the Commission, Google is dominant in the markets for general Internet search services, licensable smart mobile OSs, and app stores for the Android mobile OS as it holds market shares of more than 90% in each of these markets in the European Economic Area (EEA). Its behaviour has apparently denied consumers a wider choice of mobile apps and services while also standing in the way of innovation by other players.

More specifically, the Commission has taken three allegations into account so far: a) whether Google has required or incentivised smartphone and tablet manufacturers to exclusively pre-install Google's own applications or services; b) whether Google has prevented smartphone and tablet manufacturers who wish to install Google applications and services on some of their Android devices from developing and marketing modified and potentially competing versions of Android (the Android forks) on other devices; c) whether Google has tied or bundled certain Google applications and services distributed on Android devices with other Google applications, services, and/or application programming interfaces of Google. For what concerns the first one, Google has allegedly granted significant financial incentives to some smartphone and tablet manufacturers as well as mobile network operators on condition that they exclusively pre-install Google Search on their devices, thereby reducing the incentives of manufacturers and mobile network operators to pre-install competing search services on the devices they market.

With regard to the second one, according to the Commission, Google requires the manufacturers that wish to pre-install Google proprietary apps to enter into an Anti-Fragmentation Agreement that commits them not to sell devices running on Android forks. Thus, Google's conduct would have had a direct impact on consumers as it would have denied them accessing to innovative smart mobile devices based on alternative, potentially superior, versions of the Android OS.

As far as the third one, the Commission believes that, in the contracts signed by Google with manufacturers, the licensing of the Play Store (Google's app store for Android) on Android devices has been made conditional on Google Search being pre-installed and set as default search service. As a result, rival search engines would not be able to become the default search service on the majority of devices sold in the EEA. Furthermore, in its contracts with manufacturers Google would have required the pre-installation of its Chrome mobile browser in return for licensing the Play Store or Google Search.

According to the Commission, there are a number of factors that lead to believe that Google is dominant in the markets for general Internet search services, licensable smart mobile OSs, and app stores for the Android mobile OS. For what concerns general Internet search services, Google holds more than 90% of market shares in most EU Member States. Focusing on licensable smart mobile OSs, the percentage of market shares is the same. Also, one should consider that Android is used on virtually all smartphones and tablets in the lower price range. So, the more consumers adopt an OS, the more developers write apps for

⁶Case no. 40099, *Google Android*. All the information are available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099 (30 September 2016).

that OS (this is called network effect) and, as a consequence, Android users who would like to switch to other OSs would face significant switching costs as they would lose their apps, data, and contacts. For what concerns app stores for the Android mobile OS, Google Play Store accounts for more than 90% of apps downloaded on Android devices in the EEA. It is pre-installed on the large majority of Android devices in the EEA and is not available for download by end users who cannot download other app stores from the Play Store. Thus, Android users are not likely to switch to app stores for other OSs as they would have to purchase a new device and would face significant switching costs.

So, from the Commission's point of view, Google has tied Internet search to the most popular mobile OS in order to preserve and strengthen its dominance in that market area. Soon after the Statement of Objections was released, Google reacted with a post on its blog, underlying that its partner agreements are entirely voluntary, meaning that anyone can use Android without Google.⁷ In addition, Google stressed that manufacturers who want to be part of the Android ecosystem have to test and certify that their devices will support Android apps: otherwise, the apps could not work from one Android device to the other.⁸

3. Microsoft v Commission

Microsoft⁹ is one of the best renowned cases concerning the abuse of a dominant position. Microsoft was accused of refusing to share information that would allow interoperability between its server and equipment developed by Sun Microsystems, a software company. Afterwards, Microsoft was accused of tying Windows Media Player - that is to say, its own media software - to its own OS. The European Commission ordered Microsoft to pay a fine, disclose the server information, and produce a version of the Windows OS without Windows Media Player.¹⁰ Microsoft did not comply and sought the annulment of that decision.

For what concerns the charge of abusive tying, the European Commission took four factors into consideration: a) the tying and tied products were two separate products; b) the undertaking concerned was dominant in the market for the tying product; c) the undertaking concerned does not did customers a choice to obtain the tying product without the tied product; and d) the practice in question foreclosed competition.¹¹

⁷In the words of Google Senior Vice President and General Counsel, "try it - you can download the entire operating system for free, modify it how you want, and build a phone. And major companies like Amazon do just that". See <http://googlepolicyeurope.blogspot.it/2016/04/androids-model-of-open-innovation.html> (30 September 2016).

⁸In the words of Google Senior Vice President and General Counsel, "imagine how frustrating it would be if an app you downloaded on one Android phone didn't also work on your replacement Android phone from the same manufacturer". See <http://googlepolicyeurope.blogspot.it/2016/04/androids-model-of-open-innovation.html> (30 September 2016).

⁹Case T-201/04 *Microsoft v Commission* [2007] II-3601. For an analysis of the case, see ANDREANGELI, A. "Case note on T-201/04, Microsoft v Commission, judgment of 17 September 2007", *Common Market Law Review* 44, P. 863, COLANGELO, G., PARDOLESI, R. "Microsoft, igiudicieuropèi e l'antitrust di unavolta", *Il Foroitaliano*, 2008, P.114, PARDOLESI, R., RENDA, A. "The European Commission's Case Against Microsoft: Kill Bill?", *World Competition*, 27, P.513-566, HOWARTH, D., McMAHON, K. "Windows has Performed an Illegal Operation: the Court of First Instance's Judgment in Microsoft v Commission", *European Competition Law Review*, 29, P.117-134.

¹⁰See Commission Decision of 24 May 2004 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/C-3/37.792 - Microsoft), in OJ L 32, 6 February 2007, 23.

¹¹See *Microsoft*, para 842.

With regard to the first factor, the CFI held that customers may wish to obtain the OS and the media software together, but from different sources, or it may be consumers do not need a media software at all. Also, in light of the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products and Microsoft's commercial practice, the CFI thought the European Commission had demonstrated the existence of separate consumer demand for streaming media players. More specifically, "there are distributors who develop and supply streaming media players on an autonomous basis, independently of client PC operating systems. Thus, Apple supplies its QuickTime player separately from its client PC operating systems. A further particularly convincing example is that of RealNetworks, Microsoft's main competitor on the streaming media players market, which neither develops nor sells client PC operating systems. In that regard, it must be pointed out that, according to the case-law the fact that there are on the market independent companies specialised in the manufacture and sale of the tied product constitutes serious evidence of the existence of a separate market for that product. [...] Microsoft, as it confirmed in answer to a written question put by the Court, develops and markets versions of Windows Media Player which are designed to work with its competitors' client PC operating systems, namely Apple's Mac OS X and Sun's Solaris. Similarly, RealNetworks' RealPlayer works with, inter alia, the Windows, Mac OS X, Solaris and some UNIX operating systems. [...] Windows Media Player can be downloaded, independently of the Windows client PC operating system, from Microsoft's Internet site. Likewise, Microsoft releases upgrades of Windows Media Player, independently of releases or upgrades of its Windows client PC operating system".¹²

Most of all, the CFI stressed the difference between the nature of Windows as an OS, thus as a system software, and Windows Media Player as an application software. While the former controls the hardware of the computer and enables the user to make use of it, the latter runs on it. Therefore, the CFI concluded that an OS and a media player constitute two separate products.¹³

For what concerns the second factor, Microsoft did not dispute its dominant position, so the CFI did not focus on that issue.¹⁴

With regard to the third factor, the Court found that consumers were not allowed to acquire the Windows OS without purchasing Windows Media Player, meaning they did not have a choice to obtain the former without the latter. Also, it was not possible to uninstall Windows Media Player. Thus, the condition relating to the imposition of supplementary obligations was satisfied.¹⁵

For what concerns the fourth factor, the bundling of Windows Media Player with the Windows OS without the possibility of removing the media software from the OS, allowed Windows Media Player to benefit from the ubiquity of the OS on PCs. Windows Media Player automatically achieved a level of market penetration corresponding to that of the Windows OS without having to compete on the merits with competing products.¹⁶

Finally, the CFI held that Microsoft had not demonstrated the existence of any objective justification for the abusive bundling of Windows Media Player with the Windows

¹²See *Microsoft*, para 922-929, 933.

¹³See *Microsoft*, para 926.

¹⁴See *Microsoft*, para 843.

¹⁵See *Microsoft*, para 961, 963, 975.

¹⁶See *Microsoft*, para 1036-1038, 1046, 1090.

client PC operating system. Therefore, the Court confirmed the European Commission decision with regard to the fine, the disclosure of information and the production of a version of the Windows OS without Windows Media Player.¹⁷

4. Assessing Google Android in light of Microsoft.

Then, one can try to apply the reasoning expressed by the CFI in *Microsoft* to the *Google Android* case in order to assess whether Google may be found “guilty as charged”.

So, first of all: are Android and its applications two separate products? Yes, they are. In fact, Android is an OS, that is to say, a software system, while Google Play Service, Google Chrome and the other Google apps are applications software. The former controls the hardware of the mobile phone or the tablet and makes it possible for users to use them, while the latter runs on it.

Second of all: is Google dominant in the market of the tying product, that is to say in the smartphone and tablet OS market? As stated above, in 2016 its market share has added up to 64.07% and Apple's iOS - that is to say, the closest competitor - trails at 28.64%. But is it enough to say that Google is actually dominant? In a market as multi-sided as the digital one, being dominant in one sector is not enough in that it is necessary a certain degree of market power in every part of the market. Google's business practice related to Android seems to suggest that no matter the position that Google may have in the mobile OS market, that would be neutralized by the fact that all the downstream companies have free access to the upstream platform.¹⁸ Google cannot act like a company holding a dominant position because Android is an open-source and free software whose source code has been entirely disclosed¹⁹. So, Google cannot behave independently of its competitors²⁰ and its dominance could be proved only if it were possible for them not to innovate and still retain its market power²¹. In a framework as dynamic as this one, market shares have a very limited importance as they simply mean that a firm keeps innovating at least as fast as its competitors²².

Thirdly, does Google give customers a choice to obtain Android without Google Play and Google Mobile Service? If it were not possible to get the apps without the OS, then one would be in the presence of a tying practice, but that does not seem to be the case. For instance, about 70% of Android smartphones sold in China come without Google Play²³ so it is actually possible not to get the different products together.

17See *Microsoft*, para 1146.

18 See MAIR, C. “Paranoid Android? EU Commission vs. Google's Mobile Android OS”, available at <http://leidenlawblog.nl/articles/paranoid-android-eu-commission-vs.-googles-mobile-android-os> (30 September 2016).

19See <https://chillingcompetition.com/2013/09/05/some-thoughts-on-the-new-anti-google-android-complaint-post-13/> (30 September 2016).

20See Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, in OJ C 45, 24 February 2009, 7.

21In Case no M.6281, *Microsoft/Skype*, the European Commission stated that “the innovation cycles in these markets are short. As a result, software and platforms are constantly being redeveloped. Innovators generally enjoy a short lead in the market” (para 83).

22See KORBER T. “The commission's next big thing? - Why the Google case is not Microsoft reloaded”, *Neue Zeitschrift für Kartellrecht*, 2015, P.415.

23See KORBER, T. “Let's talk about Android - Observations on Competition in the field of Mobile operating System”, *Neue Zeitschrift für Kartellrecht*, P.378.

Finally, does Google's business practice foreclose competition? No, it does not and all things considered, it makes possible to competition to thrive since the contracts do not impose exclusivity: they simply ensure that users get a device with a fully operating set of Google apps.

As far as the foreclosure of competition is concerned, one should consider the forks issue. Generally speaking, the Android forks should be regarded as something positive as they are the manifest sign of how vibrant and open to innovation this market sector is. However, from the consumers' viewpoint, this may result in a harbinger of problems: in fact, the spread of Android forks may lead to the fragmentation of the Android system, meaning that it would be much more complicated to develop and use applications that actually work on Android. As a matter of fact, a potentially infinite number of Android systems could be developed and it would be very difficult to have a proper version of every app running on every Android version. That would affect app developers, who would have a very hard time trying to figure it out what to do, and consumers as well, who would run the risk of buying a tablet or a smartphone which could not be used.

5. Conclusion

From the viewpoint of competition law, it is highly likely that Google will be for the years to come what Microsoft was at the beginning of the new millennium: the company whose behaviours would be strictly scrutinised, favouring further developments in that area of law.

It does not come as a surprise that the European Commission has decided to initiate a number of proceedings against Alphabet and Google. For instance, the Commission is investigating the way in which Google displays its own comparison shopping service and that of competitors in its general search results as a possible case of abuse of a dominant position.²⁴ In the past, the Commission investigated some merger operations concluded by Google²⁵ and an ad hoc aid granted to Google Poland by Polish authorities.²⁶ Finally, it seems that Google will face other investigations as the European Commission is focusing its attention on the company's search services, the copying of third-party content and advertising.²⁷ It is self-evident that the technology which is able to attract a higher number

²⁴Case no 39740, Google Search. All the information are available on http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740 (30 September 2016). Two other cases (Case no 39768 and case no 39775) have been merged with this one. On this topic, see MAYS, L. "The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe", *The George Washington Law Review*, 83, available at <http://www.gwlr.org/the-consequences-of-search-bias-how-application-of-the-essential-facilities-doctrine-remedies-googles-unrestricted-monopoly-on-search-in-the-united-states-and-europe/> (30 September 2016).

²⁵Case no M.7813, Sanofi / Google / DMI JV, case no M.6381, Google / Motorola Mobility, and case no 4731, Google / Doubleclick. All the operation were declared compatible with the internal market and the EEA Agreement. See http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7813 (30 September 2016).

²⁶Case N67/2008, Google Poland Sp. z o.o. See http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N67_2008 (30 September 2016).

²⁷See <https://www.theguardian.com/technology/2016/apr/20/eu-commission-google-android-skew-market-competition-antitrust-vestager> (30 September 2016). One should remember that the US Federal Trade Commission has been focusing its attention on Android too. See

of new consumers becomes the standard in a given field as it is self-evident that consumers are more likely to adopt the most widespread technology or the technology they believe will become the most widespread. In light of that, one cannot deny that Google has become the standard in the search engine market. However, one should be aware of the peculiar features of the markets related to information technology. Google controls the clear majority of the total market shares on a global scale equaling to 71.11% and the closest competitor is Bing which trails at 10.65%. However, in 2013, Google controlled 77.46% and, in 2011, its market share added up to 82.99%.²⁸ It has already been underlined that if Facebook decided to join the search engine market, that could change the market landscape dramatically as Facebook could overcome Google and become the new dominant Internet search engine and navigator.²⁹ The same reasoning applies to the OSs market and the position (Google) Android holds in it.

Free flow of information and technological developments make it very difficult to keep a dominant position as everyone is trying to develop the next big thing. Think for instance about search engines and the clash between Internet Explorer and Netscape Navigator which took place between the end of the nineties and the beginning of the new millennium. Think about MySpace or Second Life as far as social networks are concerned. Information technology is a place where the password to (almost) everything seems to be "faster and better". The peculiar features of the digital market do not make easy to evaluate the fairness of an undertaking's conducts: in fact, classic standards may prove quite useless. This of course does not mean that those conducts do not fall within the scope of competition law and all the subjects that are involved - such as the European Commission, consumers, competitors - should rely on the dominant undertaking's self-corrective capacity.³⁰ However, the existing regulations should be implemented and adapted in order to reflect their competitive dynamics, avoiding that an excessively interventionist approach inhibits companies from continuing to invest in R&D and innovation.

New technologies have changed the way companies do business in every economic sector and the EU competition policy must take this into account.³¹

<http://www.wsj.com/articles/ftc-extends-probe-into-googles-android-1461699217> (30 September 2016). Leaving competition law aside, one should remember the issues related to the right to be forgotten. See Case C-131/12 *Google Spain and Google* [2014] published in the electronic Report of cases. For a review, see KOUTRAKOS, P., NIC SHUIBHNE, N. "To strive, to seek, to Google, to forget", *European Law Review*, 40, P.293.

²⁸See <https://www.netmarketshare.com> (30 September 2016).

²⁹AULETTA, K. *Googled: The End of the World as We Know It*. Penguin Books, 2009.

³⁰KLEIN, J.I. "The Importance of Antitrust Enforcement in the New Economy", available at <http://www.justice.gov/atr/public/speeches/1338.htm> (30 September 2016): "Just as using antitrust law to implement social policy is a mistake, so too is a religious faith in self-correcting markets. There is a need for antitrust enforcement to aid the free market and, at its legitimate core, such a role focuses on assuring that market power doesn't restrain competition that consumers would otherwise enjoy. And a properly focused concern about market power, in turn, requires surgical intervention precisely because businesses benefit from efficiency and market power alike, whereas consumers benefit from the former but not the latter. So our job is to make sure that we take out the fat (market power) without taking out the muscle (efficiency)."

³¹PONS, J.F. "European Competition policy in the New Economy", available at http://ec.europa.eu/competition/speeches/text/sp2001_012_en.pdf (30 September 2016): "Applying competition law in new economy cases is very difficult. The judgements that have to be made are often fine ones - allowing an operation to go through could close a new market completely, whilst prohibiting or imposing conditions on another could stifle innovation and prevent technical progress."