GCR NEWS

Digesting the Android decision

22 October 2018

In July, the European Commission finally issued its second long-anticipated decision against Google. This time, the EU competition enforcer found that the company had abused its dominance in several markets by imposing restrictions on its Android mobile device operating system. **Tom Madge-Wyld** gauged the opinions of several lawyers on these findings and their consequences, the theories of harm, the remedy, and the wider implications the case may have for enforcement in the technology sector.

The €4.3 billion fine attracted much of the mainstream media headlines. But for competition lawyers there was far more to chew over. Although one cannot analyse a decision for which the full reasoning has not yet been made public, the antitrust community was quick to pore over what it knew about the authority's conclusion.

First published on the Global Competition Review website, October 2018

The facts were relatively simple: the European Commission accused Google of illegally tying its search and browser applications by requiring device manufacturers to pre-install both on Android mobile devices if they also wanted to include the Google Play store; of paying off manufacturers and mobile network operators for pre-installing Google Search on devices; and of obstructing the development of competing Android-based operating systems, or "forks".

But the reactions delved deep into the legitimacy of those theories of harm, how the relevant markets were defined, and whether the remedy had done enough to address the competition concerns.

Many views followed pro-Google or pro-complainant lines – or were branded as such by those who disagreed. Twitter spats erupted between well-regarded academics and competition lawyers, with allegations ranging from the feeding of conspiracy theories to promoting content driven by people on the payroll of Google or the complainants.

Many believe that the commission founded its case on well-established legal theories. Others have highlighted supposed cracks in the decision, such as a relevant product market that excluded Apple's iOS. Many on the other side of the Atlantic – not least of whom, US president Donald Trump – have criticised the European Commission and commissioner for competition, Margrethe Vestager, for allegedly being politically motivated. A New York Times business columnist declared "Trump is right" and said it was difficult to find any competition expert who agreed with the decision.

GCR invited six lawyers and economists to share their own views.

Damien Geradin, partner at Euclid in Brussels
(adviser to Unlockd in its litigation against Google and to Microsoft at the beginning of the Android investigation)

Several observers, most of them associated with Google in one way or another, have criticised the *Android* decision as fundamentally wrong and predicted that it would have dire consequences for those benefiting from the Android ecosystem.

I disagree. The commission's decision is welcome, because it brings an end to several practices that had the effect of strengthening Google's dominance in the search market. There is nothing esoteric about the commission's findings. For instance, Google's requirement that device manufacturers pre-install the Google Search app and Chrome as a condition for licensing Google's Play Store are nothing less than a form of contractual tying prohibited by the case law of the EU courts. Google should have known that this form of "supplementary obligations" would fall foul of Article 102 of the Treaty on the Functioning of the European Union, and the same could be said of its payments to certain

manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices. On both infringements, the commission is on safe grounds.

The decision will create new opportunities – not only for device makers, which will be able to decide which apps they preload on their devices and will also be allowed to experiment with Android forks – but also for app developers competing with Google, which may be better able to negotiate deals with manufacturers for app placements.

Some have said that Google will have no choice but to charge for its Android operating system, but I very much doubt it, as Google will continue to make plenty of money with its leading apps. In any event, charging a fee for Android may not be such a bad thing. It may stimulate the development of a new mobile operating system and thus greater product differentiation. It is indeed hard to compete with a free operating system combined with strong network effects.

Some have also said that the commission's decision will negatively affect innovation, but this is again doubtful. Additional competition in the mobile operating system and app markets will stimulate innovation, not the reverse.

Perhaps a regret associated with the commission's decision is that it took so long to be adopted and that it does not do much to restore competition, which has been badly damaged by Google's abusive practices. That being said, the decision is a strong precedent and it is hoped that the commission will make sure that Google puts an end to its abusive practices.

Cristina Caffarra, head of competition at Charles River Associates Europe (adviser to Russian search engine Yandex as a complainant)

The theory of harm in the European Commission's Android probe is based on well-understood economic mechanisms – nothing eccentric or extravagant – that are entirely mainstream. The theory of harm falls into a long-established literature about tying strategies to preserve and entrench monopoly positions in ways that reduce efficiency and harm consumers. This is all fully in the Microsoft tradition, enhanced by more recent economic insights on how two-sided business models can 'dial up' the incentives to 'colonise' adjacent markets.

Reactions to the decision, though particularly vehement in the US, have not so much questioned the economic logic, but essentially embraced the idea that this is in fact one manifestation of the European 'techlash' – hitting at successful US companies out of frustration and impotence – which will 'reduce investment and innovation in smartphone operating systems, and result in higher prices for smartphone handsets'. None of this is in

fact new – we had similar cries of pain at the time of the Microsoft Internet Explorer decision, with broad claims that it would kill incentives to innovate. But invective about "blows to innovation" and "higher prices for handsets" are not credible, well-founded criticisms.

Arguing that "Google's conduct was just its way of monetising Android" cannot be an exculpation for conduct that had negative effects on others. How can one contend, as a matter of principle and without evidence, that the benefits of greater innovation by Google in respect of the Android mobile operating system outweigh the cost of entrenching Google's position in search (with its own effect on innovation incentives there)?

Second, why focus on Google's incentives to innovate in mobile OS? What if Google's tie had a further distortionary effect on the market for mobile OS because companies without a parallel search business to promote were unable to match Google's willingness to set zero prices and receive payment "in kind" via default status? It is overall innovation incentives that should matter, not just Google's.

Third, is the default assumption that the European Commission's intervention will result in Google charging for Android and making smartphones more expensive really an inevitability? Google has already said it will not seek to limit Android's distribution post-decision, and it is far from clear that it would in fact be better off with a different model. Plus, the effect on smartphone prices is ambiguous – even if Google began charging for Android/Google Play, economic analysis shows this can be offset by device makers being better able to monetise their devices by selling default status to search engines. And further, lower handset prices are not the same thing as consumer welfare: foreclosing effects in search can leave consumers worse off even if their smartphones get cheaper.

These "big picture" criticisms do not really hit on "obvious flaws" in the case.

Where things are very unclear is what the decision truly does in terms of bringing about a better outcome and making a tangible difference to competition in any of the markets of interest. It is just a "cease and desist" with everything to be played for – anything can happen, and will the remedy prove easily circumvented? A more prescriptive approach would have been giving clearer directions, but I understand the reluctance to be too prescriptive and being slammed for being so.

We will need to see what the decision says and how the remedy shakes down. But it seems better to stand up and be counted on these difficult conduct cases than doing nothing and it being argued that Europeans don't know how to do market definition, are jealous of Silicon Valley, or worse, are using antitrust as a weapon in trade wars.

First published on the Global Competition Review website, October 2018

Fiona Carlin, partner at Baker McKenzie in Brussels

The European Commission's *Android* decision is an attempt to overcome consumer reluctance to move away from a product they are happy with, in order to fix perceived societal concerns about tech firms. It disregards the fact that the mobile markets at issue do not, by their very nature, present the characteristics that could lead to anticompetitive foreclosure.

The commission defines a market for "licensable" mobile operating systems. It does not see other operating systems used by Apple and Blackberry as in the same market because the latter are not available for licence by third-party device manufacturers.

Yet the very existence of Android is evidence of the competitive pressure exerted by operating systems on each other. Since 2008, Google has delivered 14 major releases of Android. There have been year-on-year innovations. If Android were to provide a lower-quality experience, or relax its innovative efforts compared to its rivals, smartphone users, always demanding the latest technology, would surely switch in droves at the next round of handset launches.

This intense competition produces compelling consumer benefits.

Mobile phones are intensely personal, and personalised, devices. There were 82 billion downloads from Google Play in 2016. Eighty per cent of consumers customise their home screen. It seems implausible to say that consumers would put up with an undesired – or lower quality – app, just because it comes pre-installed. Some of the most popular apps – Facebook, Dropbox, WhatsApp – are more popular with consumers than their Google equivalents, whether or not the Google apps are pre-installed.

Yes, the average consumer behavioural default is to use the pre-installed search engine or browser, but switching does occur and, for discerning consumers, quality, privacy and other preferences readily overcome pre-installation.

Also, EU precedent militates against any finding of pre-installation foreclosure in relation to the apps in question. The alleged foreclosure in the 2004 *Microsoft Windows Media Player*decision occurred in a world without apps, or app stores, or user-driven device customisation available with just a few clicks. In *Microsoft/Skype* in 2013, the commission and, on appeal, the court, examined whether Microsoft choosing to install Skype on the desktop post-acquisition would lead to foreclosure of rival video telephony services. The conclusion was there were no technical or economic constraints preventing users from downloading several communications applications on their operating device, not least since the software was free, easy to download and took up little space on hard drives. Similarly,

in *Facebook/WhatsApp* in 2014, the commission found that multi-homing was facilitated by the fact that downloading is generally free, easy and does not take up much smartphone capacity, and users do not have to log in each time when switching between apps.
Many would say that pre-installation – or preset services – is at most a transitory marketing benefit. Canada's Competition Bureau in 2016 found that search engines "can and do" compete to appear as the default search engine on smartphones. Switching activity over time was significant and manufacturers were able, for example, to ship multiple devices with different pre-loaded search engine defaults.

Consumers are not locked in. They can and do swiftly switch away from apps and other default services they do not want. And the quid pro quo in terms of efficiencies would appear overwhelming. Device makers receive a free operating system, consumers have the latest innovations at their fingertips and the prices of handsets fall.

It is questionable whether the commission's decision will lead to any material improvement of consumer welfare.

Alec Burnside, partner at Dechert in Brussels
(adviser to a third-party complainant in the case)

As the dust settles on the *Android* decision, the next milestone must be the 90-day deadline for Google to comply [17 October 2018]. With, however, the troubling reflection as to whether the decision has come too late to restore the competition that might have flourished.

Compliance, at a superficial level, is much simpler than in *Shopping*, where Google needed to come forward with a solution. The *Android* decision imposes a cease-and-desist order. Google should simply strike the offending clauses from new contracts, and no doubt inform its universe of contractual partners that they are not bound by any existing clauses. If this upsets the balance of those contracts, then good: that's exactly what the commission wants, to have Google operate contracts without these exclusionary clauses.

Experience tells us, however, that Google will look for a minimalist form of compliance – as it did in *Shopping*, which Commissioner Vestager described as providing a precedent – but which has produced not the slightest ripple effect into Google's preferencing in other areas of specialised search. At least Google is prevented from replacing the offending clauses with other measures of equivalent effect. So all eyes will focus on any attempted re-balancing of the contracts in question.

Lifting those eyes to the horizon, the bigger question is whether Google has been able, during the long delay in bringing the case to decision, to entrench itself so effectively that it can relax these clauses without feeling any effect. For example, Amazon – a sometime

would-be entrant into smartphones, with a plan to use open source Android – has already declared that it will not now renew the effort. Who else – at least of comparable potential – will now launch a smartphone running a forked version Android?

Similarly, with the Google search app now so thoroughly entrenched in mobile devices – thanks to the default status and exclusivity secured by means of Google's abuses – which search app stands a realistic chance of displacing it?

Early commentary speculated that Google might start charging for the use of Android software, with critics of the decision arguing that this would be to the detriment of the consumer. But Google has been quick to announce that it will ensure the continued availability of Android. This is hardly surprising: Android is the conduit for the flow of user data back to Google, which fuels its income stream. Google is hardly likely to want to make it less attractive. Of course, the notion that Android is "free" is, as we know, a relative thing: free in a monetary sense, but users pay with their personal data. Data attracts advertisers, advertisers pay for access to the user. Follow the money.

While Commissioner Vestager adroitly side-stepped journalists' questions whether ultimately the only solution was to break Google up, others have not been so reticent. Echoing – for example – the *Boston Globe*, DG Competition's own chief economist, Tommaso Valletti, mused out loud, before the decision, that a break-up might ultimately be the way forward. The power exists, even if it is not spelt out in those words. Structural measures are available, if there is no less intrusive way of achieving what needs to be done.

Short of enforcing a change of ownership, there is precedent for separations within a continuing single ownership (think gas and electricity) – so-called "legal unbundling". But the approach is challenging, because the incentives for self-favouring remain unaffected. Witness the ineffectiveness of the *Shopping* remedy, where Google is consistently the highest bidder in the auction it has instituted – then of course simply transferring the auction price from one pocket to another.

It is good to have the *Android* decision. But the proof of the pudding will be in the eating.

Hein Hobbelen, partner at Bird & Bird in Brussels

The auction remedy in the *Google Shopping* case was able to wall off shopping from other parts of Google's business, while keeping it as part of the company. In theory, the commission could have gone further in the *Android* case, but calls for the breakup of Google were always unlikely to be pursued. It would be an extremely drastic step both from a legal and a political perspective.

From a legal perspective, it would be difficult for the commission to do that under EU competition rules as things stand. The bottom line is that the legislation says that the commission can impose a structural remedy where it is proportionate and necessary to bring an alleged infringement to an end. However, EU courts have ruled in previous cases that the commission cannot impose a particular remedy where several remedies exist for bringing an infringement to an end. In essence, this means that imposing a structural remedy is not really within the competence of the commission without first having explored other possible remedies. So, I don't think the commission can, as things stand, force Google to divest some of its business to another owner and do what the US authorities did at the beginning of the last century, namely breaking up Standard Oil.

Second, from a political perspective, it would be a highly controversial remedy. Although some politicians have called for the breakup of Google, it would be an unprecedented step in European competition policy that would undoubtedly lead to significant further tensions with the US government. Who hasn't taken note of President Trump's tweet following the *Android*decision?

A choice of screen remedy has not yet been ruled out as a solution. This is still to be decided by the commission and Google, which has to now propose a remedy to bring the alleged infringement to an end. It is not excluded that this choice of screen remedy might happen, but many alternative avenues are possible.

In terms of wider implications, the time it takes for the European Commission to decide these types of cases is a key factor in an ongoing debate about the effectiveness of competition policy in tackling alleged anticompetitive practices in digital markets. Indeed, Commissioner Vestager acknowledged back in January with reference to the commission's *Google Shopping*decision that "of course it would have been better if this case had been solved fast, because then everyone could move on." It took quite a number of years for the commission to conclude its *Google Android* investigation. According to some commentators, that was far too long.

All of this may well lead to Commissioner Vestager reiterating her calls for the commission to take on broader powers to impose interim measures requiring companies to cease alleged anticompetitive behaviour before a formal infringement decision. However, such a move could give rise to several due process concerns. The debate is very much open and alive.

First published on the Global Competition Review website, October 2018

Jonas Koponen, partner at Linklaters in Brussels (formerly an adviser to Microsoft in a complaint against Google, but not involved for any client in the Android case)

The conduct that the European Commission found objectionable – tying and exclusivity payments – is a classic exclusionary strategy, reducing consumer choice and innovation. But tying is a difficult allegation to make, and lawyers on both sides will fight tooth and nail over the theory of harm.

The onus is now on Google to ensure that the changes it implements as part of the remedy are effective.

But it remains to be seen whether the enforced change on Google's practices will have a significant impact on competition in the relevant markets. There is some doubt as to whether a shift in consumer preference for products such as Google Search and Google Chrome will ensue.

Companies that go through a series of cases of this kind – assuming they have a reflective and ambitious corporate environment – will likely alter their approach. For any company that goes through this, it is a very profound experience, unless the company is completely laissez faire, which successful large companies rarely are.

The investigation and time it took for a decision to be reached raises wider questions about the effectiveness of enforcement in the tech sector.

It does raise the question as to whether the commission should use its powers to adopt interim measures at a certain stage during a procedure of this kind. One would expect the commission at a point in the journey to believe that it has a prima facie case and that sufficient harm results, so it could then adopt interim measures.

First published on the Global Competition Review website, October 2018