

## Google and abuse of dominance: Commission lands another blow

The European Commission (the Commission) has issued its highest ever fine in sanctioning Google €4.34 billion for abusing its dominant positions in:

- General internet search services.
- Licensable smart mobile operating systems.
- App stores for the Android mobile operating systems.

The decision is the most recent in a trilogy of dominance cases that the Commission has brought against Google, the other two being the Google shopping case, in which Google was fined €2.42 billion in June 2017 and the Google AdSense investigation, which is still ongoing ([www.practicallaw.com/w-009-3400](http://www.practicallaw.com/w-009-3400); [www.practicallaw.com/6-631-3860](http://www.practicallaw.com/6-631-3860)). The Commission issued its statement of objections to Google in respect of these infringements in July 2016 (see *News brief "Google investigated over Android business practices: the Commission strikes again"*, [www.practicallaw.com/4-628-3425](http://www.practicallaw.com/4-628-3425)).

### Dominance

The Commission framed its decision within the following markets:

**General internet search services.** The Commission found that Google enjoys a dominant position throughout the EEA, with market shares exceeding 90% in a majority of EU member states. This follows the frame of reference adopted by the Commission in the Google shopping case.

### Licensable smart mobile operating systems.

The Commission found that Google enjoys a dominant position worldwide (excluding China), with market shares exceeding 95% and high barriers to entry.

It is notable that the Commission distinguished licensable smartphone operating systems, such as Android, from vertically integrated smartphone operating systems, such as Apple's iOS, which cannot be licensed by third-party device manufacturers. It considered that downstream competition between iOS and Android devices did not sufficiently constrain Google's Android

operating system licensing power upstream on the basis that:

- Apple devices are typically priced higher than Android devices, meaning that they may not be accessible to a large part of the Android user base.
- End-user purchasing decisions are influenced by factors that are independent from the operating system, for example, device brand and hardware features.
- Android users face barriers to switching though loss of apps, data and contacts, and sunk learning costs.
- Even if users were to switch, Google is still the default search engine within iOS.

**App stores for the Android mobile operating systems.** The Commission found that Google enjoys a dominant position worldwide (excluding China), with the Play Store accounting for more than 90% of apps downloaded to Android devices and with high barriers to entry.

### Abuse

The anti-competitive behaviour by Google that the Commission focused on related to the following areas of conduct:

**Licensing of apps.** Google offers its apps to device manufacturers as a bundle which includes the "must have" Google Play store app. In doing so, the Commission held that Google engaged in two instances of illegal tying: the tying of the Google search app with Play Store; and the tying of the Google Chrome browser with Play Store or the search app.

The Commission expressed concerns around the status quo bias created by the illegal tying. It found, for example, that on Windows mobile devices with Microsoft's Bing search engine pre-installed, more than 75% of search queries were carried out using Microsoft's Bing platform; whereas on Android devices with Google search and Chrome pre-installed, more than 95% of all search queries were carried out using the Google search platform.

The Commission found that this practice reduced the incentives of manufacturers

to pre-install competing search and browser apps and reduced the incentives of consumers to download these apps. The Commission rejected Google's submission that the bundling was necessary to allow Google to monetise its investment in Android, on the basis that it achieves significant revenues from each of the Google Play store and search advertising alone.

**Exclusivity-inducing arrangements.** The Commission found that Google granted financial incentives to device manufacturers and mobile network operators (MNOs) on the condition that they exclusively pre-install Google search across their entire portfolio of Android devices.

The Commission opined that this practice has denied rival search engines the ability to compete on the merits, by reducing manufacturer's and MNOs' incentives to pre-install competing search engines on their mobile devices.

**Anti-fragmentation provisions.** The Commission found that in order to pre-install Google's proprietary apps on mobile devices (including the Play Store and Google search), manufacturers had to commit not to develop or sell any devices running on an alternative, unapproved version of Android, known as an "Android fork".

The Commission views this practice as having obstructed the development and distribution of competing Android forks which could have provided a platform for rival apps and services, and, in particular, rival search engines.

The Commission rejected Google's submissions that these restrictions were necessary to prevent fragmentation of the Android ecosystem on the basis that Google:

- Did not provide credible evidence that Android forks would be affected by technical failures or fail to support apps.
- Could have ensured that Android devices using Google apps were compliant with Google's technical requirement through other means.

### Implications and next steps

Few legal developments exceed the propensity of big tech antitrust decisions to provoke strong political opinions. The large size of the fine incited a strong reaction from a number of politicians, including US President Trump, who took to Twitter to express his displeasure.

Academic debate has also been strong following the decision. Commissioner Margrethe Vestager emphasised in her press release that Google's conduct "denied rivals the chance to innovate and compete on the merits". Although not mutually exclusive, some commentators have expressed concerns over whether the decision emphasises the protection of market structure and

competitors over consumer welfare concerns. Theories of harm based on the former receive little credence in contemporary US antitrust jurisprudence.

There has also been debate around the Commission's apparent decision to discount competitive pressure placed on Google by Apple's and Blackberry's vertically integrated mobile operating systems.

Google has 90 days to effectively bring an end to the practices that led to the finding of abuse. If it fails to do so, the penalty could be up to 5% of the average daily worldwide turnover of Alphabet, Google's parent, for each day of non-compliance. However, Google has expressed intentions to seek

interim measures with the EU General Court to avoid "serious and irreparable harm" to its business. It is rare for the General Court to grant this type of request.

Unlike the Google shopping investigation, which was initiated under former Commissioner Joaquín Almunia, Commissioner Vestager has presided over the Google Android investigation from its inception. The Commission allegedly rejected commitments offered by Google to settle the case. Google has stated that it intends to appeal the decision.

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