

Google vs Brussels

WHAT COMPARISON SHOPPING TELLS US ABOUT ANDROID



Google continues to generate almost 90% of its revenues from advertising¹. To maximise revenues, the company has many strategies to attract traffic and collect data from users so that its adverts are better targeted and gain more exposure. However, some of these strategies have landed Google in hot water with the European Commission (EC) and other authorities around the globe.

In June 2017, the EC fined Google a record €2.42bn for stifling competition in comparison shopping markets. The EC has also issued a Statement of Objections in a long-running competition investigation into Google's Android mobile operating system. Whereas the nature of the abuses in the two cases differs, there is some overlap between the approaches to market definition and dominance. This article explores the implications of the EC's analysis in the probe into comparison shopping for the Android inquiry.

In the comparison shopping case, the EC found that Google had abused its dominant position in general search by systematically favouring its own comparison shopping service to drive traffic to this site. Whereas Google Shopping typically featured near the top of search results in a rich display format, Google modified its algorithms to demote rival comparison services, which did not appear, on average, until the fourth page of search results.

As for Android, the EC has made three allegations of abuse against Google. The EC's preliminary view is that these preserve and strengthen Google's dominance for general search services². First, Google has provided significant financial incentives to device manufacturers and Mobile Network Operators (MNOs) to exclusively pre-install Google Search on their devices – a form of potentially anti-competitive rebate in the market for general internet search services (the same market in which Google was found to be abusing its dominant position in the comparison shopping case). This behaviour should increase/maintain traffic flow to Google Search.

Second, Google requires device manufacturers that wish to pre-install Google Play Store³ to also pre-install Google Search and Chrome. This, the EC contends, is a form of anti-competitive tying or bundling in a market defined by the EC as 'App stores for the Android mobile operating system'. Again, this helps direct more queries to Google Search because it increases the number of pre-installations of Google Search and gives Google greater control over the default search engine used in web browsers.

Finally, Google prohibits device manufacturers that wish to pre-install Google's apps from installing Android forks⁴ on any of their other devices. The company does so by means of "anti-fragmentation agreements", which the EC argues are illegally restrictive in a market defined as 'Licensable smart mobile operating systems'. The consequence of these agreements is that developers of Android forks have difficulty finding handset manufacturers that are willing to pre-install their operating system, as

¹ http://europa.eu/rapid/press-release_IP-17-1784_en.htm

² http://europa.eu/rapid/press-release_IP-16-1492_en.htm

³ Most users find and then download apps to their mobile devices from Play Store rather than downloading them through websites. The Play Store also includes a number Application Programming Interfaces (APIs) - these perform a range of different functions, such as integrating maps, location services and push notifications, which allow apps to work with and exploit the capability of the Android operating system.

⁴ Android provides the basic software onto which other features, including apps, can be added. Google itself adds proprietary software to Android in order to create Google Android. Other parties can also add their own software to Android to develop something known as an "Android fork". Amazon and various Chinese companies (Google Android is banned in China) are the most prominent developers of such Android forks.

Amazon discovered when it tried to launch its own Android fork⁵. This reduces the popularity of Android forks and therefore restricts an avenue for rivals to provide apps (including search engines) that compete with Google’s apps (including Google Search).

The definition of dominance

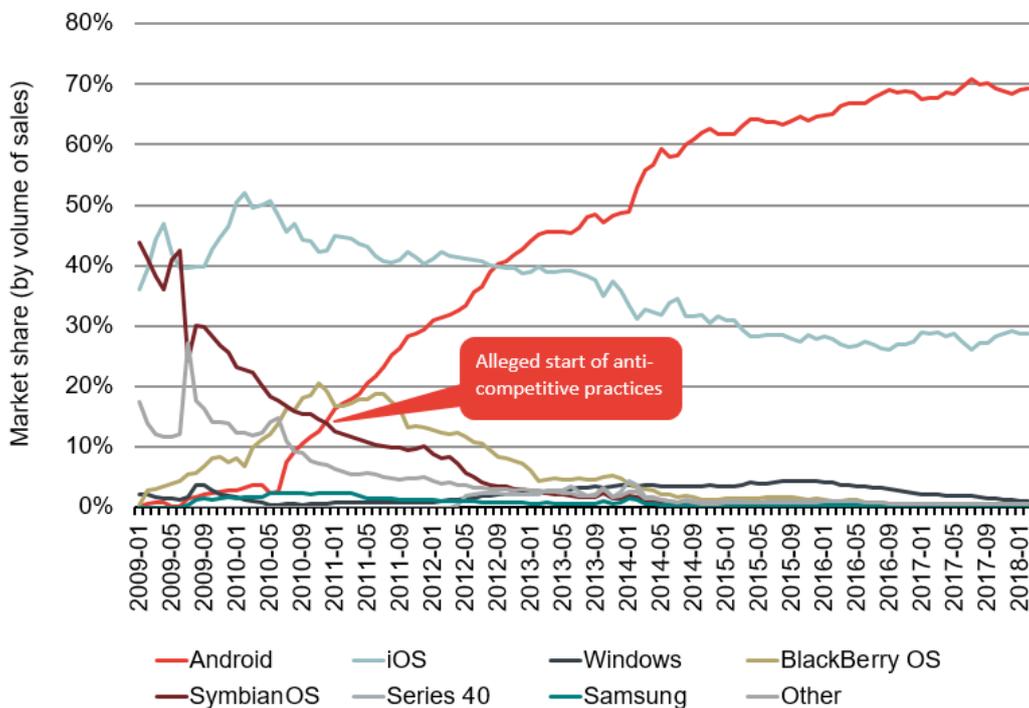
When it looked into comparison shopping, the EC found that Google held a dominant position for general search services in all 13 countries under consideration from 2008 onwards⁶, thereby setting a precedent for the Android case. If the EC can just cross-refer to that earlier investigation, it will already have demonstrated Google’s dominance in general internet search services, one of the three product markets that it is scrutinising in its probe of Android. However, proving that Android and the Play Store are dominant in the other two markets (‘Licensable smart mobile operating systems’ and ‘App stores for the Android mobile operating system’ respectively) will likely be more complex.

The market for Apples

In its examination of comparison shopping, the EC placed considerable emphasis on Google’s very high and stable volume market share for general search services (typically above 90%). The EC played down the significance of Google search being provided for free⁷. In the case of mobile operating systems, Android is also provided for ‘free’, hence similar arguments could be replayed.

In contrast to Google Search, Android’s market share varies significantly over time, and by country, depending on how widely the market is defined. If all operating systems are part of the same market, Android has recently achieved a share (by volume of sales) above 50%. But this has not always been the case – see the chart below.

Figure 1 Share of mobile operating systems in Europe (including iOS)



Source: <http://gs.statcounter.com/>

⁵ <https://arstechnica.com/gadgets/2013/10/googles-iron-grip-on-android-controlling-open-source-by-any-means-necessary/3/>

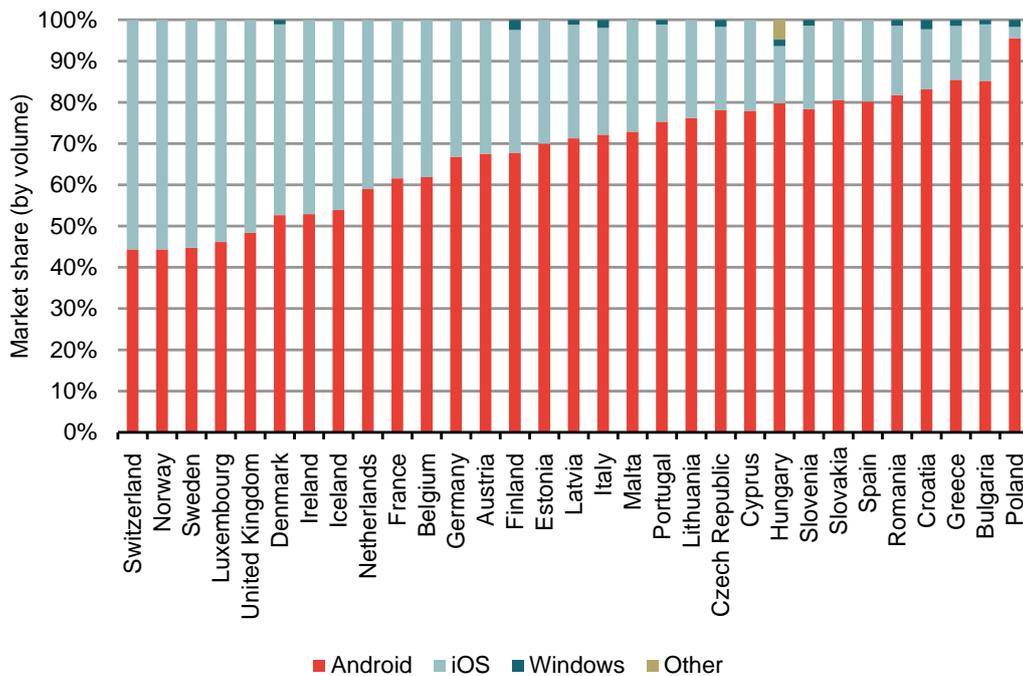
⁶ Except in the Czech Republic, where the dominance did not start until 2011.

⁷ In response to Google’s contention that it was providing its search services for free, the EC said this was not really the case in light of the data that Google collects on consumers. Besides, the EC ruled, “the free nature of a service is only one “relevant factor in assessing [...] market power”.

It has been reported⁸ that the EC will seek to show that there was abuse of dominance from January 2011 onwards. This task will be much easier if it can demonstrate that Google and Apple are not close competitors. Whether iOS is in the same market as Android depends on the magnitude of switching between the two platforms. Device manufacturers cannot shift from Android to iOS (as iOS is not licensable). Therefore, the market definition depends on the behaviour of end users. If enough of them are willing to change from Android phones to iPhones in response to a 5-10% drop in quality⁹ of the Android OS, this could support a wider market definition. When such customer switching does occur, it can constitute an 'indirect constraint' - in competition jargon - if deemed sufficient to deter a company from reducing the quality of its product by a small but significant amount. In its guidance on telecoms regulation, the EC recognises that indirect constraints can be taken into account when defining markets if they are sufficiently strong¹⁰.

If the EC fails to show that iOS is in a different market to Android, this implies greater variability in Android's position in different EU markets - iOS actually has a larger market share (by volume) than its rival in countries such as the UK, Norway, Sweden, Luxembourg and Switzerland¹¹. This could mean that Google has never been dominant in operating systems in some national markets.

Figure 2 Market share by operating system in January 2018



Source: <http://gs.statcounter.com/>

⁸ <https://www.reuters.com/article/us-eu-google-antitrust-exclusive/exclusive-eu-considers-record-fine-as-panel-checks-google-android-case-sources-idUSKBN19Q1RU>

⁹ A 5-10% increase in price cannot be considered in this context given that Android is provided for free.

¹⁰ <https://ec.europa.eu/digital-single-market/en/news/explanatory-note-accompanying-commission-recommendation-relevant-product-and-service-markets>

¹¹ <http://gs.statcounter.com/>

The EC has also argued that there is a separate market for app stores on Android. Under this narrow market definition, it should be easy to find Play Store dominant. For this definition to be challenged, a case will need to be made similar to that for operating systems, i.e. if the price of the Play Store goes up by 5-10%¹² (or the quality goes down by 5-10%), then a sufficient number of Android users will switch to iPhones and use the Apple App Store instead, thereby rendering the price increase unprofitable.

Both or nothing

To substantiate its allegation that Google distorts competition by providing financial incentives to handset manufacturers and MNOs to exclusively pre-install Google Search, the EC probably needs only to prove dominance for general search services. It has already done that in the comparison shopping case. However, if the EC failed to demonstrate dominance for Android and/or Play Store, the implications for its other two abuse allegations could be significant. Success with respect to showing Play Store's dominance would likely be more important as this could support both of the EC's remaining allegations. However, the chances of finding dominance in the two markets are linked because they both depend on users' willingness to switch between Android phones and iPhones. Therefore, a more likely outcome may be that the EC manages to demonstrate dominance in both markets or in neither.

And what about the effects?

When it investigated comparison shopping, the EC highlighted that traffic on Google Shopping was declining before the abuse started. Google's service then benefited immediately from a leap in traffic. In the UK, it increased no less than 45-fold. In contrast, traffic on competing comparison shopping sites slumped, for example by 92% in Germany. In short, the EC had solid evidence that the abuse it alleged had transformed Google Shopping's performance relative to its competitors. Such evidence is likely to be difficult to detect in the Android case. The EC claims that Google's aim is to maintain and strengthen its position in general search, a market where it is already dominant and where an improvement in the performance of Android would be unlikely to have a detectable impact. The Commission is therefore worrying about a more hypothetical competition effect – that mobile devices with rival search apps might have proven to be more successful in the absence of Google's anti-competitive behaviour.

In the comparison shopping case, Google also contended that there was an objective justification for its behaviour as it helped to improve its products, e.g. by making its search results more useful. The EC dismissed this claim. Google has argued that its anti-fragmentation agreements for Android help to ensure that life is easier for app developers because they don't have to produce lots of different versions of their apps. The EC may find these arguments more challenging to dismiss as they seem more plausible in light of evidence, for instance, that Apple does not license its operating system at all. In addition, according to Google, Unix and Symbian provide examples of how problematic fragmentation can be for developers.

Inadequate remedies?

When it probed comparison shopping, the EC set out only high-level principles for the required remedy, namely that Google should stop favouring its own service, Google Shopping. This gave the firm considerable latitude in implementing the remedy, and the EC is already investigating complaints¹³ that Google's response is proving ineffective¹⁴. This being so, the EC may consider giving Google less freedom in the Android case if and when it comes to remedies. The EC is likely to conclude its investigation later this year.

¹² This could occur through the price of apps within the Play Store increasing by 5-10%.

¹³ <https://www.politico.eu/article/commission-probes-google-shoppings-antitrust-remedy-document/>

¹⁴ http://www.foundem.co.uk/fmedia/Foundem_Sep_2017_Undead_Auction/

The remedy in relation to Google Shopping seems to focus primarily on improving competition for other comparison shopping services, whilst making Google think carefully about how it treats rivals in other types of downstream specialised search services. In contrast, when it comes to Android the remedies are likely to be intended to promote competition in search (and browsers), rather than competition for operating systems.

The task facing the Commission's investigators and lawyers is complex. But if they can make the case that the pre-eminence of Android is being abused – to say nothing of a third EC investigation into Google's AdSense advertising network – then Google may look back on 2017's record fine as the beginning rather than the end of a challenging relationship with Brussels.



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