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Record Google fine over restrictions on Android devices draws strong reactions

Jody Coultas (Wolters Kluwer Law & Business) · Friday, July 27th, 2018

A record €4.34 billion (approximately \$5 billion) fine was imposed on Google last week by the European Commission (EC) in response to the company's imposition of restrictions on Android device manufacturers and mobile network operators. The EC **announced** that Google's practice of requiring mobile device manufacturers to pre-install the Google Search app and browser app (Chrome) as a condition for licensing Google's app store harmed competition in the search engine market as well as the larger mobile market. The decision has drawn strong reactions.

Android, which Google purchased in 2005, is a licensable smart mobile operating system. Google is dominant in the worldwide market (excluding China) for licensable smart mobile operating systems, with a market share of more than 95 percent. Third-party manufacturers of smart mobile devices can license and run Android on their devices. Device manufacturers who wish to obtain Google's proprietary Android apps and services need to enter into contracts with Google, as part of which Google imposes a number of restrictions. According to the EC, Google has (1) required manufacturers to pre-install the Google Search app and the Chrome browser as a condition for licensing Google's Play Store; (2) made payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices; and (3) prevented manufacturers that wanted to pre-install Google apps from selling even a single smart mobile device running on alternative versions of Android that were not approved by Google (so-called "Android forks").

In 2015, the EC opened an investigation into the extent to which competition for end users, particularly between Apple and Android devices, could be indirectly constrained by Google's market power for the licensing of Android to device manufacturers. The EC found that this competition does not sufficiently constrain Google upstream, and that Google engaged in three separate types of practices, which all had the aim of cementing Google's dominant position in general Internet search. Specifically, Google engaged in illegal tying of the Google Search app and the tying of the Chrome browser in order to ensure that the Search app and Chrome were installed on every Android devices sold in Europe.

The EC also concluded that Google made illegal payments conditional on exclusive pre-installation of Google Search. Google granted significant financial incentives to some of the largest device manufacturers as well as mobile network operators on condition that they exclusively pre-installed Google Search across their entire portfolio of Android devices. This harmed competition by significantly reducing their incentives to pre-install competing search apps. The Commission dismissed Google's claim that payments based on exclusivity were necessary to convince device manufacturers and mobile network operators to produce devices for the Android ecosystem. In 2013, after the Commission started

to look into this issue, Google started to gradually lift the requirement. The illegal practice effectively ceased as of 2014.

Finally, the EC found that Google illegally obstructed development and distribution of competing Android operating systems. Google has prevented device manufacturers from using any alternative version of Android that was not approved by Google (Android forks). The practice reduced the opportunity for devices running on Android forks to be developed and sold, closing an important channel for competitors to introduce apps and services, in particular general search services, which could be pre-installed on Android forks. Google's arguments that these restrictions were necessary to prevent a "fragmentation" of the Android ecosystem was rejected.

The fine of €4,342,865,000 was calculated based on the value of Google's revenue from search advertising services on Android devices in the European Economic Area. Google has 90 days to stop and to not re-engage in any of the three types of practices. Nothing prevents Google "from putting in place a reasonable, fair and objective system to ensure the correct functioning of Android devices using Google proprietary apps and services, without however affecting device manufacturers' freedom to produce devices based on Android forks," it was noted.

Google statement. Google CEO Sundar Pichai [said](#) that today's EC decision "ignores the fact that Android phones compete with iOS phones, something that 89 percent of respondents to the Commission's own market survey confirmed. It also misses just how much choice Android provides to thousands of phone makers and mobile network operators who build and sell Android devices; to millions of app developers around the world who have built their businesses with Android; and billions of consumers who can now afford and use cutting-edge Android smartphones."

Other reactions. Response to the EC fine was swift. Senate lawmakers weighed in. In addition, there was criticism from some in the tech sector. However, others took the opportunity to call for greater scrutiny of Google in the United States.

Sen. Mike Lee (R.-Utah), chair of the Senate Judiciary Committee's antitrust subcommittee, [said](#) that the decision "has the potential to undermine competition and innovation in the United States." Noting the different approaches in competition policy in the United States and Europe, Lee said that "appropriate competition policy should serve the interests of consumers and not be used as a vehicle by competitors to punish their successful rivals."

The Information Technology and Innovation Foundation (ITIF), an independent, nonpartisan think tank focusing on the intersection of technological innovation and public policy, called the EC's move "misguided and shortsighted." According to ITIF, the ruling "merely fills European coffers at the expense of American companies. "

The Computer & Communications Industry Association (CCIA), an international, nonprofit association representing a broad cross section of computer, communications, and Internet industry firms, described the ruling as problematic. "Android has brought more competition, product variety and innovation to the market," said CCIA in a [statement](#). "It competes fiercely with Apple's iOS, which the Commission seems to underestimate in its decision. It is paradoxical for a competition authority to go after a company that has been one of the main pro-competitive forces in the mobile economy," in CCIA's view.

Competitive Enterprise Institute fellow Ryan Young said that the EC's decision today was "reminiscent of the EU's similarly baseless crusade against Microsoft in the 1990s and 2000s."

On the other hand, Sen. Bill Blumenthal (D.-N.J.) said that Google was a “direct beneficiary of the world created by that historic antitrust case.” He called on the FTC to “end its decade of inaction and deference, and confront the mounting evidence that Google’s business practices have stifled robust competition in a market that is critical to our economy and society. Europe should not be alone setting the agenda.”

The Open Markets Institute, the Electronic Privacy Information Center, the Center for Digital Democracy, Consumer Watchdog, and Fight for the Future also **voiced** their support for the decision and encouraged the EC to speed up and broaden investigations against Google and other dominant online firms, including Facebook.

Google has stated its intention to appeal. Expect to hear more from all sides.

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