
Google Android Decision: Is EU Competition Law Becoming a Tool to Impose the Union’s Industrial Policies – Should Turkey Follow the Commission?

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After three years of investigation, on July 18, 2018, The European Commission (“Commission”) issued its decision on the well-known Android case and fined Google LLC (“Google”) an astounding €4.34 billion for abusing its dominant position. The Commission held that “since 2011, Google has imposed illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search”. The fine imposed to Google is the biggest of all times. The decision also opens the door to civil actions under which affected parties may claim compensation for damages incurred due to Google’s abusive conduct.

A Brief Summary of the Android Case

Android is the most popular smartphone operating system in the world which is used by various device manufacturers. According to the Commission, about 80% of smartphones in Europe uses Android as their operating system. The Commission determined three types of illegal restrictions imposed by Google on Android device manufacturers. The Commission determined that Google had:

- required manufacturers to pre-install the Google Search and Google Chrome apps, as a condition to access Google Play Store (Application Store),
- made payments to some large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices and
- prevented manufacturers wishing to pre-install Google apps from selling any smart devices running alternative “forked” versions of Android that were not approved by Google.

Per the Commission, Google was in a dominant position in the markets for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system. The Commission concluded that Google illegally tied the Google Search app and the Google Chrome browser to Play Store and foreclosed the relevant markets to its competitors. Furthermore, the Commission decided that the incentives Google provided to device manufacturers for exclusively pre-installing Google’s applications also cemented its dominant position in the relevant markets. The most critical basis behind the Commission’s reasoning was that pre-installation of certain services led to market foreclosure due to strong “status-quo bias”, which means that the consumers do not prefer to change pre-installed services even if, at least from a technical perspective, they can very easily do so.

Critics from a Competition Law Perspective

The Commission's decision has been viciously criticized immediately after its publication despite the limited available information on the merits. A significant majority of the criticisms pointed out the same exact problem; that the consumers will most likely suffer due to this decision of the Commission. Many agreed with the proclamation of Google's CEO that "Android has created more choice for everyone, not less. A vibrant ecosystem, rapid innovation, and lower prices are classic hallmarks of robust competition." As a matter of fact, since Android is a free to use open source project, it boosts innovation and ultimately benefits the consumers.

Although there seems to be numerous weak points to address in the decision, it seems that the "Achilles Heel" is the market definition. To say the very least, it seems counterintuitive to accept that iOS is not a direct competitor of Android. When the fact that the world is basically divided in two groups as "Android People" and "Apple People", the Commission could have a better chance to defend that Boston Red Sox and New York Yankees are not competitors. As this seems to be too absurd a claim to viably hold, the Commission also points out that there is no substitutability between Android and iOS from the perspective of OEMs, simply because iOS is not available to the OEMs. This approach raises another question: Since iOS constitutes a separate relevant market where Apple enjoys a monopoly, can OEMs claim that Apple controls an essential facility and that it is abusing its dominant position by refusing to allow OEMs access to iOS. As unreasonable as this question might seem, the Commission's claims might justify such a claim.

Moreover, although it is too early to jump to conclusions, it seems very unlikely that the final decision of the Commission will include satisfying economic justifications concerning the concrete effects of the so called "status-quo bias". Yet, it would be very disappointing if the Commission solely relies on empirical data showing the number of customers that actually prefer the competitors of the pre-installed services. This is because; such an approach would completely disregard the fact that the pre-installed services here refers to Google Chrome and Google Search, which are undoubtedly the most preferred products in the market, and it would be comical to simply assume that the customers would not have preferred these services had they been not pre-installed in the first place.

As a final remark, some critics refer to a set of empirical study which shows that the Commission's decisions had effects of slowing down Research & Development ("R&D") in numerous markets¹. According to "The Global Innovation 1000", Google has the second biggest R&D budget with €11,8 billion². It is probable that the decision of the Commission will force Google to cut its R&D investments. Therefore, considering the market reality, Commission's decision may harm consumers by hindering effective competition and forestalling innovation.

Is it Possible that the Commission may be Pursuing a Different Agenda

This is not the first time Google has been under the Commission's scrutiny. Just one year passed since the Commission has fined Google €2.42 billion for abusing its dominant position by

leveraging its dominant position in the search market to provide undue competitive advantage to Google Shopping. In that case, the Commission determined that Google gave featured placement to Google Shopping, in Google search results and therefore restricted competition in comparison shopping markets. Currently, Google's compliance with the EU competition watchdog's decision is being vigorously monitored. Further, it should also be noted that the Commission is currently investigating whether Google has reduced consumer choice by preventing third-party websites from sourcing search ads from Google's search advertising service, AdSense's competitors and expected to render its decision in a little while.

It is beyond doubt that the Commission must apply the competition rules to the full extent whenever there is a violation and it is not the Commission's problem if this means imposing a fine of approximately €7 billion to a single company (which is higher than the total GDPs of San Marino and Montenegro). However, it is difficult to overlook the Commission's obsession with the American tech giants. Considering Commission's obvious hostility, one inevitably questions whether there may be other motives behind the astronomical fines imposed on the American tech giants. The latest Android decision (in light of the available data) as well as the Google Shopping decision support the doubts regarding the motives of the Commission are not baseless. Hence, one should at least entertain the idea that the Commission is no longer applying the EU competition law in a "purely technical manner" and it is pursuing a wider policy adopted by the European Union against the absolute dominance of Silicon Valley.

What does this mean for Turkey

On February 9, 2017, the Turkish Competition Authority ("TCA") has also initiated an investigation against Google to investigate (i) Google's allegedly abusive practices concerning the supply of its mobile operating system and mobile applications/services and (ii) the agreements made between Google and OEMs. The alleged abusive behaviours of Google are probably very similar (if not the same) with those investigated and penalized by the Commission."

The TCA closely follows the case law of the Commission and in a vast majority of the cases it adopts a similar approach with that of the Commission's. Since TCA's following the Commission's footsteps is also welcomed by the administrative courts, the TCA might be tempted to do the same in its ongoing investigation as well. However, the TCA should not disregard the possibility that this case might actually be different. It is crucial that the TCA assesses whether it would be adopting the "technical viewpoints of the Commission" or "its political motives". As the latter merely serves the industrial policies and the goals of the European Union (which are probably quite different than those of Turkey), the TCA should not rely on the Commission's analyses in case it has any doubts in that respect.

If the application of the competition rules is going to be affected by industrial policies (which, we believe is bad for the economy), it should at least be ensured that they are not affected by someone else's industrial policies.

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1. The European Commission Is Undermining R&D and Innovation: Here's How to Change It, Thibault Schrepel, Assistant Professor at Utrecht University School of Law.
 2. <https://www.strategyand.pwc.com/innovation1000>