EU-India Competition Week

Day 1, Session II:
Antitrust enforcement in digital markets

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Competition

Collusion in online markets

- No evidence that there are less anticompetitive agreements (art. 101 TFEU infringements)
- Ways to implement them have changed -> digitalization
- Are our tools fit?
- Need to adapt application to facts of each case : our analytical framework remains the same
- No reason to treat offline or online infringements differently

Algorithms

- What are they?
- Recent debate
- Joint report FR and DE National Competition Authorities
- Possible types of algorithms relevant for competition law enforcement

The consumer electronics cases

- E-commerce sector inquiry
- Software used to monitor prices of other online retailers – widely used by retailers to monitor prices of competitors and adjust prices accordingly
- July 2018: 4 decisions against Asus, Denon&Marantz, Philips and Pioneer

Google Android

Main elements

- Commission Decision of 18 July 2018:
  - Google is dominant in licensable operating systems for mobile devices, app stores for Android
  - Breached article 102 (abuse of a dominant position)
  - Imposes a fine of 4.32 billion €
  - Requires Google to cease and desist, implement remedy within 90 days

- Application for annulment of the Commission Decision pending before the General Court

Market Definition

- **Licensable smart mobile Oss (Google is dominant)**
  - Different from PC OSs or OSs for basic and feature phones
  - Same product market for smartphone OSs and tablet OSs
  - Non-licensable OS (e.g. Apple's iOS) are out of the market
  - Geographic scope: worldwide market (excluding China)

- **Android app stores (Google is dominant)**
  - Different from other apps
  - App stores for other licensable smart mobile OSs are out of the market (e.g. Windows Mobile Store)
  - App stores for non-licensable smart mobile OSs are out of the market (e.g. Apple App Store)
  - Geographic scope: worldwide market (excluding China)

Dominance

- Licensable smart mobile OS: **Android**
  - Has a 90%+ market share
  - Installed on c. 80% of smart mobile devices worldwide
  - Strong network effects
  - Weak indirect constrains from Apple iOS
- App stores for Android: **Play Store**
  - Pre-installed on 95%+ of Android devices
  - Has a share of 90%+ of app downloads on Android app stores
  - Considered a "must-have" by device manufacturers

I - Tying

- If device manufacturers want to pre-install the Play Store, they must sign Mobile Application Distribution Agreements (**MADAs**) under which they must also **pre-install** a range of Google apps, including **Google Search** and **Google Chrome**
- Two abuses:
  - Tying of the Google Search app with the Play Store
  - Tying of Google Chrome with the Play Store and the Google Search app

The tying analysis

- Distinct products (Play, Search, Chrome)
- Dominance in tying product (Play Store and Google Search)
- Tying product cannot be obtained without tied product
- Tying harms competition: provides Google with significant advantage that competitors cannot offset
- No objective justification

Analysis of effects

- Evidence on **pre-installation**:
  - **OEMs**: limited interest in duplicating apps (transaction cost, user experience, exclusivity impossible for competitors)
  - **Users**: downloads of rival search and browser apps do not counteract the pre-installation advantage
  - Google's market shares on devices where Search was not pre-installed are systematically lower than those on devices where Search was pre-installed
- Market share developments consistent with incentives:
  - Penetration of Google Search higher on mobile than desktop
  - Chrome grew faster on mobile than desktop

Objective justification and efficiencies

- Google has not shown that the tie is necessary to monetise its investment in Android
- Google achieves significant revenues with Play Store and gathers valuable data via Android
- Google would achieve search advertising revenues on devices without MADA (like on PC)
- If users want an out of the box experience with different apps pre-installed, it should not be Google that ensures that it is always its apps that are the ones pre-installed

II - Revenue share agreements conditional on exclusivity

- Between 2011 and March 2014, Google entered into **portfolio-based revenue share agreements** with a range of OEMs and MNOs
- Google shared its search revenues on condition that OEMs and MNOs did not pre-install **any competing search service on Android devices**
- **Tying** is about ensuring **pre-installation** of Google Search. These agreements were about ensuring that Google Search was **exclusively** pre-installed

The abuse

- Exclusivity payments
- Effects analysis outlines harmful effects
  - Contemporaneous evidence shows that OEMs/MNOs would have wished to pre-install competing search services, but were deterred by RSAs (combination with MADA)
  - Quantitative analysis shows that competitors with the same costs would have been unable to match the Google payments
  - Portfolio effect: meaning that if a customer wanted to launch just one device with a rival pre-installed, it would lose the revenue share across all devices

III - Anti-Fragmentation Agreements

- Google Android is based on the Android Open Source Project code (**AOSP**)
- Anyone could take AOSP and develop a new OS ("**Android fork**"), such as Amazon's Fire OS, Alibaba's AliYun and Nokia X
- Google hampered the development of Android forks by entering into **Anti-Fragmentation Agreements (AFAs)** with device manufacturers which wanted to pre-install its proprietary apps
- Through AFAs, device manufacturers were obliged not to "fork" Android and not to distribute even one device based on a "fork"
- AFAs applied to the entire portfolio of a device manufacturer, i.e. not only to devices which pre-install Google proprietary apps

The abuse

- Licensing of Play and Search conditional on device manufacturers entering into AFAs
- Android forks represent a credible competitive threat to Google Android: app adaptation easier than between other OSs
- AFAs cover large part of market
- Directly foreclose rival open source operating system: Example of Amazon Fire OS

Objective justification and efficiencies

- Google decided to develop an open-source OS and profited substantially from the open-source nature of Android
- "Fragmentation" is in fact innovation and competition
- No evidence that Android forks would be affected by technical failures or fail to support apps
  - And even if this were the case, Google can continue to use branding (e.g. "Android" logo) to differentiate between Google Android and forks
- AFAs are disproportionate as they go beyond what is needed to protect Google's legitimate interest in the functioning of its own proprietary apps

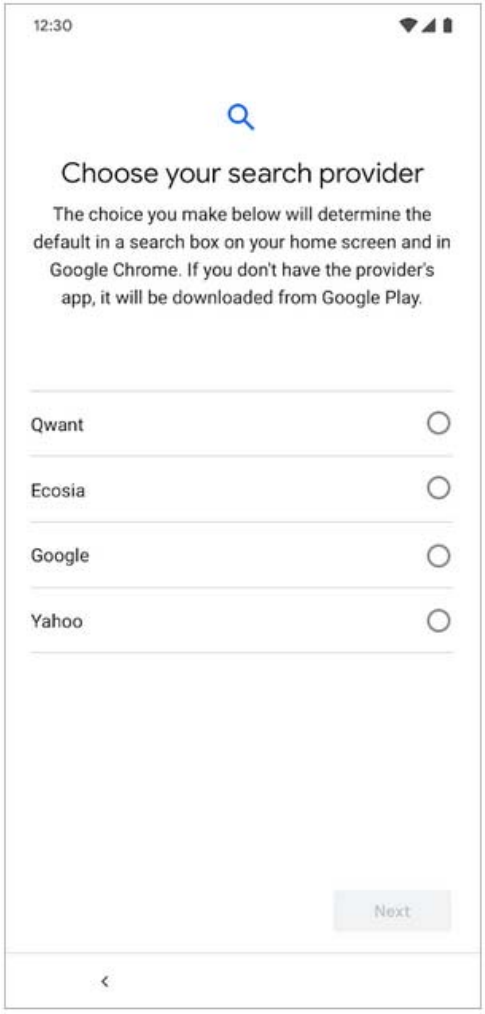
Strategy: to protect search

- Same objective of all abuses: **protect** and strengthen Google's position in **general search** (and related search advertisement)
  - ***Tying***: ensures that Google Search app and Google Chrome (which are most important search entry points on Android devices) are on all devices
  - ***Revenue share***: ensure that for major OEMs/MNOs, Google Search is the only pre-installed general search service
  - ***Anti-fragmentation***: prevent Android forks that Google does not control (and on which therefore could be other general search services)
- Abuses also significantly help Google's data collection

Remedies

- Google implements cease and desist order by:
  - ***Tying***: Licensing Search and Chrome separately from Google Play
  - ***Revenue share***: cancelling revenue share agreements based on exclusivity
  - ***Anti-fragmentation***: authorizing forks even in case an OEM uses Play, subject to adequate branding

Choice screen - new devices (early 2020)



- Search choice screen for all new devices on which Google Search is pre-installed (i.e. not if rivals are exclusively pre-installed)
- Shown at setup of device prompting users to select one search engine from list of four
- Chosen search engine will be installed on device and become default in home page search widget and Chrome
- Selection process:
  - Technical eligibility criteria (actual search engine, language)
  - Yearly auction among eligible rivals

European Commission

Interim measures

The recent Broadcom case

The Broadcom Decision

- On 16 October 2019, the Commission adopted a decision imposing interim measures on Broadcom
- Broadcom is the the world leader in the supply of chipsets for TV set-top boxes and modems, including so-called systems-on-a-chip (SoCs)
- First time the Commission adopts a Decision after IMS (2001) and first time for a Decision under Article 8 of Regulation 1/2003
- Decision follows beginning of investigation in October 2018 and SO on interim measures on 26 June 2019
- CAVEAT: all findings on infringement are *prima facie*

Dominance

- The Decision *prima facie* finds Broadcom to be dominant in 3 product markets:
  - SoCs for set-top boxes (STBs)
  - SoCs for xDSL modems
  - SoCs for fibre modems
- Dominance established in light of:
  - High market shares
  - Barriers to entry (including economies of scale)
  - Lack of buyer power

Prima facie abuse

- Clauses included in contracts between Broadcom and six STB and modem original equipment manufacturers:
  - Provisions **strengthening Broadcom's dominance**:
    - Exclusive or quasi-exclusive purchasing obligations
    - Commercial advantages (e.g. rebates, early access to technology and premium technical support) conditional on the customer buying exclusively or quasi-exclusively from Broadcom
  - Provisions **leveraging Broadcom's dominance in cable modem SoCs**:
    - Clauses granting commercial advantages (price and non-price advantages) in dominated markets conditional on customers buying SoCs for cable modems exclusively or quasi-exclusively from Broadcom

Prima facie analysis of abuse

- Regardless of presumption of anticompetitive effects for at least part of the conduct, Commission carried out a *prima facie* analysis of the effects of Broadcom's conduct *inter alia* based on:
  - Size and importance of the relevant customers
  - Conditions and duration of the agreements
  - Contemporaneous evidence found in internal documents of customers and competitors
- Price-cost AEC test was not necessary in this case and would have been anyway unsuitable
- Objective justification assessed and dismissed on *prima facie* basis

Urgency (1)

- Broadcom's conduct would likely affect future tenders launched by service providers
- Competitors would be unable to compete on the merits for those tenders
- This would result in the exit or marginalisation of Broadcom's competitors
- Once competitors have exited, re-entry would be unlikely (if not impossible)

→ Conduct is likely to result in serious and irreparable harm to competition

Urgency (2)

- Thorough assessment of urgency requirement based *inter alia* on:
  - Likely future tendering behaviour of service providers
  - Upcoming introduction of WiFi 6 standard for modems and STBs
  - Economies of scale, which makes it unlikely that market developments can be reversed
  - Evidence from competitors concerning the likelihood of exit or marginalisation
  - Evidence of past exit confirming challenging state of the market and low likelihood of re-entry

Interim measures

- Decision imposes on Broadcom within 30 days to:

(i) Unilaterally cease to apply the anticompetitive provisions identified by the Commission and to inform its customers that it will no longer apply such provisions; and

(ii) Refrain from agreeing the same provisions or provisions having an equivalent object or effect in other agreements with these customers, and refrain from implementing punishing or retaliatory practices having an equivalent object or effect

Proportionality

- Interim measures imposed in the Decision are proportionate because:
  - They consist of a cease-and-desist order limited to the OEMs concerned
  - They do not cause serious and irreparable harm to Broadcom
  - They can be waived, if appropriate
  - They are limited to three years or the end of the Commission investigation on the substance (if earlier than three years)

Conclusions

- Interim measures are "*One way to tackle the challenge of enforcing our competition rules in a fast and effective manner*"
- They are key in preventing irreparable harm to competition, particularly when market characteristics are suitable (e.g. economies of scale, network effects)
- Parties maintain full rights of defence both in interim measures and substantive proceedings
- Whenever necessary, Commission is committed to make best possible use of this tool

Conclusions

Lessons from cases

- Different practices in different markets

- Antitrust well able to look at issues such as:
  - Two-sided markets, network effects, free products, data …
  - Cannot be complacent - need to adapt, including remedies

- Detailed analysis of effects of conduct
  - Analysis should not be abstract or theoretical - must be grounded in the specific evidence of each case
  - Must also be grounded in common sense

Competition policy is a complementary part of a broader policy toolkit

- Competition enforcement cannot answer every problem
- If there are general issues that can be properly identified beyond competition, that is something to be looked at by other policy tools
  - Copyright
  - Data protection

Thank you