12th international scientific conference
„Innovation, standardization and European policies
in the context of sustainable development goals“
Banská Bystrica
6th November 2018

INFRINGEMENT OF THE EU COMPETITION RULES ON THE MARKET FOR GENERAL INTERNET SEARCH SERVICES AND THE MOBILE OPERATING SYSTEM MARKET ON THE EXAMPLE OF THE EUROPEAN COMMISSION'S DECISION OF JULY 2018 ON GOOGLE ANDROID

BEATA WIECZERZYŃSKA
b.wieczerzynska@uthrad.pl

Kazimierz Pulaski University of Technology and Humanities in Radom Poland, Faculty of Economics and Legal Sciences, Department of Law, ul. Malczewskiego 29, Radom, Poland

Abstract

One of the important instruments for strengthening the single internal market of the EU is the protection of competition, the essential principles of which are contained in article 101 and 102 of the Treaty on the Functioning of the European Union. The European Commission takes protective measures if the behaviour of entrepreneurs affecting competition rules and has influence on trade between Member States. By decision of July 18, 2018 the Commission decided that Google has imposed illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search. One of the Commission's allegations was the tying of Google applications to search the Internet with the Google Play Store app. The subject of the work is a basic analysis of the nature of tied sales and its impact on competition on the relevant market and the dangers of antitrust error in assessing the behaviour of entrepreneurs on innovative markets.

Key words

Competition, Google, Android, abuse of a dominant position, tying, antitrust error

JEL klasifikácia

K21, K23

1. Introduction

One of the important instruments for strengthening the single internal market of the EU is the protection of competition, the essential principles of which are contained in article 101 and 102 of the Treaty on the Functioning of the European Union. The European Commission takes protective measures if the behavior of entrepreneurs affecting competition rules and has influence on trade between Member States.

By decision of July 18, 2018[1], the Commission decided 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 and has fined Google €4.34 billion for breaching EU antitrust rules

[1] EC communication regarding the decision of 18 July 2018 on the imposition of a penalty on Google for illegal practices on Android mobile devices, aimed at strengthening the dominant position of Google's search engine http://europa.eu/rapid/press-release_IP-18-4581_pl.htm [access: 15.10.2018]

General, market dominance is, as such, not illegal under EU antitrust rules. However, dominant companies have a special responsibility not to abuse their powerful market position by restricting competition, either in the market where they are dominant or in separate markets. Google has engaged in three separate types of practices, which all had the aim of cementing Google's dominant position in general internet search: illegal tying of Google's search and browser apps, illegal payments conditional on exclusive pre-installation of Google Search, illegal obstruction of development and distribution of competing Android operating systems.

The EC decision analyzed a wide variety of issues related to the development of the market of mobile telephony devices and their functionality, especially as regards the possibilities of using the Internet, which are expected by end users (consumers). However, one of the Commission's complaints regarding the bundling of Google products to Android mobile device manufacturers deserves special attention in the context of EU competition rules, which will be the subject of this paper.

2. Tying in the light of the doctrine and jurisprudence

Tying and bundling are two terms used in competition law to identify the phenomenon of bundled transactions that is widespread in the economy. They consist in the total sale of two or more goods or services. Bundled transactions are used both in retail and wholesale and are used in organizing and managing the distribution network.[2]

Tying and bundling are the forms of behavior of entrepreneurs classified as practices, the common feature of which is the total sales of more than one product and thus "tying products".

Tying practices are classified in different ways. According to one of the adopted divisions, based on the economic perception of tying as a strategy for operating on the market, it is necessary to distinguish: 1) pure bundling; 2) tying and 3) mixed bundling.[3]

The pure bundling consists in selling more than one commodity in a package with another commodity, if none of the components of the package is offered by the entrepreneur alone. Mixed bundling occurs when two or more goods can be purchased both in a package and individually, but the purchase of a package is more advantageous for the buyer.

From the point of view of the Google Android case analyzed here, the most important is the tying, which depends the sale of one product (called the tying product) from the purchase of another product (the tied product). Tying occurs when at least some of the components of the package are sold separately (the tied product), while others (the tying products) are only offered with related products. Then the buyer who is interested in the tying product must also buy the tied product, whereas the buyer interested only in the tied product may purchase it separately.[4]

[2] B.H. Kobayashi, *Does economics provide a reliable guide to regulating commodity bundling by firms? A survey of the economic literature*, 1 Journal of Competition Law & Economics 707, 2005, p. 707, given for D. Miąsik*, Tied sales of the Windows operating system with Windows Media Player application software*, [in:] *Microsoft Case - case study. Competition law on new technology markets,* ed. D. Miąsik, T. Skoczny, M. Surdek, Warsaw 2008, s. 89, http://www.cars.wz.uw.edu.pl/tresc/ksiazki/20/Microsoft.pdf [access: 14.11.2018]

[3] J. Langer, *Tying and bundling as a leveraging concern under EC competition law*, Alphen aan den Rijn, Kluwer International 2007; P. Papandropoulos, *Article 82: tying and bundling*, Competition Law Insight 2006, No. 6, p. 3 given for D. Miąsik*, Tied sales….,* op.cit. p. 90.

[4] R. O'Donoghue, A.J. Padilla, *The law and economics of article 82*, Oxford 2006, p. 477 given for D. Miąsik, *Tied sales….,* op.cit. p. 91.

By focusing on the form that tying takes, the total sales of two separate products can take the form of a contractual or technological binding. The contractual relationship consists in the fact that the conclusion of a contract for the sale of one product depends on the conclusion of a contract for the sale of another product. Technological bonding occurs when two separate products are physically connected, physically integrated, creating a new quality (eg a mobile phone with a camera) and sold as one product. Technological bonding is also associated with such a (basic) product design that it can function properly only in conjunction with a complementary product made by the same manufacturer (a related product).[5]

There is agreement in the literature that tying has both pro and anti-competitive effects. The pro-competitive effects include the fact that binding usually serves to satisfy the clients' needs. It enables diversifying the offer of entrepreneurs. It leads to increased revenues. It allows to achieve economies of scale by increasing the level of efficiency. It leads to cost savings. It ensures the proper operation of the product, both in the case of tying the sale of the product with service and specific consumables (e.g. obligation for purchasers of machines for aseptic packaging of food products to use only the packaging carton provided by the machine manufacturer [6]), maintaining product safety. Tying also gives you the ability to control how you use the licensed technology.[7] The above circumstances indicate that the binding behavior of undertakings is not anti-competitive, or at least does not fall into the category of practices that restrict competition, and which as such should be prohibited *per se* or considered unlawful without the need for a thorough analysis impact on the market.[8] Instead, they should be analyzed on the basis of a more flexible *rule of reason.*[9]

The anti-competitive nature of binding, especially by market dominants, is the subject of heated debate between lawyers and economists alike. The following basic negative competitive effects of the binding of products are identified[10]: (1) expanding a monopolistic or dominant position to other markets (leverage), that is from the tying product market for the tied product market, (2) foreclosure, which means that a tied product seller who does not they have a binding product losing their market to a competitor using binding because the demand from the competitors' products is transferred to monopoly products, which may lead to their marginalization and withdrawal from the market, (3) price discrimination mainly through cross-subsidies[11], (4) higher operating costs of competitors.

According to art. 102 lit. d) TFEU is regarded as an abuse of a dominant position by the behavior of "making contracts subject to acceptance by partners of additional obligations which, due to their nature or commercial practices, are not related to the subject of these contracts". The practice of applying art. 102 lit. d) TFEU (formerly Article 82 EC) deviates

[5] D.E. Gaynor, *Technological Tying*, Bureau of Economics, Federal Trade Commission, Working Paper 2006, no. 284, p. 1.

[6] EC decision regarding Tetra Pak Int SA, Off. Jou. 1992 L 72/1; Judgment of the CFI in Case T-83/91 Tetra Pak Int SA, Commission, Judgment Set 1994, pp. II-755; ECJ judgment in Case C-333/94 Tetra Pak Int SA, Commission, Judgment Set 1996, pp. I-5951.

[7] E.g. EC Commission decision i the case Vaassen/Moris, Off. Jou. WE 1979 L 19/32.

[8] D. Miąsik, *Tied sales of the Windows operating system with Windows Media Player application software*, [in:] *Microsoft Case - case study. Competition law on new technology markets,* ed. D. Miąsik, T. Skoczny, M. Surdek, Warsaw 2008, s. 89, http://www.cars.wz.uw.edu.pl/tresc/ksiazki/20/Microsoft.pdf [access: 14.11.2018]

[9] A C Witt, *The more economic approach to EU antitrust law*, 1st ed. Hart Publishing 2016.

[10] E.g. D. Ridyard, *Tying and bundling – cause for complaint*, European Competition Law Review 2005, No. 26, p. 317.

[11] D. Ridyard, *Exclusionary pricing and price discrimination abuses dunder Article 82 – an economic analysis,* European Competition Law Review 2002, No. 6, p.286.

from its literal interpretation. An expression of this is the application of a recipe for different types of binding (not only contractual as its content would suggest). In this approach, the competition-restricting practice is the delivery of a specific product, provided that the buyer acquires another product from the supplier, which has been confirmed in several cases considered by the EU authorities. [12]

3. Google Android case

Google obtains the vast majority of its revenues via its flagship product, the Google search engine. The company understood early on that the shift from desktop PCs to mobile internet, which started in the mid-2000s, would be a fundamental change for Google Search. So, Google developed a strategy to anticipate the effects of this shift, and to make sure that users would continue to use Google Search also on their mobile devices.

In 2005, Google bought the original developer of the Android mobile operating system and has continued to develop Android ever since. Today, about 80% of smart mobile devices in Europe, and worldwide, run on Android. When Google develops a new version of Android it publishes the source code online. The openly accessible Android source code covers basic features of a smart mobile operating system but not Google's proprietary Android apps and services. 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. Google also entered into contracts and applied some of these restrictions to certain large mobile network operators, who can also determine which apps and services are installed on devices sold to end users.

The Commission decision concerns three specific types of contractual restrictions that Google has imposed on device manufacturers and mobile network operators.

Google is dominant in the national markets for general internet search throughout the European Economic Area (EEA), i.e. in all 31 EEA Member States. Google has shares of more than 90% in most EEA Member States. There are high barriers to enter these markets.

Google is dominant in the worldwide market (excluding China) for app stores for the Android mobile operating system. Google's app store, the Play Store, accounts for more than 90% of apps downloaded on Android devices. This market is also characterized by high barriers to entry.

Indicated above specific contractual restrictions that Google has imposed on device manufacturers and mobile network operators have, in the opinion of the European Commission, enabled Google to use Android as a vehicle to cement the dominance of its search engine. One of EC's basic allegations against Google, is the use of illegal tying of Google's search and browser apps.

Google offers its mobile apps and services to device manufacturers as a tie, which includes the Google Play Store, the Google Search app and the Google Chrome browser. Google has required manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google's app store (the Play Store), because they cannot lawfully download it themselves. Google's licensing conditions make it impossible for manufacturers to pre-install some apps but not others.

[12] Judgment of the CFI in Case T-201/04 Microsoft v. Commission, Dz.Urz. EU 2007 C 269/45, paragraph 860; ECJ judgment in Case C-333/94 P Tetra Pak Int SA, Commission, Zb. Orz. 1996, pp. I-595; Judgment of the CFI in Case T-30/89 Hilti v. Commission, Zb. Orz. 1991, pp. II-1439.

After the investigation, the EC stated that Google had committed a violation of Art. 102 TFEU of the tying of the Google Search app. As a result, Google has ensured that its Google Search app is pre-installed on practically all Android devices sold in the EEA. The tying of the Google Chrome browser and as a result, Google has ensured that its mobile browser is pre-installed on practically all Android devices sold in the EEA. In both cases, Google made the license of the Play Store application dependent upon the installation of the indicated internet search application.

It can therefore be said that the Google search engine and the Chrome browser were the tie products whereas the Play Store app was the tying product.

As the Commission explained, pre-installation the Google search engine and the Chrome browser can create a *status quo* bias. Users who find search and browser apps pre-installed on their devices are likely to stick to these apps. For example, the Commission has found evidence that the Google Search app is consistently used more on Android devices, where it is pre-installed, than on Windows Mobile devices, where users must download it. This also shows that users do not download competing apps in numbers that can offset the significant commercial advantage derived through pre-installation.

Google's practice has therefore reduced the incentives of manufacturers to pre-install competing search and browser apps, as well as the incentives of users to download such apps. This reduced the ability of rivals to compete effectively with Google. Google's practices have denied rival search engines the possibility to compete on the merits.

Google's strategy has also prevented rival search engines from collecting more data from smart mobile devices, including search and mobile location data, which helped Google to cement its dominance as a search engine.

The other complaints against Google contained in this decision concern:

- 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
- has prevented manufacturers wishing 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").

For all of these acts being a violation of EU competition rules, Google imposed a fine of EUR 4.34 billion.

Google must now bring the conduct effectively to an end within 90 days or face penalty payments of up to 5% of the average daily worldwide turnover of Alphabet, Google's parent company.

4. Summary

Innovations intensify the risk of antitrust mistakes. The social costs of antitrust mistakes in matters of innovation are usually higher than in other cases. As the American judge Easterbrook noted (30 years ago), the problem of costly anti-monopoly errors is particularly severe in the face of “new methods of production and distribution of the product”.[13] The risk may be additionally compounded by the enormous value of technological innovations, as well as the daunting effect of wrong antitrust interventions in the area of innovation on the tendency to engage in similar projects in the future.

[13] F.H. Easterbrook, *The Limits of Antitrust*, „Texas Law Review” 1984, vol. 63, no. 1, p. 1.

In any case, considering the priority objective of the economic policy which should be to support and promote innovations, as well as taking into account that the goal of antitrust law is not only to settle real conflicts arising between innovations and the protection of competition, but also to provide for an innovation-friendly environment, the antitrust intervention into innovations should be sensible, farsighted and predictable. Otherwise antimonopoly law may become a heavy burden for actual or potential innovators.[14]

References

[1] F.H. Easterbrook, *The Limits of Antitrust*, „Texas Law Review” 1984, vol. 63, no. 1;

[2] D.E. Gaynor, *Technological Tying*, Bureau of Economics, Federal Trade Commission, Working Paper 2006, no. 284;

[3] B.H. Kobayashi, *Does economics provide a reliable guide to regulating commodity bundling by firms? A survey of the economic literature*, 1 Journal of Competition Law & Economics 707, 2005;

[4] J. Langer, *Tying and bundling as a leveraging concern under EC competition law*, Alphen aan den Rijn, Kluwer International 2007;

[5] D. Miąsik, *Tied sales of the Windows operating system with Windows Media Player application software,* [in:] *Microsoft Case - case study. Competition law on new technology markets*, ed. D. Miąsik, T. Skoczny, M. Surdek, Warsaw 2008, http://www.cars.wz.uw.edu.pl/tresc/ksiazki/20/Microsoft.pdf ;

[6] R. Molski, *Anticompetitive innovations – oxymoron or a real challenge for antitrust law?,* Public Law Studies 2018 No. 2;

[7] R. O’Donoghue, A.J. Padilla, *The law and economics of article 82*, Oxford 2006,

[8] P. Papandropoulos, *Article 82: tying and bundling*, Competition Law Insight 2006, No. 6;

[9] D. Ridyard, *Tying and bundling – cause for complaint*, European Competition Law Review 2005, No. 26

[10] D. Ridyard, *Exclusionary pricing and price discrimination abuses dunder Article 82 – an economic analysis*, European Competition Law Review 2002, No. 6;

[11] A C Witt, The more economic approach to EU antitrust law, 1st ed. Hart Publishing 2016;

[12] EC communication regarding the decision of 18 July 2018 on the imposition of a penalty on Google for illegal practices on Android mobile devices, aimed at strengthening the dominant position of Google's search engine http://europa.eu/rapid/press-release_IP-18-4581_pl.htm

Judgments

[1] EC decision regarding Tetra Pak Int SA, Off. Jou. 1992 L 72/1;

[2] Judgment of the CFI in Case T-83/91 Tetra Pak Int SA, Commission, Judgment Set 1994;

[14] R. Molski, *Anticompetitive innovations – oxymoron or a real challenge for antitrust law?,* Public Law Studies 2018 No. 2, p. 37 – 40.

[3] ECJ judgment in Case C-333/94 Tetra Pak Int SA, Commission, Judgment Set 1996;

[4] EC Commission decision in the case Vaassen/Moris, Off. Jou. WE 1979 L 19/32.

[5] Judgment of the CFI in Case T-201/04 Microsoft v. Commission, Off. Jou. EU 2007 C 269/45;

[6] Judgment of the CFI in Case T-30/89 Hilti v. Commission, Judgment Set 1991