

The EC's *Android* Decision & The Future of Platform Competition “Great Cases Make Bad Law”

Yo Sop Choi
BA, MA, LL.M, LL.M, PhD



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한국외국어대학교
HANKUK UNIVERSITY OF FOREIGN STUDIES

Four Separate Infringements:

1. Tying the Google Search app with its app store, the Play Store;
2. Tying its mobile web browser, Google Chrome, with the Play Store and the Google Search app;
3. Making the licensing of the Play Store and the Google Search app conditional on agreements that contain anti-fragmentation obligations, preventing hardware manufacturers from (i) selling devices based on modified versions of Android (“Android forks”); (ii) taking actions that may cause or result in the fragmentation of Android; and (iii) distributing a software development kit (“SDK”) derived from Android; and
4. Granting revenue share payments to OEMs and mobile network operators (“MNO”) on condition that they pre-install no competing general search service on any device within an agreed portfolio.

1. New Economy and Competition Policy

1.1. Features of the New Economy

1.2. Competition law Issues in the New Economy

2. Discussions on *Google Android* Decision

2.1. Market Definition & Market Dominance

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3.1. Appropriate Balance and/or Trade-off

3.2. Improvement of Inter-Platform Competition

4. Concluding Remarks



- Features of the New Economy

1. Knowledge-based feature, e.g., IPR: high fixed cost and low marginal cost (with some exceptions, e.g., social media platforms) – this background may bring concerns about market dominance

However,

2. ‘Network effect (direct and indirect)’, such as communication & media network; software programmes; operating system (OS)

- The supply of mobile apps affects the value of OS to consumers: the more apps, the more value
- Thus, app developers are more willing to provide apps for an OS that has more users or consumers
- OS is a product, and apps are supplementary to it: mobile OS platforms (i.e., iOS and Android) compete with each other to attract more app developers and to improve the value of own OS
- Inter-platform (or OS) competition does exist

3. Rapid and disruptive innovation: dynamic efficiency for consumers

• Competition Law Issues in the New Economy

1. Factors of high fixed cost with low marginal cost and network effect may reinforce each other to create and maintain market dominance by means of innovation

However,

2. Need to consider Innovation incentives: the profitability of innovation is important for firms – to prevent free-riding, e.g., Android fork, and recoup investment

- High market share from network and innovation also indicates a large number of users who receive benefits from new technology
- More users, more investment for innovation

3. Error-cost problem in antitrust enforcement: Type I error or excessive enforcement may harm network effect and innovation (it may impede consumer welfare)

- Consideration of disruptive innovation in the new economy ('Creative Destruction'), e.g., search engine, video game, etc.
- Yes, an appropriate balance of various objectives is crucial; but the most important value of antitrust should be consumer welfare!

2. Discussions on *Google Android Decision*

- **Market definition (Relevant Product Market) & Market dominance**

- Separate markets for (i) licensing of smart mobile OS, (ii) Android app stores, (iii) the provision of general search services, and (iv) non OS-specific mobile web browsers

1. ‘Licensable smart mobile OS’: it is not consumer-based but a business-model based market definition (OEMs) – switching from Android to iOS (user substitution)?

- We can consider iOS as an Android’s competitor – ‘OS platform war’, e.g., often switch from (low-end) devices to (high-end) devices
- Again, users can easily switch or multi-home, e.g., Naver in Korea as a leading web browser

2. Android app stores: SSNDQ – ‘small but significant and non-transitory deterioration (decrease) in quality’: but how can we measure the decrease of quality by 5-10%?

- To measure quality and its impact on demand is extremely difficult
- Users’ switching cost is very low in our modern society (while in the traditional market it is costly)

3. Market dominance: 'the power (economic strength) to control prices or exclude competition'

- Did Google control price (open source platform) or exclude competition? (Samsung develops Tizen – no exclusion; OEMs are free to install apps on other OS like Tizen)
- “[M]ultisided platforms with indirect network effects are seldom monopolies ” ; as additional users do not add much value, indirect network effects may become exhausted at some point (Evans)
- A traditional flaw appeared again: What is the most important value of competition law? Who receives benefits? Consumer or competitor? Need to consider the real impact on competition

4. Some comments:

- The relevant market can be narrow, such as in *Google (de novo)*
- But we should focus on the analysis on the critical loss
- Users can switch from devices to devices; also from Android to iOS; a simple SSNDQ method is not very sufficient in this case, e.g., Windows update functionality

- Abusive Conduct 1: Tying relating to its proprietary apps

Four conditions: (i) two products; (ii) dominance in the tying product market; (iii) coercion (not giving consumers a choice); and (iv) restricting competition

1. Microsoft as a relevant precedent? Some differences

- Seeking to maintain Google Search's dominance by tying it to Google Play Store (MS was seeking to make IE dominance by tying it to Windows); Charges for Windows but free of charge for Android
- Downloading media player was somewhat difficult at that time of the *MS* case, but it is very common to download apps that compete with Google apps; users often download mobile apps daily – No coercion

2. Pre-installation itself is not 'exclusionary' because alternative exists

- In the market definition, "Galaxy Apps store is a substitute to the Play Store" (para. 267)

3. Is the bundling anti-competitive or efficiency-enhancing?

- 'Superior quality' matters! Many users switched from IE to Chrome (competition on the merits); also, consider a similar case of magazine

- **Abusive Conduct 2: Anti-fragmentation obligations**

1. Competition in the mobile OS platform: Android and iOS

- Inter-brand (inter-platform) competition is more important than intra-brand competition, especially in the digital economy

2. Any robust theory of harm? Is AFA capable of restricting competition?
Improving interoperability and developing OSs

- Preventing Android fork may lead to creation of new mobile OS if the quality of Android is not good enough to compete with iOS
- Fragmentation reduces consumer choice of apps

- **Abusive Conduct 3: Portfolio-based revenue share payments conditional on the pre-installation of no competing general search**

1. Google's payments to OEMs in return for exclusively installing Google Search App (default) – exclusivity rebates – price competition?

2. *Intel* can be relevant; we need to implement AEC test (“equally efficient competing general search services”); a zero-pricing product

3. Implications for Antitrust Enforcement

- Appropriate Balance and/or Trade-off

1. Important issues on the new economy in competition law
 - A focus of traditional competition scrutiny is often price
 - But the focus in the new economy should be dynamic efficiency in creating new products or improving major technologies that reduce cost rather than product price (even no pricing)
 - The vigour of dynamic competition should be the important consideration of the performance in the new-economy industries
2. Competition for the market rather than in the market
 - The relevant market definition is often less useful
 - The role of potential competition becomes more important: quickly acquiring market share and quickly losing it
3. Some critical enquiries (a timely manner):
 - When and how will the next innovation (new competition) emerge?
 - How can we measure the value of product without price-based test?

• Improvement of Inter-Platform Competition

1. Our (Korea and the EU's) focus is not about market dominance itself but abuse of dominance
 - We can expect emergence of a new firm with some market power after the competition for the market – consumer benefits from higher-value services from network effect
 - Harming competitors cannot be the focus of the antitrust scrutiny; consumer welfare should be the one; competition law is to protect a competitive process for consumer welfare rather than competitors

2. It is a time to establish a standard of ‘a high probability threshold’ in the assessment of anti-competitive effect in the new economy, including platform competition

3. Inter-platform competition is more important than intra-platform competition

- The case of the Symbian OS tells us that ‘fragmentation’ is not attractive and often leads to failure
- The lack of interoperability between OEMs can significantly impede the development of the mobile services market
- iOS and Android have competed to attract both consumers and app developers on their mobile OS platforms
- Without a guarantee of interoperability through anti-fragmentation, it would not be possible for app developers to reach a wider range of users – this leads to the increase of the number of apps and improves consumer choices

4. A big question: “Will the EC’s decision improve consumer welfare?”

- Mobile apps are often the important factor of how consumers use their handsets: ‘the rate of downloads is increasing’

4. Concluding Remarks

1. The EC's *Google Android* case may indicate possible anti-competitive effects by digital undertakings
2. However, it is necessary to consider appropriate measure of relevant market definition (and market power) in platform
3. Also, it is important to review inter-platform competition
4. “Great cases ... make bad law”: we need to consider the typical Type I error cost in the new economy cases – it can bring legal uncertainty – the *Google* cases may provide little guidance to digital undertakings including app developers
5. Consumer welfare should be the most priority in competition law scrutiny – prevention of AFA may increase prices; market dynamics is important
6. Contemporary competition law and policy on platform should consider certain features like disruptive innovation and unpredictability of technology-based competition
7. Incentive is important – (what if Android is closed source? Will agencies still investigate when they rely on their approaches?) – it is time to move towards more effects-based approach

“Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgement.”

Oliver Wendell Holmes, Jr.

Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904).





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HANKUK UNIVERSITY OF FOREIGN STUDIES

Thank you!

yosopchoi@hufs.ac.kr

