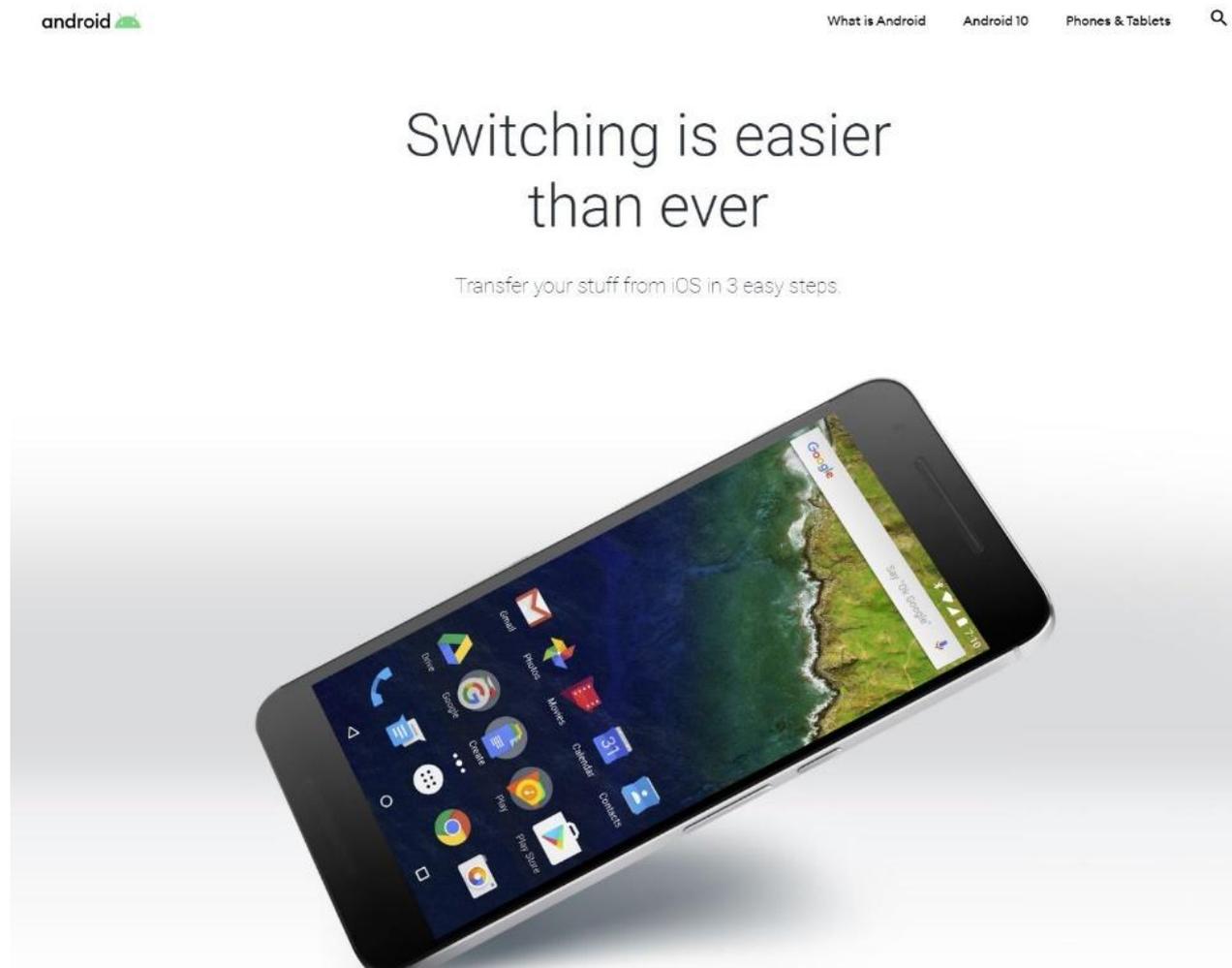


## Making Sense of the Google Android Decision (part 1): Four Problems with the EU Commission's Market Definition

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*This is the first in a series of TOTM blog posts discussing the Commission's recently published Google Android decision. It draws on research from a soon-to-be published ICLE white paper.*

The European Commission's recent Google Android decision will surely go down as one of the most important competition proceedings of the past decade. And yet, an in-depth reading of the 328 page decision should leave attentive readers with a bitter taste.

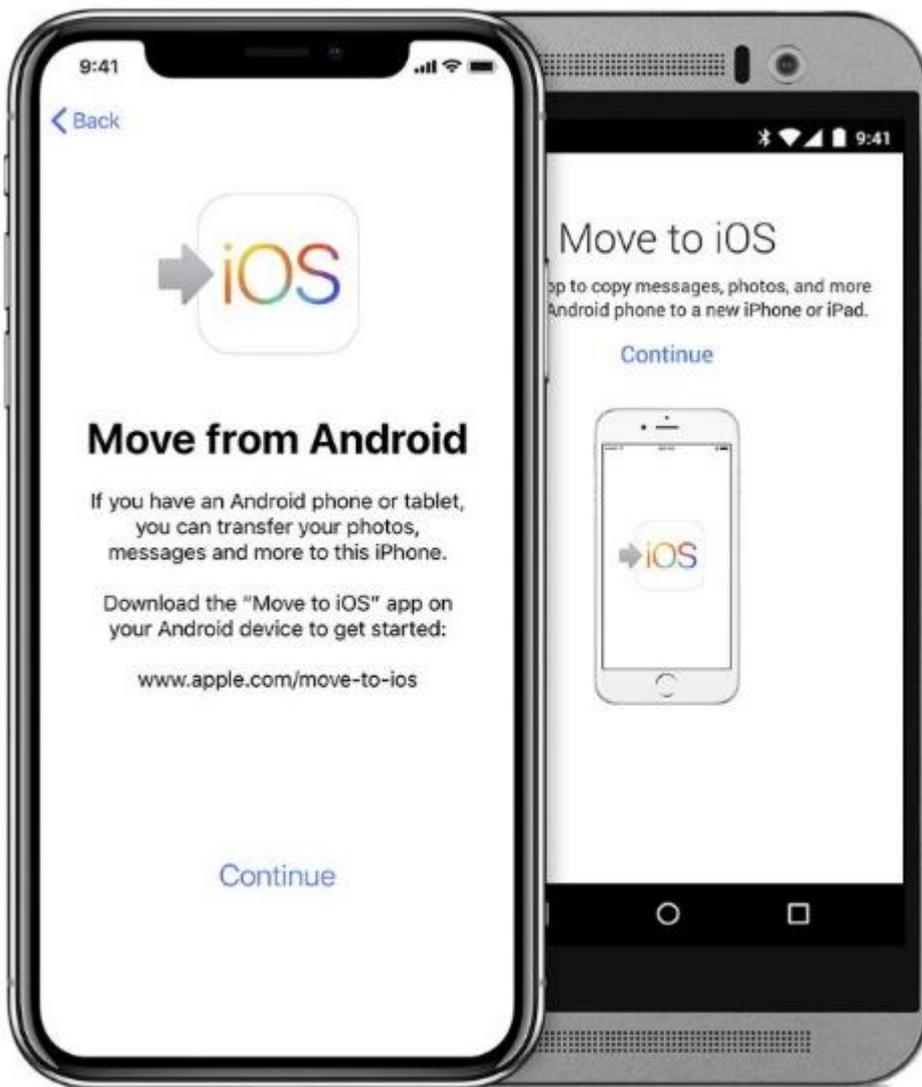
One of the Commission's most significant findings is that the Android operating system and Apple's iOS are not in the same relevant market, along with the related conclusion that Apple's App Store and Google Play are also in separate markets.

This blog post points to a series of flaws that undermine the Commission's reasoning on this point. As a result, the Commission's claim that Google and Apple operate in separate markets is mostly unsupported.

## **1. Everyone but the European Commission thinks that iOS competes with Android**

Surely the assertion that the two predominant smartphone ecosystems in Europe don't compete with each other will come as a surprise to... anyone paying attention:

- The internet is replete with "Android versus Apple" buying guides: "[Apple iPhone 11 vs the Android competition](#)", "[iOS 13 vs. Android 10: How Apple and Google match up](#)", "[iPhone vs. Android: Which is better?](#)", etc.
- Both [Apple](#) and [Google](#) have webpages that help users to switch from one platform to the other:



- The business pages of newspapers routinely talk of the fierce rivalry that exists between Apple and Google: "[Why competition between Apple and Google is more brutal than ever](#)", "[Google vs. Apple: Why Their Competition Is Good For You](#)", etc.
- Numerous competition policy papers reach a similar conclusion. Nicolas Petit refers to Apple and Google as "[moligopolists](#)". David Evans speaks of "[dynamic competition](#)". Marshall Van Alstyne and his co-authors have analyzed the [strategies](#) deployed by Google and Apple to compete against each other.
- Finally, the annual reports of Apple and Google both cite the other firm as an important competitor (if not by name):

#### [Apple 10-K:](#)

The Company believes the availability of third-party software applications and services for its products depends in part on the developers' perception and analysis of the relative benefits of developing, maintaining and upgrading such

software and services for the Company's products **compared to competitors' platforms, such as Android for smartphones and tablets** and Windows for personal computers.

[Google 10-K](#):

**We face competition from:** Companies that design, manufacture, and market consumer electronics products, including **businesses that have developed proprietary platforms.**

This leads to a critical question: Why did the Commission choose to depart from the instinctive conclusion that Google and Apple compete vigorously against each other in the smartphone and mobile operating system market?

As explained below, its justifications for doing so were deeply flawed.

## **2. It does not matter that OEMs cannot license iOS (or the App Store)**

One of the main reasons why the Commission chose to exclude Apple from the relevant market is that OEMs cannot license Apple's iOS or its App Store.

But is it really possible to infer that Google and Apple do not compete against each other *because* their products are not substitutes from OEMs' point of view?

The answer to this question is likely no.

Relevant markets, and market shares, are merely a proxy for market power (which is the appropriate baseline upon which build a competition investigation). As Louis Kaplow [puts it](#):

[T]he entire rationale for the **market definition** process is to **enable an inference about market power.**

If there is a competitive market for Android and Apple *smartphones*, then it is somewhat immaterial that Google is the only firm to successfully offer a *licensable mobile operating system* (as opposed to Apple and Blackberry's "closed" alternatives).

By exercising its "power" against OEMs by, for instance, degrading the quality of Android, Google would, by the same token, weaken its competitive position against Apple. Google's competition with Apple in the smartphone market thus constrains Google's behavior and limits its market power in Android-specific aftermarkets (on this topic, see [Borenstein](#) et al.,

and [Klein](#)).

This is not to say that Apple's iOS (and App Store) is, or is not, in the same relevant market as Google Android (and Google Play). But **the fact that OEMs cannot license iOS or the App Store is mostly immaterial for market definition purposes.**

### **3. Google would find itself in a more “competitive” market if it decided to stop licensing the Android OS**

The Commission's reasoning also leads to illogical outcomes from a policy standpoint.

Google could suddenly find itself in a more “competitive” market if it decided to stop licensing the Android OS and operated a closed platform (like Apple does). The direct purchasers of its products - consumers - would then be free to switch between Apple and Google's products.

As a result, an act that has no obvious effect on actual market power — and that could have a distinctly *negative* effect on consumers — could nevertheless significantly alter the outcome of competition proceedings on the Commission's theory.

One potential consequence is that firms might decide to close their platforms (or refuse to open them in the first place) in order to avoid competition scrutiny (because maintaining a closed platform might effectively lead competition authorities to place them within a wider relevant market). This might ultimately reduce product differentiation among mobile platforms (due to the disappearance of open ecosystems) - the exact opposite of what the Commission sought to achieve with its decision.

This is, among other things, what Antonin Scalia objected to in his [Eastman Kodak](#) dissent:

It is quite simply **anomalous that a manufacturer functioning in a competitive equipment market should be exempt from the *per se* rule when it bundles equipment with parts and service, but not when it bundles parts with service** [when the manufacturer has a high share of the “market” for its machines' spare parts]. This vast difference in the treatment of what will ordinarily be economically similar phenomena is alone enough to call today's decision into question.

### **4. Market shares are a poor proxy for market power, especially in narrowly defined markets**

Finally, the problem with the Commission's decision is not so much that it chose to exclude Apple from the relevant markets, but that it then cited the resulting market shares as

evidence of Google's alleged dominance:

(440) **Google holds a dominant position** in the worldwide market (excluding China) for the licensing of smart mobile OSs since 2011. This **conclusion is based** on:

(1) the **market shares** of Google and competing developers of licensable smart mobile OSs [...]

In doing so, the Commission ignored one of the critical findings of the law & economics literature on market definition and market power: Although defining a narrow relevant market may not itself be problematic, the market shares thus adduced provide little information about a firm's actual market power.

For instance, Richard Posner and William Landes have [argued](#) that:

**If instead the market were defined narrowly**, the firm's **market share would be larger** but the effect on market power would be **offset by the higher market elasticity of demand**; when fewer substitutes are included in the market, substitution of products outside of the market is easier. [...]

If all the submarket approach signifies is willingness in appropriate cases to call a narrowly defined market a relevant market for antitrust purposes, it is unobjectionable - so long as appropriately less weight is given to market shares computed in such a market.

Likewise, Louis Kaplow [observes](#) that:

**In choosing between a narrower and a broader market** (where, as mentioned, we are supposing that the truth lies somewhere in between), **one would ask whether the inference from the larger market share in the narrower market overstates market power** by more than the inference from the smaller market share in the broader market understates market power. If the lesser error lies with the former choice, then the narrower market is the relevant market; if the latter minimizes error, then the broader market is best.

The Commission failed to heed these important findings.

## 5. Conclusion

The upshot is that Apple should not have been automatically excluded from the relevant market.

To be clear, the Commission *did* discuss this competition from Apple later in the decision. And it also asserted that its findings would hold even if Apple were included in the OS and App Store markets, because Android's *share of devices sold* would have ranged from 45% to 79%, depending on the year (although this ignores other potential metrics such as the *value of devices sold* or Google's *share of advertising revenue*).

However, by [gerrymandering](#) the market definition (which European [case law](#) likely permitted it to do), the Commission ensured that Google would face an uphill battle, starting from a very high market share and thus a strong presumption of dominance.

Moreover, that it *might* reach the same result by adopting a more accurate market definition is no excuse for adopting a faulty one and resting its case (and undertaking its entire analysis) on it. In fact, the Commission's choice of a faulty market definition underpins its entire analysis, and is far from a "harmless error."

I shall discuss the consequences of this error in an upcoming blog post. Stay tuned.

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