Questions On Market Rules In Google Android Decision

By **Andreas Reindl and Steve Ross** (November 18, 2022)

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In its Sept. 14 judgment in Google and Alphabet v. Commission, the European Union's General Court partially upheld Google LLC's appeal against the European Commission's 2018 Google Android decision,[1] but confirmed the decision's most important and consequential elements.

The court held that certain of Google's contractual arrangements with original equipment manufacturers, or OEMs, and mobile network operators regarding the Android mobile platform could be considered parts of a strategy to protect and consolidate Google's dominant position for online general search services, and infringed Article 102 of the Treaty on the Functioning of the European Union.

The fine imposed on Google was reduced from €4.34 billion ($4.49 billion) to €4.125 billion ($4.26 billion).[2]

In summary, the court confirmed that strict standards apply under Article 102 when assessing the effects of price-based exclusivity strategies, as developed by the EU's Court of Justice in 2017 in Intel v. Commission,[3] and annulled the commission's finding that Google's payments for the exclusive installation of Google apps on mobile phones under the portfolio-based revenue-sharing agreements infringed Article 102, faulting the commission's market coverage analysis and its use of the "as-efficient competitor," or AEC, test.

The court also applied a more lenient standard when upholding the commission's finding that the nonexclusive preinstallation requirements under the mobile application distribution agreements, or MADAs, tying the free license in the Google App Store to preinstallation of Google's general search app (Google Search) and browser app (Google Chrome) had the effect of foreclosing rival search app providers as it provided Google a competitively significant distribution advantage.

Finally, under a similarly lenient standard, the court upheld the commission's view that the anti-forking obligations under the anti-fragmentation agreements — which prohibited OEMs that sold devices with preinstalled Google apps from selling devices with noncompatible Android forks — restricted competition by preventing the emergence of alternative mobile platforms where rival search service providers could have promoted their products.

After summarizing the court's most significant findings, we highlight the effect of Google Android on the commission's digital enforcement agenda and the more widely relevant questions raised by the judgment about the nature of the effects test under Article 102.

The commission was entitled to disregard competition between the Google and Apple **mobile ecosystems when defining relevant markets.**

The court fully endorsed the commission's findings on market definition and dominance in their entirety, including the determination that there was a separate market for the licensing of smart mobile device operating systems in which Google's Android OS was

dominant.

Google had argued that there could not be a separate licensable operating system market because the intense competition between Apple Inc.'s and Google's mobile ecosystems prevented it from exercising market power vis-à-vis OEMs that built Android devices. The court dismissed the argument and found these competitive constraints were merely indirect and insufficient to counterbalance Google's market power, and therefore irrelevant for market definition purposes.

The court also endorsed the commission's use of the novel small but significant nontransitory decrease in quality, or SSNDQ, test — an attempt to consider the likely effects of a small but significant and nontransitory decrease in quality — and confirmed that the results of this test, despite its methodological limitations, could constitute relevant evidence when defining relevant markets.

The MADAs' preinstallation provided a competitive distribution advantage.

The commission had found that the MADAs, which required OEMs to preinstall Google's general search app and browser app as a condition for obtaining a free license to its online app store, the Play Store, were capable of restricting competition.

The court agreed that the MADAs' preinstallation requirements, although nonexclusive, created a status quo bias that disincentivized users from turning to competing search apps in sufficient numbers.

Preinstallation thus provided Google with a significant competitive advantage that competing general search providers could not offset, whether through downloads, agreements with search engine developers or preinstallation agreements with OEMs.

Google's counterfactual argument did not persuade the court either. Google had argued that the contested decision failed to consider that that Google would not have been able to develop and maintain the open and free Android platform, which created unprecedented competitive opportunities for rivals, in the absence of the MADA conditions.

The court held that the commission was not challenging the MADAs as a whole, but only the preinstallation conditions.

The anti-fragmentation agreements prevented competition by forked Android platforms.

The anti-fragmentation agreements' obligations required OEMs that obtained a Play Store license and preinstalled Google apps to comply on all devices, with minimum compatibility standards for the implementation of the Android source code.

The contested decision found that these obligations, which prevented OEMs from selling devices with Android version not approved by Google — so-called noncompatible Android forks — were abusive to the extent they applied to devices without preinstalled Google apps.

The court found that the commission had correctly assessed the effects of the anti-fragmentation obligations, which it considered abusive and not justified insofar as they applied to devices without preinstalled Google apps.

Prohibiting OEMs from marketing any devices running a noncompatible Android fork deprived noncompatible Android forks of any commercial market and, in turn, rival search providers from a platform on which they could market their products.

The commission failed to establish that exclusivity payments under the revenue-sharing agreement foreclosed competitors.

Under the portfolio-based revenue-sharing agreements — applicable only until March 31, 2014 — Google granted OEMs and mobile network operators a percentage of its advertising revenues if they agreed to exclusively preinstall Google's search service on all devices within an agreed portfolio.

The commission found that the revenue-sharing agreements were abusive as they constituted exclusivity payments that made access to the national markets for general search services more difficult for Google's competitors.

The court annulled the commission's finding. Relying on the Court of Justice's Intel judgment, it found Google's argument — that the coverage of the portfolio-based revenue-sharing agreement was less than 5% of the market defined by the commission — to be plausible and noted that the commission had failed to support its own assessment of a wider market coverage.

The court therefore concluded that there was insufficient evidence to conclude that the share of the relevant market covered by the exclusivity payments was significant. The court also found that the commission had committed errors when applying the AEC test to establish that the exclusivity payments had exclusionary effects.

Key Takeaways From Google Android

Article 102 Remains a Powerful Tool in the Digital Space

The Google Android judgment, coming after the commission's successful defense of its 2021 decision in Google and Alphabet v. Commission,[4] known as the Google Shopping decision, provides a further boost for the commission's enforcement agenda against large digital platforms.

As in Google Shopping, the court showed a great degree of deference to the commission. This applies in the first place to the commission's market definition, including the court's first-ever endorsement of the methodologically questionable SSNDQ test.

Despite superficial similarities with the widely used small but significant and nontransitory increase in price test, the SSNDQ test does not rely on any benchmarks or parameters that could be used to verify or falsify the results it is supposed to produce, which makes it extraordinarily difficult to challenge commission findings derived from this test.

The court was equally deferential to the commission's finding of an Article 102 infringement if a dominant digital player's conduct, even if not exclusivity-inducing, provides a competitive advantage that smaller rivals cannot overcome.

In this context, the court's dismissive attitude toward Google's business model and the zero-price nature of Google's products could become particularly consequential in the digital space, where zero-price products are common.

The court fails to seriously engage with Google's argument that the MADA preinstallation requirements should be seen as a legitimate mechanism to protect the prospect of a financial reward in return for its significant investment; preinstallation allowed Google to license Play to OEMs for free — a key contributor to the Android platform's undisputed success — including at a time when proprietary mobile platforms, such as Apple's iOS, were the standard.

At some point, the court laconically suggests that Google could have avoided an Article 102 infringement by replacing the preinstallation requirements with a license fee. Leaving aside how this solution could affect markets and customers, it would have the puzzling consequence that dominant firms can reduce competition law risks by charging higher prices, rather than by growing markets through the distribution of zero-price products and contractually agreed nonmonetary compensation mechanisms.

The Effects Tests in Article 102 Cases

The Google Android case confirms the recent trend that findings of an Article 102 infringement must be based on evidence of harmful effects.

According to the Android court, however, effects tests come in very different shapes, depending on whether the alleged exclusion is driven by pricing or nonprice strategies. If confirmed, this could have a much wider effect on Article 102 cases beyond the digital economy.

For the allegedly exclusionary payments under the revenue-sharing agreements, where pricing conduct was at the core of the alleged Article 102 infringement, the court — consistent with the court's renvoi judgement in Intel — considered a correct application of the AEC test a central element of the commission's case.

The very idea underlying the AEC test is that Article 102 protects only at least as efficient rivals against exclusion by dominant firms. Conduct capable of excluding less efficient rivals will generally be considered consistent with competition on the merits.

Exclusionary effects of nonprice conduct apparently can be found under much less stringent circumstances, according to Google Android.

A mere distribution advantage that rivals cannot offset is sufficient for an Article 102 infringement, without any inquiry into whether rivals at least as efficient as Google would have had means to offset Google's alleged distribution advantage. Article 102 of the Treaty on the Functioning of the European Union prohibits abusive conduct by companies that have a dominant position on a particular market.

In other words, the Google Android case suggests that when an alleged violation focuses on nonprice conduct, Article 102 protects all rivals, regardless of whether they may be less efficient than the dominant firm.

This would be a troubling result. It would suggest that Article 102 pursues different policy goals, depending on a dominant firm's strategy under review, and it would more broadly raise the question of why competition law should protect firms that are not as efficient as their rivals.

In addition, the court strictly reviewed the commission findings that Google's pricing conduct — the revenue-sharing agreement exclusivity payments — had exclusionary effects.

It annulled this portion of the commission decision on the ground that Google had submitted sufficiently credible evidence that the share of the market covered by exclusivity payments may have been miniscule, contrary to the commission's insufficiently substantiated assumptions.

This strict review is positive for the companies and is fully consistent with the consistent with the court's renvoi judgment in Intel in 2017,[5] where the court also put the commission's findings on exclusionary effects of rebates under the microscope.

It is also based on a highly persuasive rationale — the Intel court explained that, given the quasi-criminal nature of competition law proceedings, instances of doubt about the correct factual basis of a decision had to be resolved in favor of the firm accused of a competition law violation.

Nothing of this approach can be found in the court's review of the commission's finding that Google's nonprice conduct such as the nonexclusive MADA preinstallation requirement had excluded rivals.

Here, the court found the commission's status quo bias argument sufficient, despite Google's plausible arguments that preinstallation requirements did not provide a distribution advantage that rivals could not offset.

In particular, Google had shown that apps competing with certain preinstalled Google apps are downloaded frequently and used much more widely than the competing Google apps, which strongly suggested that the reluctance of customers to download rival search apps could not be explained by a preinstallation distribution advantage.

Although this should have been sufficient to cast doubt on the commission's factual assumptions, this was not sufficient for the court to annul the commission decision.

If upheld on appeal, the Google Android case would thus have the puzzling result that Article 102 provides for a less demanding effects test, protects a wider group of competitors, and has less demanding evidentiary requirements when the dominant firm uses allegedly exclusionary nonprice strategies compared to price-based strategies.

This would obviously be a highly unsatisfactory situation. Hopefully the appeal from Google Android will provide the Court of Justice an opportunity to develop a more uniform interpretation of Article 102.

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[1] Case AT.40099.

[2] Case T-604/18, Google and Alphabet v. Commission (Google Android) https://curia.europa.eu/juris/document/document.jsf?text=&docid=265421&pageI

ndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=246489.

[3] Case C-413/14, Intel v Commission, 6 September 2017.

[4] (Case T-612/17, Google and Alphabet v. Commission (Google Shopping), 10 November 2021).

[5] Case T-286/09 RENV, Intel v. Commission, 26 January 2017.