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# General Court partially annuls the Commission's Google/ Android decision, but upholds the decision's key elements

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**In its judgment of 14 September 2022 (the "Judgment"), the General Court partially upheld Google's appeal against the Commission's 2018 Google/Android decision, but upheld the decision's most important and consequential elements, thus confirming that certain of Google's practices 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 TFEU.**

In summary, the General Court:

- confirmed the strict standards applicable to the assessment of exclusivity arrangements under Article 102, as developed in *Intel* and *Qualcomm*, 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 ("RSAs") infringed Article 102, faulting the Commission's market coverage analysis and its use of the "as efficient competitor" ("AEC") test;

- showed considerable deference to the Commission's finding that the pre-installation requirements under the Mobile Application Distribution Agreements ("MADAs"), tying a license in the Google App Store to pre-installation of Google's general search app (Google Search) and browser app (Google Chrome), foreclosed rival search app providers as it provided Google a competitively significant distribution advantage;

- upheld the Commission's view that the anti-forking obligations under the Anti-Fragmentation Agreements ("AFAs") which prohibited OEMs that sold devices with pre-installed Google apps from selling devices with non-compatible Android forks, restricted competition by preventing the emergence of alternative mobile platforms where rival search service providers could have promoted their products.

The General Court also reduced the fine imposed on Google from € 4.34 billion to € 4.125 billion. The General Court's most significant findings are summarized below.

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

The General Court agreed with the Commission that Google held a dominant position on the worldwide market (excluding China) for the licensing of smart mobile device Operation Systems ("OS"). Like the Commission, the Court found Google's arguments about competition between mobile ecosystems (namely that intense competition between Apple's and Google's mobile platforms prevented Google from exercising market power in its relationships with OEMs), irrelevant for market definition purposes. Competitive constraints exerted by Apple's platform were merely indirect and insufficient to counterbalance Google's market power.

Notably, the General Court endorsed the Commission's use of the novel SSNDQ test - an attempt to consider the likely effects of a small but significant and non-transitory decrease in quality - and confirmed that the SSNDQ test, despite its limitations, could constitute relevant evidence for the purpose of defining the relevant market.

**The MADAs' preinstallation provided a competitive (distribution) advantage**

The General Court agreed that the MADAs' pre-installation requirements created a "status quo bias" that disincentivized users from turning to competing search apps in sufficient numbers. Pre-installation 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 pre-installation agreements with OEMs.

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

The General Court disagreed, holding that the Commission was not challenging the MADA as a whole, but only the pre-installation conditions. The Court even agreed with the Commission's view that Google could instead have licensed the app store for a fee, thus questioning a key element in Google's business model, which built on the idea that a free license should reduce costs for OEMs and increase adoption of the Android platform.

**The Anti-Fragmentation Agreements ("AFAs") prevented competition by forked Android platforms**

The Court also found that the Commission had correctly assessed the effects of the anti-fragmentation obligations, which required OEMs to comply with a minimum compatibility standard for the implementation of the Android source code for all devices running on an OS developed from the Android source code. These obligations allowed OEMs to use "Android compatible forks," but prevented them from using "non-compatible Android forks."

The General Court noted that the Commission considered the anti-fragmentation obligations abusive only insofar as they applied to all Android OS devices and therefore included devices without preinstalled Google apps. Prohibiting OEMs from marketing any devices running a non-compatible Android fork deprived non-compatible 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 RSAs foreclosed competitors**

The Court annulled that Commission's finding that Google's payments to certain OEMs and MNOs – on condition that they did not pre-install, or make available immediately after purchase, any competitive general search services on a portfolio of mobile devices in themselves constituted unlawful exclusivity loyalty payments , as they made access to the national markets for general search services more difficult for Google's competitors.

Relying on the Court of Justice's *Intel* judgment, the General Court found Google's argument – that the coverage of the portfolio-based RSA was less than 5% of the market defined by the Commission – to be plausible. At the same, the General Court noted that the Commission had failed to explain its own assessment of the market coverage. It therefore concluded that the share of the relevant market covered by the exclusivity payments could not be characterized as significant. In addition, like in *Intel*, the General Court found that the Commission had committed a number of errors when applying the AEC test to establish that the exclusivity payments had exclusionary effects.

**Observations**

The *Google/Android* judgment, coming after the Commission's successful defense of its *Google Shopping* decision, provides significant support for the Commission's enforcement agenda against large digital platforms. In contrast to the demanding standards governing the review of the Commission's assessment of exclusivity payments, the General Court continues to be more deferential when reviewing a finding by the Commission that certain conduct, even if not exclusivity-inducing, provides a significant competitive advantage that smaller rivals cannot overcome.

Case T-604/18, *Google and Alphabet v Commission*

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