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Judgment of the General Court in Case T-604/18 | *Google and Alphabet* v *Commission (Google Android)*

The General Court largely confirms the Commission's decision that Google imposed unlawful restrictions on manufacturers of Android mobile devices and mobile network operators in order to consolidate the dominant position of its search engine

In order better to reflect the gravity and duration of the infringement, the General Court considers it appropriate however to impose a fine of €4.125 billion on Google, its reasoning differing in certain respects from that of the Commission

Google, [1] an undertaking in the information and communications technology sector specialising in internet-related products and services, derives most of its revenue from its flagship product, the search engine Google Search. Google's business model is based on the interaction between, on the one hand, a number of products and services offered to users for the most part free of charge and, on the other hand, online advertising services using data collected from those users. Google also offers the Android operating system (OS), which, according to the European Commission, was installed on approximately 80% of smart mobile devices used in Europe in July 2018.

Various complaints were submitted to the Commission regarding some of Google's business practices in the mobile internet, leading the Commission to initiate a procedure against Google in relation to Android on 15 April 2015. [2]

By decision of 18 July 2018, [3] **the Commission fined Google for having abused its dominant position** by imposing anticompetitive contractual restrictions on manufacturers of mobile devices and on mobile network operators, in some cases since 1 January 2011. Three types of restriction were identified:

1. those contained in 'distribution agreements', requiring manufacturers of mobile devices to pre-install the general search (Google Search) and (Chrome) browser apps in order to be able to obtain a licence from Google to use its app store (Play Store);
2. those contained in 'anti-fragmentation agreements', under which the operating licences necessary for the pre-installation of the Google Search and Play Store apps could be obtained by mobile device

[1] In this case, 'Google' refers jointly to Google LLC, formerly Google Inc., and to its parent company, Alphabet, Inc.

[2] In June 2017, the Commission had already imposed a fine on Google of €2.42 billion for abuse of its dominant position on the market for search engines by conferring an unlawful advantage on its own comparison shopping service. That decision was largely upheld by the General Court by judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17 (see also PR No 197/21). Google's appeal against that judgment is currently pending before the Court of Justice (C-48/22 P).

[3] Commission Decision C(2018) 4761 final of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android).

manufacturers only if they undertook not to sell devices running versions of the Android operating system not approved by Google;

3. those contained in 'revenue share agreements', under which the grant of a share of Google's advertising revenue to the manufacturers of mobile devices and the mobile network operators concerned was subject to their undertaking not to pre-install a competing general search service on a predefined portfolio of devices.

According to the Commission, the objective of all those restrictions was to protect and strengthen Google's dominant position in relation to general search services and, therefore, the revenue obtained by Google through search advertisements. The common objective and the interdependence of the restrictions at issue therefore led the Commission to classify them as a single and continuous infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area (EEA).

Consequently, **the Commission imposed a fine of almost €4.343 billion on Google**, the largest fine ever imposed by a competition authority in Europe.

The action brought by Google is largely dismissed by the General Court, which confines itself to annulling the decision only in so far as it finds that the portfolio-based revenue share agreements referred to above constitute, in themselves, an abuse. In the light of the particular circumstances of the case, the General Court also considers it appropriate, in the exercise of its unlimited jurisdiction, to set the amount of the fine imposed on Google at €4.125 billion.

Findings of the General Court

As a first step, the General Court examines the plea alleging errors of assessment in the **definition of the relevant markets** and in the subsequent assessment of Google's dominant position on some of those markets. In that context, the General Court states that it is required, essentially, to ascertain, in the light of the parties' arguments and of the reasoning set out in the contested decision, whether Google's exercise of its power on the relevant markets enabled it to act to an appreciable extent independently of the various factors likely to constrain its behaviour.

In the present case, the General Court notes at the outset that the Commission identified, first of all, four types of relevant market: (i) the worldwide market (excluding China) for the licensing of smart mobile device operating systems; (ii) the worldwide market (excluding China) for Android app stores; (iii) the various national markets, within the EEA, for the provision of general search services; and (iv) the worldwide market for non OS-specific mobile web browsers. The Commission went on to find that Google held a dominant position on the first three of those markets. The General Court observes however that, in the Commission's presentation of the different relevant markets, it duly mentioned their complementarity, presenting them as being interconnected, particularly in the light of the overall strategy implemented by Google to promote its search engine by integrating it into an 'ecosystem'.

Having been called upon, specifically, to rule on the definition of the boundaries of the market for the licensing of smart mobile device operating systems and the associated assessment of the position held by Google in that market, the General Court establishes, first of all, that the Commission found without objection from Google that the 'non-licensable' operating systems exclusively used by vertically integrated developers, like Apple's iOS or Blackberry, are not part of the same market, given that third-party manufacturers of mobile devices cannot obtain licences for them. Nor did the Commission err in also finding that Google's dominant position on that market was not called into question by the indirect competitive constraint exerted on that market by Apple's non-licensable operating system. The Commission also rightly concluded that the open-source nature of the licence to use the Android source code did not constitute a sufficient competitive constraint to counterbalance that dominant position.

As a second step, the General Court examines the various pleas alleging that the finding that **the restrictions at issue were abusive** was incorrect.

First, as regards the **pre-installation conditions imposed on manufacturers** of mobile devices, [4] the Commission concluded that they were abusive, distinguishing, on the one hand, the Google Search and Play Store apps bundle from the Chrome browser, Google Search and Play Store apps bundle, and finding, on the other hand, that those bundles had restricted competition during the infringement period, for which Google had been unable to demonstrate any objective justification.

In that regard, the General Court notes that, in order to substantiate the claim that a significant competitive advantage was conferred by the pre-installation conditions at issue, the Commission found that such pre-installation could give rise to a 'status quo bias' as a result of the tendency of users to use the search and browser apps available to them and apt to increase significantly and on a lasting basis the usage of the service concerned, an advantage which could not be offset by Google's rivals. According to the General Court, none of the criticisms put forward by Google can be levelled against the Commission's analysis in that respect.

Next, addressing complaints regarding the finding that the means available to Google's competitors did not enable them to counterbalance the competitive advantage derived by Google from the pre-installation conditions in question, the General Court observes that, while those conditions do not prohibit the pre-installation of competing apps, the fact remains that there is provision for such a prohibition, in respect of the devices covered, in the revenue share agreements – whether portfolio-based or the device-based revenue share agreements that replaced them – that is, more than 50% of Google Android devices sold in the EEA from 2011 to 2016, which the Commission was able to take into account as the combined effects of the restrictions in question. In addition, the Commission was also legitimately able to rely on its observation of the actual situation to support its findings, noting in that respect the limited use in practice of pre-installation or downloading of competing apps or of access to competing search services through browsers. Lastly, deeming Google's criticisms of the considerations that led the Commission to find that there was no objective justification for the bundles examined also to be ineffective, the General Court rejects in its entirety the plea by which it is alleged that the finding that the pre-installation conditions were abusive is incorrect.

Second, as regards the assessment of the **sole pre-installation condition included in the portfolio-based revenue share agreements**, the General Court finds, first of all, that the Commission was justified in considering the agreements at issue to constitute exclusivity agreements, in so far as the payments provided for were subject to there being no pre-installation of competing general search services on the portfolio of products concerned.

That being so, in view of the fact that, in finding them to be abusive, the Commission considered that those agreements were apt to encourage the manufacturers of mobile devices and the mobile network operators concerned not to pre-install such competing services, it was required, according to the case-law applicable to that type of practice, [5] to carry out an analysis of their capability to restrict competition on the merits in the light of all the relevant circumstances, including the share of the market covered by the contested practice and its intrinsic capacity to foreclose competitors at least as efficient as the dominant undertaking.

The Commission's analysis was based essentially on two elements: examination of the coverage of the contested practice, and the results of the 'as efficient competitor' test [6] which it applied. In so far as the Commission found, in relation to the first element, that the agreements in question covered a 'significant part' of the national markets for general search services, irrespective of the type of device used, the General Court considers that statement to be unsupported by the evidence which the Commission set out in the contested decision. There is a similar deficiency

[4] In view of the similarities between the cases, the General Court refers in that respect to the judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04 (see also PR No 63/07), referred to by the Commission in the contested decision.

[5] See judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P (see also PR No 90/17).

[6] 'The AEC test'.

as regards one of the premisses of the AEC test, namely, the search query share that might be contested by a hypothetically at least as efficient competitor whose app would have been pre-installed alongside Google Search. The General Court also identifies a number of errors of reasoning relating to the assessment of essential variables of the AEC test applied by the Commission, namely, the estimate of the costs attributable to such a competitor; the assessment of the competitor's ability to obtain pre-installation of its app; and the estimate of likely revenues on the basis of the age of mobile devices in use. It follows that, as conducted by Commission, the AEC test does not support the finding of abuse resulting from the portfolio-based revenue share agreements in themselves, and the corresponding plea is accordingly upheld by the General Court.

Third, as regards the assessment of the **restrictions contained in the anti-fragmentation agreements**, the General Court observes, as a preliminary point, that the Commission considers such a practice to be abusive in so far as it seeks to prevent the development and market presence of devices running a non-compatible Android fork, [7] although the Commission does not dispute Google's right to impose compatibility requirements in respect only of devices on which its apps are installed. Having established the material existence of the practice in question, the General Court also considers that the Commission was justified in accepting the ability of non-compatible Android forks to exert competitive pressure on Google. In those circumstances, in the light of the matters set out by the Commission that are relevant to establishing the impediment to the development and marketing of competing products on the market for licensable operating systems, the Commission was entitled, according to the General Court, to find that the practice in question had led to the strengthening of Google's dominant position on the market for general search services, while deterring innovation, in so far as it had limited the diversity of the offers available to users.

As a third step, the General Court examines the plea alleging infringement of the rights of the defence, by which Google seeks a declaration that its right of access to the file was infringed and that its right to be heard was not respected.

Examining, in the first place, the **alleged infringement of the right of access to the file**, the General Court makes clear, as a preliminary point, that Google's complaints in this respect relate to the content of a set of notes sent by the Commission in February 2018 regarding meetings which the Commission held with third parties throughout its investigation. Since those meetings were all interviews conducted for the purpose of collecting information relating to the subject matter of the investigation, within the meaning of Article 19 of Regulation No 1/2003, [8] the Commission was consequently required to ensure that a record was drawn up that would enable the undertaking in question, when the time came, to acquaint itself with that record and to exercise the rights of the defence. In the present case, the General Court finds that the requirements thus outlined were not met on account, on the one hand, of the time that elapsed between the interviews and the transmission of the notes concerning them and, on the other, of the summary nature of those notes. As regards the inferences to be drawn from that procedural error, the General Court nevertheless recalls that, according to the case-law, a breach of the rights of the defence may be found to have occurred, where there is such a procedural error, only if the undertaking concerned demonstrates that it would have been better able to ensure its defence had there not been that error. In the present case, the General Court considers, however, that that has not been demonstrated by the evidence disclosed to it or the arguments presented to it in that regard.

Addressing, in the second place, the **alleged infringement of the right to be heard**, the General Court observes that Google's criticisms in that regard constitute the procedural aspect of the complaints put forward to challenge the merits of the finding as to the abusive nature of certain revenue share agreements, in so far as they seek to challenge the denial of a hearing on the AEC test applied in that context. Given that the Commission refused Google

[7] These are, in this instance, operating systems developed by third parties from the Android source code released by Google under an open-source licence, which covers the basic features of such a system, but not the Android apps and services owned by Google. In that context, the anti-fragmentation agreements in question defined a minimum compatibility standard for implementation of the Android source code.

[8] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).

a hearing, even though it had sent Google two letters of facts supplementing substantially the substance and scope of the approach initially set out in the statement of objections in that respect, but without adopting, as it ought to have done, a supplementary statement of objections followed by a hearing, the General Court considers that the Commission infringed Google's rights of defence and thus deprived Google of the opportunity better to ensure its defence by developing its arguments in a hearing. The General Court adds that the value of a hearing is all the more apparent in the present case, given the deficiencies previously identified in the Commission's application of the AEC test. Consequently, the finding as to the abusive nature of the portfolio-based revenue share agreements must be annulled on that basis also.

Lastly, being required to carry out, in the exercise of its unlimited jurisdiction, an **autonomous assessment of the amount of the fine**, the General Court states at the outset that, while the contested decision must accordingly be annulled in part, in so far as it concludes that the portfolio-based revenue share agreements are in themselves abusive, that partial annulment does not affect the overall validity of the finding, in the contested decision, of an infringement, in the light of the exclusionary effects arising from the other abusive practices implemented by Google during the infringement period.

On the basis of its own assessment of all the circumstances relating to the penalty, the General Court rules that it is appropriate to vary the contested decision, concluding that the amount of the fine to be imposed on Google for the infringement committed is to be €4.125 billion. To that end, the General Court considers it appropriate, as did the Commission, to take account of the intentional nature of the implementation of the unlawful practices and of the value of relevant sales made by Google in the last year of its full participation in the infringement. By contrast, as regards taking into consideration the gravity and duration of the infringement, the General Court considers it appropriate, for the reasons set out in the judgment, to take account of the evolution over time of the different aspects of the infringement and of the complementarity of the practices concerned, in order to assess the impact of the exclusionary effects properly established by the Commission in the contested decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

The full text of the judgment is published on the CURIA website on the day of delivery.

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