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Advocate General's Opinion in Case C-738/22 P | Google and Alphabet v Commission

In the Google Android case, Advocate General Kokott proposes that the Court of Justice dismiss Google's appeal and, therefore, that it confirm the new fine of €4.124 billion set by the General Court

By decision of 18 July 2018, ¹ the Commission imposed a fine on Google of almost €4.343 billion. ² Google 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:

1. Manufacturers could obtain a licence for Google's app store 'Play Store' only if they pre-installed Google's general search app 'Google Search' and Google's 'Chrome' browser ('bundle').
2. In addition, in order to obtain a licence for Play Store and Google Search, they had to undertake not to sell devices equipped with versions of the Android operating system not authorised by Google ('anti-fragmentation').
3. Lastly, Google made the grant of a share of Google's advertising revenue to manufacturers and network operators subject to the condition that they did not pre-install another general search service on any device within an agreed portfolio ('revenue sharing').

According to the Commission, by all those restrictions, Google pursued the objective of protecting and strengthening its dominant position in relation to general search services and, therefore, the revenue obtained by Google through search advertisements, at a time when the importance of the mobile internet was growing significantly. Because of their common objective and their combined effects, the Commission described the restrictions as a single and continuous infringement.

Google challenged the Commission's decision before the General Court of the European Union, with limited success: By judgment of 14 September 2022, ³ the General Court annulled the decision (only) in so far as it concerned the revenue-sharing scheme and reset the fine at €4.124 billion. ⁴

Google then lodged an appeal before the Court of Justice.

In her Opinion delivered today, Advocate General Kokott proposes that the Court of Justice dismiss Google's appeal and, therefore, uphold the judgment of the General Court.

First, the assessment of the facts and evidence by the General Court cannot, in principle, be challenged before the Court of Justice. Second, the legal arguments put forward by Google are ineffective.

As regards, more specifically, the bundling of Play Store with Google Search and Chrome, contrary to Google's contention, the General Court was not obliged, in order to establish the existence of an abuse, to require the Commission to analyse the state of competition in the absence of the impugned conduct (the so-called counterfactual analysis). The General Court was entitled to confine itself to finding that the decision of users to use Google Search and Chrome rather than competing apps was influenced in a discriminatory way by the 'status quo

bias' associated with their pre-installation which competitors could not offset.

In addition, the General Court was not obliged to extend its examination beyond the capacity of the bundling to restrict competition and to assess whether that conduct was capable of specifically foreclosing competitors as efficient as Google.

It is not realistic, in the present case, to compare the situation of Google with that of a hypothetical as-efficient competitor. Google held a dominant position in several markets of the Android-ecosystem and thus benefited from network effects that enabled it to ensure that users used Google Search. As a result, Google obtained access to data that enabled it in turn to improve its service. No hypothetical as-efficient competitor could have found itself in such a situation.

In the view of Advocate General Kokott, the General Court was also correct to hold that there was still a single and continuous infringement despite the annulment of the Commission's decision in relation to revenue sharing. Notwithstanding that partial annulment, there is an overall strategy aimed at anticipating the development of the mobile internet, while preserving Google's own business model, which is based on the revenues which it derives essentially from the use of its general search service.

Lastly, the General Court also did not err in recalculating the amount of the fine.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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Images of the delivery of the Opinion are available on '[Europe by Satellite](#)' ☎ (+32) 2 2964106.

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¹ Decision of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android, summarised in OJ 2019 C 402, p. 19; see also Commission Press Release [IP/18/4581](#)). At the time, this was the largest fine ever imposed by a competition authority in Europe.

² Of which almost €1.922 billion jointly and severally with Alphabet, Google's parent company.

³ Decision of the General Court of 14 September 2022, *Google and Alphabet v Commission* (Google Android), [T-604/18](#); see also Press Release [No. 147/22](#).

⁴ Alphabet is jointly and severally liable for almost €1.521 billion.