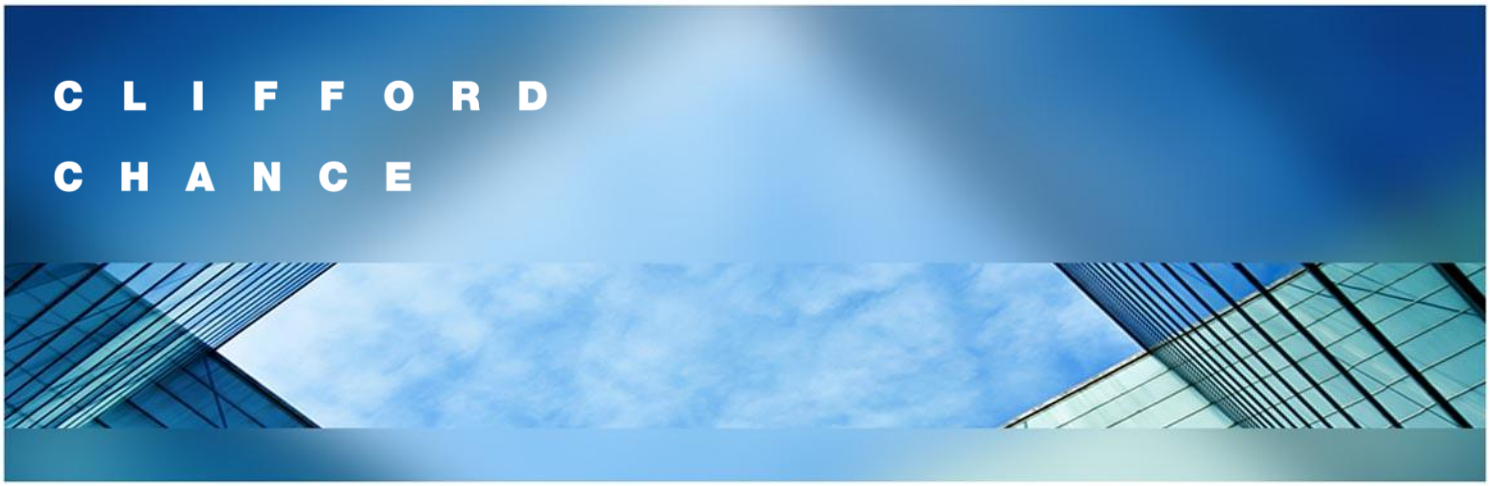

THE GOOGLE ANDROID EUROPEAN COURT JUDGMENT AND ITS WIDER IMPLICATIONS

On 14 September 2022, the General Court of the European Union (**General Court**) largely upheld the European Commission's (**EC**) 2018 Android Decision (**Decision**) finding that Google had abused multiple dominant positions in relation to the Android mobile operating system platform in order to strengthen and expand Google's position in web search. The General Court annulled the EC's finding in relation to Google's revenue-sharing agreements (**RSAs**) and set the amount of the fine imposed on Google at €4.125 billion (reduced by 5% from €4.343 billion).

WHY THE *ANDROID* JUDGMENT MATTERS

- The EC's success in this case can (for better or worse) be expected to bolster its enforcement of competition law in the IT tech sector. The outcome is also likely to embolden the EC in implementing and applying the new Digital Markets Act, soon to enter into force.
- Current and future investigations in the IT sector against Google and Apple will be able to rely on the General Court's finding that Google and Apple do not significantly constrain one another in smart mobile operating systems (**OS**) and app stores, and that by implication both can be dominant in relation to these products. This finding will, for example, give the EC considerable comfort in relation to its ongoing investigation of Apple's App Store terms.
- Releasing software as an open source rather than a closed source product can have antitrust implications: under open source licensing, third parties can provide derivative versions or forks of that software, and the judgment confirms that antitrust law limits the restrictions that the copyright owner can impose on the distribution of forks that constitute a competitive threat to the copyright owner's own version.
- After the *Intel* (T-286/09 RENV) and *Qualcomm* (T-235/18) judgments, the EC again failed to successfully prove the anticompetitive effects of exclusivity rebates. The judgment demonstrates the considerable burden the EC continues to face bringing cases concerning pricing practices, rebates and similar issues against dominant IT companies. If the EC relies

Key questions

- Do Google and Apple mobile operating systems compete in the same market? Do Google's and Apple's app stores compete in the same market?
- Is software preinstallation by way of tying by a dominant company illegal if there are other means to distribute competing software (such as end user downloading)?
- Does the assertion that software is provided for free to end users and needs to be monetized render tying of revenue-generating apps by a dominant firm lawful?
- Can an open source software copyright owner prevent the distribution of competing forks of that software?
- What is the EC required to show to establish that a dominant firm's payments or rebates provided in exchange for exclusivity are anticompetitive?
- How should the EC record meetings with third parties during its investigation?
- When should the EC issue a new complaint (statement of objections) thus providing investigated parties with a new opportunity to request a hearing, rather than issuing a simple letter of facts?

on economic models in its decisions, it is essential that such analysis is sufficiently robust and rigorous.

- The judgment includes criticism of the EC's handling of the administrative procedure which could positively influence its respect of the rights of the parties it investigates.
  - The General Court chastises the EC for keeping improper notes of meetings during which it collected information related to the investigation and effectively tells the EC to do a better job in the future.
  - The General Court also takes issue with the EC's failure to send a supplementary complaint ("supplementary Statement of Objections") when it significantly expanded the substance and scope of its concerns. This finding could lead the EC more easily to issue another statement of objections (thus affording investigated parties the opportunity to request a new hearing), rather than sending a simple letter of facts (which only gives parties the right to send written comments on the new evidence).

BACKGROUND

The General Court case originated with a complaint in 2013 by industry association FairSearch. In 2018, the EC adopted a decision against Google finding that Google:

- Abused its dominant position in the worldwide market (excluding China) for Android app stores by tying the Google search app to its Play Store app store;
- Abused its dominant position in the worldwide market (excluding China) for Android app stores and national markets for general search services by tying its Chrome browser to the Play Store and its search app;
- Abused its dominant position in in the worldwide market (excluding China) for Android app stores and national markets for general search services by making manufacturers' (**OEMs**) licensing of the Play Store and the Google Search app conditional on agreeing to so-called "antifragmentation obligations" (**AFAs**). OEMs wishing to install these apps on any of their devices were thereby prohibited from selling other smart mobile devices running on alternative Android versions (so-called "forks" of open source Android); and
- Abused its dominant position in the national markets for general search services by concluding revenue sharing agreements (**RSAs**) which gave financial incentives to OEMs and mobile network operators (**MNOs**) to exclusively pre-install Google Search across a portfolio of devices.

The Decision required Google to end the infringements and imposed a record fine of €4.3 billion. Multiple parties intervened in the appeal proceedings before the General Court, including, among others, the Computer and Communications Industry Association (CCIA), Gigaset and HMD (supporting Google) and the European Consumers Organisation (BEUC), FairSearch, Czech search engine provider Seznam and French search engine Qwant (supporting the EC). Clifford Chance teams represented the first complainant FairSearch and Seznam in the appeal proceedings, in addition to representing FairSearch during the entire course of the EC investigation.

The Google Android judgment is the second decision delivered by the General Court in an antitrust case against Google. In November 2021 the General Court upheld a fine of €2.42 billion imposed on Google for abusing its dominant position in Google Shopping. For more information on this case, please see our dedicated client briefing here. Google's appeal against the General Court's Google Shopping decision is currently pending before the European Court of Justice.

Meanwhile, the EC's prohibition decision concerning Google's AdSense search adverts (2019) is still pending before the General Court. The EC is also currently investigating Google in relation to potential anti-competitive behaviour in online advertising and app store billing.

THE JUDGMENT

Apple and Google are not direct competitors in relation to smart mobile OS and app stores

One of the most disputed aspects of the case concerned market definitions and Google's dominance in the worldwide market (excluding China) for (i) licensable mobile OS and (ii) Android app stores.

Google's key argument was that the EC wrongly focused its assessment on OEMs but failed to properly consider the competitive pressure from Apple app stores and OS in relation to users and developers.

- The General Court confirmed that Android and iOS are not in the same market since Apple does not offer to license its iOS to other OEMs. In relation to users and developers, the competition is only indirect and Apple does not exert sufficient indirect competitive pressure on Google to constrain its conduct. The General Court agreed with the EC's analysis that due to switching costs and users' loyalty to their OS, users would not switch to Apple in case of a small but significant non-transitory decrease in quality of the OS (the **SSNDQ** test). As users would not switch, the same is true for developers, who would not abandon Android's large user base.

  These findings are of particular importance in light of the EC's ongoing investigation against Apple, which will help the EC establish Apple's App Store dominance.

- The General Court acknowledged that the SSNDQ test, which has never been used before by the EC, can be a useful tool in the analysis of zero-price markets and that the test does not require a specific or precise quantification of degradation of quality.

- The General Court also shed some light on the assessment of digital markets in general, acknowledging that parameters such as innovation, user behaviour or network effects may be more important than price. It also stated that in a digital "ecosystem" relevant markets may overlap. The markets at issue in the Android case were considered "*distinct but interconnected*".

Google's tying of the Play Store with Google Search and Chrome browser created a competitive advantage that competitors could not offset

Google required OEMs to pre-install the Google Search app and Chrome browser, as a condition for licensing its Play Store. The General Court noted

that the EC correctly relied on the same legal test as in *Microsoft v. Commission* (T-201/04) by examining the actual effects of the practices to establish harm to competition. It added that when a conduct covers several years, the restriction of competition may be established by finding that practices have eliminated or hampered sources of competition which would otherwise have taken place or developed.

Google argued that the EC failed to prove the restriction of competition, as OEMs were still able to preinstall rival services alongside those of Google and users could download competing search or browser services. In relation to the latter point, Google argued that the *status quo bias* of users and Google's resulting competitive advantage arose only where Google's service was set as the default in the OS and that the EC had not proven that the same is true where a service is pre-installed, but not set as the default.

The General Court concluded that even though theoretically OEMs could pre-install the competing apps or users could download them, these were not credible alternatives for Google's rivals, in part because *status quo bias* renders users reluctant to download alternative apps, and partly because of the combined effect of Google's agreements with OEMs, which prevented OEMs from installing a competing app to Google Search and from setting competing browsers as default. The General Court also considered that there is no practical difference between a default setting and pre-installation as their effects are similar. The Court considered a range of evidence, including behavioural data on user switching, in coming to its conclusion, which supports the EC's position that it can consider new types of evidence when bringing cases, especially in the digital sphere.

The General Court also rejected Google's argument that its conduct was objectively justified as necessary to monetise Google's substantial investment in Android and ensure that it remains free. The General Court found that the practices were not necessary as Google had other significant sources of revenue to finance Android.

Allegations of exclusivity restrictions require a demonstration that a significant part of the market is foreclosed

Google alleged that the EC failed to demonstrate that the RSAs which required the sole pre-installation of Google's general search services across a portfolio of devices amounted to "exclusivity" arrangements and that in any case it did not establish their exclusionary effect. In particular, the portfolio-based RSAs had a low market coverage and therefore only had negligeable impact. In addition, Google also criticised the EC's application of the as-efficient-competitor (**AEC**) test.

The General Court found:

- Contrary to Google's claims, the financial advantage conferred on OEMs if they do not pre-install competing general search services constituted exclusivity payment as it gave an incentive to OEMs to contract with Google, thereby excluding Google's competitors from an important segment of mobile devices.
- Mobile devices account for only a portion of the overall market for general search. As the portfolio-based RSAs covered less than 5% of this overall search market in any of the countries concerned, the General Court found

that the EC had failed to prove that the RSAs had foreclosed a "significant" part of the market.

- The General Court, however, does not seem necessarily to exclude that Google's RSAs could have been exclusionary. The General Court noted that even a small segment of the market could be significant in certain circumstances, *e.g*., if it comprises particularly important customers, but the EC had not argued its case that way.
- The General Court agreed with Google that the EC's application of the AEC test contained several errors in reasoning. For example, the EC wrongly assessed the search query share that might be contested by a hypothetical as efficient competitor whose app would have been pre-installed alongside Google Search, and wrongly estimated the costs attributable to such a competitor and the ability of the competitor to obtain pre-installation of its app.

The General Court therefore annulled yet another of the EC's attempts to sanction exclusivity rebates, having previously annulled fines on Intel and Qualcomm for similar reasons. If the EC relies on economic models in its decisions, it is essential, said the General Court, that such analysis is sufficiently robust and rigorous.

Protection of the Android "ecosystem" cannot justify the exclusion of non-compatible Android open source forks from the market

In the Decision, the EC had found that Google's AFAs prohibited OEMs who distributed devices with Google apps to also distribute devices with open source versions of Android that were not approved by Google (*i.e.,* Android forks). The EC considered that this restricted competition as it deprived consumers of alternative versions of OS which were not controlled by Google. The practice also strengthened Google's position in general search, as competing general services could be exclusively preinstalled and set as default on such Android forks, so they represented a viable distribution channel for Google's rivals.

The General Court confirmed the EC's reasoning stating that AFAs limited Android forks' access to the market. The General Court clarified that to establish a restriction of competition the extent of competitive pressure or credibility of threat from Android fork is irrelevant. It suffices to establish (as the EC had) that Android forks would be a competitor on the market for licensable OS.

The General Court also rejected Google's argument that the AFA protected the Android ecosystem from the threat of fragmentation caused by the existence of various incompatible platforms. The General Court considered that Google's high market shares during the infringement period made such risk implausible. It also considered that less restrictive means, such as trademarks, could have ensured that any malfunctions of Android forks did not harm the reputation of the whole Android ecosystem.

PROCEDURAL ISSUES AND FINE SETTING

The EC is required to take thorough notes of all meetings with third parties, including meetings with the EU Commissioner when it collects information related to the investigation

The judgment includes some important lessons in relation to the EC's handling of procedures.

- The General Court agrees with Google that the EC's notes of its meetings with third parties were incomplete, belated and failed to capture the substance of the discussion. It expressly states that the EC's obligation to make notes of meetings with third parties includes meetings with the Commissioner where such meetings have the purpose of collecting information relating to the subject matter of the investigation. The notes of any meetings should be complete, enabling the defendant to understand the substance of discussion. A cursory summary of the subjects addressed is not sufficient. Moreover, the notes should be drafted immediately or shortly after the meetings took place, not several years later.
- Despite these procedural shortcomings, the General Court held that there was no infringement of the rights of defence, as Google did not demonstrate that it could have defended itself better had those procedural irregularities not occurred.

  In this regard, the General Court recalls that the party under investigation must establish that (a) in the case of incriminating evidence, the outcome of the procedure would have been different had it had access to such evidence or (b) in the case of exculpatory evidence, that it did not have access to certain such evidence and that it could have used it for its defence. In this case, Google failed to establish that it had been deprived of access to either incriminating or exculpatory evidence. In particular, Google was still able to obtain information about the substance discussed during the meetings, as the EC could link the content of discussions to specific documents in the investigation file or the discussion was not linked to the abuses captured in the Decision.

This contrasts with the recent *Qualcomm* case (T-235/18), in which the General Court annulled the EC's decision because of note-taking failures. In *Qualcomm*, the EC had concealed the existence of some meetings, or did not record the content at all, which made it impossible for Qualcomm to ascertain their relevance.

The EC cannot substantially change the objections in the letters of facts, but should send a supplementary statement of objections

During the procedure the EC sent Google two letters of facts, which, according to Google, included new quantitative analysis in the form of an AEC test and new methodology in relation to the assessment of the RSA. Google claimed that these should have been sent in a supplementary Statements of Objections (**SO**), which would have given Google the right to an oral hearing.

- The General Court stated that the letters of facts did not formally add any additional objection to those already set out in the SO. However, they substantially supplemented the substance and scope of the objections and

significantly changed the evidence in relation to the RSAs. The General Court considered that the quantitative analysis in the SO regarding the RSAs (in particular, the AEC test) could be understood only if read in conjunction with the two letters of facts.

- The General Court therefore ruled that the EC should have sent Google a supplementary SO, which would have given Google the opportunity to be heard orally. An oral hearing would have made it easier for Google to develop its arguments regarding the AEC test and to resolve the ambiguities and difficulties surrounding its application. Consequently, the General Court considered that Google's rights of defence were infringed and therefore annulled the EC's decision in relation to the RSAs. The RSA infringement was therefore annulled on both substantive and procedural grounds.

The existence of a single and continuous infringement

In the Decision, EC found that Google's practices constituted a single and continuous infringement, as they pursued a common objective of protecting and strengthening Google's dominant position in general search services and thus its revenues via search advertisements.

Even though the General Court annulled the Decision in relation to the RSAs as a standalone infringement, it upheld the EC's finding that the other abuses (two tying infringements and AFA restrictions) constituted a single and continuous infringement. The General Court noted that the abuses were part of Google's overall strategy aimed at preserving its position in online search in the context of the development of mobile internet and stressed the interlocking nature of Google's practices. The General Court specifically noted that the RSAs were an important factual element when analysing the other abuses.

General Court reduces the fine, but takes a firm view on the gravity of the infringement

Acting with unlimited jurisdiction, the General Court reduced the fine to €4.125 from €4.343 billion. It is likely that the reduction would have been bigger, had the General Court not also found that the EC should have imposed a greater uplift in the fine to reflect the gravity of the infringement

The General Court considered that it was necessary to take into account the complementarity of the abuses and the heightened intensity of their effects at a crucial time for the development of online search on mobile devices. The General Court also confirmed that the infringement was committed intentionally, emphasizing Google's 'carrot-and-stick' strategy to strengthen its position in general search.

NEXT STEPS

- Google and the EC have two months and ten days from the notification of the judgment to decide whether to appeal the General Court's judgment.
- The judgment could lift the suspension of damages actions brought in national courts by rivals which had been put on hold pending the outcome of the appeal.

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