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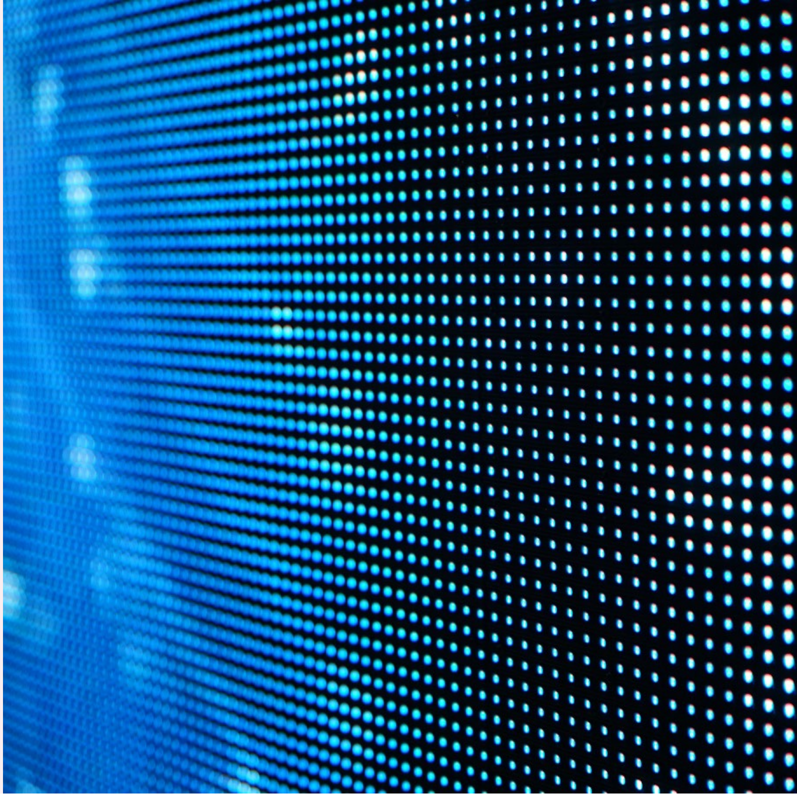

Google Android: Key lessons from the CJEU's final judgment

14 July 2026

The Court of Justice of the European Union (CJEU) has delivered its long-awaited judgment in the *Google Android* case. The judgment upholds the General Court's (GC) 2022 ruling, which had largely confirmed the European Commission's (EC) 2018 decision against Google for abusing its multiple dominant positions in relation to the Android mobile operating system.

The EC held back its updated guidelines on exclusionary abuses under Article 102 TFEU pending this judgment. With the CJEU's ruling on these key legal points now out, the EC has confirmed it intends to publish the guidelines in Q3 this year.

Clifford Chance has been at the heart of this case from the outset, acting for FairSearch, the organisation that made the original complaint to the EC, and for Seznam, a leading Czech search engine and direct competitor of Google that has been damaged by Google's abuse of its dominant position.

Why the CJEU's *Android* judgment matters

The EC's 2018 Google Android decision was a landmark in global scrutiny of mobile ecosystems that has since continued under the EU Digital Markets Act and parallel regimes around the world. The CJEU's judgment brings the Google Android saga to a close, while providing important guidance on the assessment of exclusionary conduct in digital markets that will shape Article 102 enforcement for years to come. In particular:

- **Relevance of (lawful) context**: Exclusionary effects should not be assessed in the abstract. The full factual and commercial context must be taken into account in assessing whether abusive conduct has occurred, including surrounding agreements and market conditions, even if those surrounding elements are not themselves abusive. In its judgment, the CJEU confirmed that the GC was correct to take Google's portfolio-based revenue sharing agreements into account as relevant factual context when assessing the exclusionary effects of other elements in Google's conduct, notwithstanding the GC's finding that those revenue sharing agreements were not independently abusive. The relevant question is whether those contextual elements, even if found in themselves to be lawful, amplify or attenuate the exclusionary effects of the conduct under assessment.

- **Counterfactual analysis**: The EC must establish a causal link between abusive conduct and its anticompetitive effects, but is not required to do so through a "but-for" counterfactual analysis (that is, an assessment of what the competitive situation would have been had the contested conduct never occurred). Counterfactual assessments can be relevant evidence, but they are one tool among others. Further, it suffices to demonstrate - through specific and tangible evidence in context – that the conduct is *capable* of producing exclusionary effects; proof of actual harm is not required.
- **Tying arrangements**: Tying arrangements by a dominant undertaking deviate from competition on the merits – *e.g.*, by winning customers by offering better products or services at lower prices, or based on the quality of goods offered. By engaging in tying conduct, the dominant undertaking is not outperforming its rivals and thus tying by its nature does not constitute competition on the merits. But proof of (at least potential) exclusionary effects remains necessary for the contested conduct to be considered abusive. Consequently, the use of pre-installation or default options is not automatically abusive: in this case, the CJEU accepted that exclusionary effects arose due to status quo bias of consumers, which had been demonstrated on the basis of a factual record showing distortion of user behaviour and foreclosure dynamics in the relevant ecosystem.
- **As-efficient competitors (AECs)**: The CJEU confirmed that a finding of infringement under Article 102 TFEU does not systematically require showing that the conduct concerned is capable of excluding a hypothetical competitor that is as efficient as the dominant company. Circumstances exist where it is neither possible nor meaningful to conduct such an analysis, particularly in ecosystem markets characterised by significant barriers to entry and network effects, where the market structure can make the entry, survival, or even emergence of such a competitor practically impossible. However, an absence of exclusionary effects on a hypothetical AEC will remain a relevant factor in some scenarios – it was, for example, a key element in the GC's uncontested finding that Google's portfolio-based rebates were not abusive.
- **Single and continuous infringement under Article 102:** The CJEU stated for the first time that the concept of a single and continuous infringement (SCI) may apply to abuse of dominance cases under Article 102 TFEU. Moreover, where each element of conduct involved in a case is characterised both as a separate, autonomous infringement and, collectively, as part of a SCI, the annulment of one element does not call into question the abusive nature of the rest, nor does it dissolve the SCI finding, provided an overall strategy covers the remaining infringements.

Background to the case

The case concerns Google's Android mobile ecosystem and the contractual arrangements governing the distribution of Google's proprietary applications on Android devices. The underlying question, as framed by Advocate General Kokott, is whether the ubiquitous presence of Google

Search in everyday life, particularly on mobile devices, is (at least in part) due to abusive conduct by Google.

Google launched the Android operating system in 2008 and made it available to original equipment manufacturers (OEMs) and mobile network operators (MNOs) on a free and open-source basis. While Android itself was distributed free of charge, Google's business model in the mobile sector relied heavily on revenue-generating services – including the Play Store, Google Search and the Chrome browser – which were distributed on Android devices through a series of contractual arrangements entered with OEMs and MNOs. The EC found that those agreements raised several concerns as they effectively locked Google's services onto virtually every Android device sold.

The EC challenged Google's practices with regards to three sets of agreements:

(a) **Mobile Application Distribution Agreements (MADAs)**: The EC identified two separate tying practices. First, to obtain a licence to the Play Store, OEMs were required to pre-install Google Search. Second, to obtain a licence to the Play Store and Google Search, OEMs were required to pre-install Google Chrome.

- **Anti-Fragmentation Agreements (AFAs)**: OEMs that sold even a single mobile device on which Google apps were installed were prohibited from distributing any devices running open-source versions of Android that were not approved by Google (Android Forks).

(b) **Revenue Sharing Agreements (RSAs)**: Google provided financial incentives to OEMs and MNOs on condition that they did not pre-install competing general search services and exclusively pre-installed Google Search across a device portfolio.

The EC concluded that these agreements were part of an overall strategy of Google aimed at consolidating its dominant position in the online general search market, at a key point in time when mobile internet was becoming central to everyday life. It imposed a fine of €4.343 billion, the largest competition fine ever at the time.

Google appealed to the GC, which largely dismissed the challenge in September 2022. The infringements related to the MADAs and AFAs were confirmed; the EC's finding of an abuse related to the RSAs was annulled; and the fine was reduced to €4.125 billion. Google then brought the current appeal before the CJEU.

A fuller account of the background and the GC's ruling can be found in our previous article here.

Findings of the CJEU

1. The role of (lawful) context in assessing anticompetitive effects

The CJEU confirmed that anticompetitive effects under Article 102 TFEU should not be assessed in the abstract. Whether conduct is capable of producing anticompetitive effects depends on the specific circumstances in which it occurs, and the authority must assess the conduct within its full factual and commercial context. A factual element may form part of the relevant context even where it does not itself constitute an abuse, and even where it has been explicitly found in itself to be lawful. The relevant question is whether it amplifies or attenuates the exclusionary effects of the conduct under assessment.

Consequently, the fact that the GC had annulled the finding that the portfolio-based RSAs were independently abusive did not preclude the EC from considering them as contextual elements when assessing the effects of the MADAs. Irrespective of the RSAs' legal characterisation (*i.e.*, whether or not they were lawful in themselves), they had to be taken into account in assessing the effects of the MADAs. The same reasoning applied to the compatibility requirements in the AFAs. Although those requirements, insofar as they related to devices on which Google's apps *were* installed, were not themselves found to be abusive, the CJEU confirmed that they constituted a relevant element of the context in which the abusive conduct took place.

2. Causal link and counterfactual analysis

Google argued that the EC was obliged to carry out a but-for counterfactual analysis, to consider whether competitors would have been similarly weakened even if Google had not imposed the MADA pre-installation conditions, and to determine whether Google's open licensing model for Android would have remained viable without those conditions. Google claimed there was no causal link between the pre-installation conditions and the alleged anticompetitive effects.

The CJEU rejected this argument, confirming its position in *Google Shopping*. Whilst the EC must establish a causal link between the abusive conduct and its anticompetitive effects, it is not required to employ any particular methodology – including a counterfactual analysis – to discharge that burden. The EC may instead rely on a range of evidence.

The CJEU further confirmed, again by reference to *Google Shopping*, that proof of actual harm is not required. It is sufficient to demonstrate that the relevant conduct was capable of producing exclusionary effects. This does not mean that capability to exclude can be asserted abstractly – the CJEU was explicit that capability must be shown through specific and tangible evidence in context. However, where a dominant undertaking can influence the behaviour of customers or users in a manner that discriminates against competitors – a finding the EC had made in relation to the MADA pre-installation conditions – that may itself suffice to establish the requisite capability for harm.

3. Tying

The CJEU confirmed that tying – offering a product (the tying product) only together with a separate product (the tied product) – constitutes, in principle, conduct that departs from competition on the merits, when carried out by a dominant company. Competition on the merits is the process through which consumers benefit, for example, from lower prices, better quality, or a wider choice of goods and services. Tying, by contrast, deprives the customer of a genuine market choice by making the supply of the tying product conditional on the acquisition of a tied product. The CJEU accordingly held that competition authorities are not required to demonstrate that a tying arrangement constitutes a departure from competition on the merits; that conclusion follows from the nature of the conduct itself.

That said, while tying conduct does not constitute competition on the merits, it is not abusive *per se*. The CJEU confirmed that for conduct to be considered abusive, two cumulative conditions must be met: the contested conduct (i) departs from competition on the merits and (ii) is capable of producing exclusionary effects, *i.e.*, the practice is capable of impacting the market structure by making market entry and continued participation more difficult for competitors. In other words, while tying arrangements are in principle considered as means falling outside the scope of competition on the merits, proof of (at least potential) exclusionary effects remains necessary for the contested conduct to be considered abusive.

Consequently, the use of pre-installation or default options is not automatically abusive: in this case, the CJEU accepted that exclusionary effects arose due to status quo bias of consumers that had been demonstrated on the basis of a factual record showing distortion of user behaviour and foreclosure dynamics in the relevant ecosystem.

4. Capacity to foreclose as-efficient competitors

Google argued that the EC was required to establish that the MADA pre-installation conditions were capable of foreclosing competitors as efficient as Google itself, and that it had not done so. The CJEU rejected this argument.

The CJEU confirmed that the EC was not required to demonstrate exclusionary effects by reference to a hypothetical AEC. While conduct outside competition on the merits may breach Article 102 TFEU if it would exclude a hypothetical AEC, it can also be found to be abusive in other circumstances. Previous case law (*European Superleague Company*) indicated that one of those circumstances is where the conduct impedes *potential* competitors from entering the market. In *Google Android*, the CJEU confirmed another scenario: where the conduct harms *existing* competitors, and the entry or even emergence of an AEC is practically impossible, due to the structure of the market – for example in digital markets characterised by significant barriers to entry, network effects, and complex interdependencies – combined with the conduct at issue. In such cases, assessing whether the conduct is exclusionary by reference to the question whether a hypothetical AEC could replicate the contested conduct is neither possible nor meaningful, said the CJEU.

The judgment does not, however, mean that an absence of potential effects on a hypothetical AEC is never relevant. It was, for example, a key element in the GC's uncontested finding that Google's portfolio-based rebates were not abusive.

5. Single and continuous infringement under Article 102 TFEU and severability

A finding of a SCI allows competition authorities in the EU to treat a series of separate anticompetitive actions as one unified breach that persisted for the entire period in question. The CJEU's judgment addresses two distinct questions: first, whether the SCI concept, which was developed in the context of cartel enforcement, can apply in Article 102 cases; and second, whether the partial annulment of one constituent element of an SCI means the SCI finding falls away.

On the first question, the CJEU confirmed that an Article 102 infringement may result not only from an isolated act, but also from a series of acts or continuous conduct, even where individual elements of that series could each independently constitute an infringement. Where distinct practices form part of an overall plan, the EC is entitled to characterise them collectively as a single infringement, including for purposes of calculating the fine.

On the second question of severability, the CJEU confirmed that partial annulment of an element of an SCI does not cause the SCI finding to fall away where the annulled elements can be severed from the remainder without altering the substance of the SCI.

Applying those principles, the CJEU upheld the GC's approach. While the GC had annulled the EC's decision finding the portfolio-based RSAs to be abusive, each of the three remaining practices – the Google Search app tie, the Chrome browser tie, and the AFAs – had been characterised in the EC's decision as standalone, autonomous infringements and as constituent elements of the broader SCI. Those practices were independently sufficient to establish an overall plan: each was directed at attaching special conditions to the use of Android OS or of specific apps and services, with the common objective of preserving Google's dominant position in general search services and protecting the business model underpinning it as mobile internet usage expanded.

The CJEU confirmed that the RSA finding was severable from the remainder of the decision, and that the GC was therefore fully entitled to annul that element whilst retaining the SCI classification in respect of the remaining three infringements.

6. The fine of €4.125 billion is confirmed

The CJEU confirmed the fine of €4.125 billion imposed by the GC, dismissing all of Google's objections.

While the GC had adopted a different approach to the EC when calculating the fine, the CJEU found that this did not breach Google's rights of defence. The GC has the power to substitute its own assessment for that of the EC and, whilst it cannot rely on factors that the parties could not have foreseen, it is not required to invite comment on specific variations that it is contemplating, or the precise parameters it intends to apply. The underlying factors (gravity, duration, and intensity) had all been argued before it.

Google contended the fine should have been reduced by at least one third to reflect the fact that the GC had annulled the EC's decision in respect of one of the alleged abuses. The CJEU rejected this argument on the basis that Google had provided no support for its claim. Moreover, the CJEU added that the GC had given adequate reasons for the limited reduction it applied, anchored in its finding that the SCI characterisation remained intact notwithstanding the annulment of the EC's finding that Google's portfolio-based RSAs constituted a standalone abuse.

EC's Article 102 Guidelines on Exclusionary Abuses

The EC deliberately held back the publication of the final version of its updated Article 102 TFEU guidelines on exclusionary abuses, pending this judgment. The CJEU's findings broadly reaffirm the direction already signalled in the EC's draft guidelines issued for comments in August 2024 (Draft Guidelines), so are unlikely to result in significant changes to the EC's draft text. For example:

- On **tying**, the Draft Guidelines explicitly provide that if a dominant company engages in tying, it is not competing on the merits and that, in certain markets due to specific circumstances, exclusionary effects can be presumed;
- On the **counterfactual**, the Draft Guidelines indicate that a counterfactual analysis may not be required where the dominant undertaking's conduct has made it very difficult or impossible to ascertain the objective causes of observed market developments; and
- On **AECs**, the Draft Guidelines state that there is no requirement to demonstrate that actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking, drawing on the GC's *Google Shopping* judgment. The CJEU in *Google Android* reconfirms this position and posits more generally that the EC was not required to demonstrate exclusionary effects by reference to a hypothetical AEC. It identifies the situation of an ecosystem characterised by significant barriers and network effects, and conduct which makes the entry, maintenance or even emergence of an AEC practically impossible, as one in which it is not possible, nor does it make sense, to base an analysis of exclusionary effects of the conduct on whether it could be replicated by an AEC.

Beyond these issues, the judgment's confirmation of the SCI concept under Article 102 is a point the EC may well seek to incorporate into the final text.

More broadly, the *Google Android* judgment is perhaps best understood as a confirmation of the CJEU's existing case law and the EC's interpretation thereof. The CJEU reaffirms that competition authorities are not required to satisfy rigorous economic evidentiary thresholds in every case, particularly in respect of conduct that is well-established in prior case law as inherently capable of restricting competition (such as tying). In doing so, the *Google Android* judgment confirms the measured but meaningful departure from the effects-based approach reflected in recent CJEU case law and EC decisional practice. This clarification is not new, but does carry practical significance for the analytical framework to be adopted in the EC's forthcoming guidelines and future enforcement.

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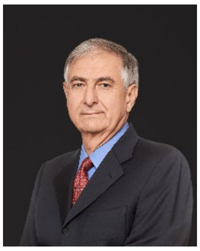

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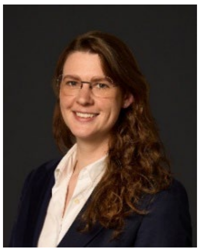

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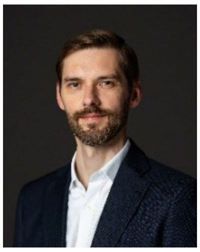

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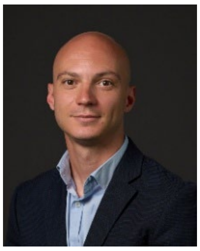

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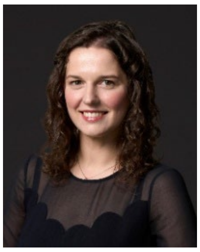

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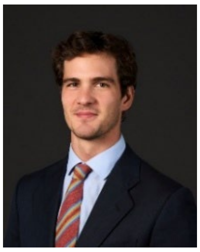

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