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BERGEN CENTER FOR COMPETITION LAW AND ECONOMICS

Google Android

Advocate General Kokott's Opinion

www.beccle.no
post@beccle.uib.no

UNIVERSITY OF BERGEN

NHH

Google Android Timeline

- Key case concerning competition in mobile markets and raises some issues of principle vital to future efficacy of Article 102
- FairSearch filed complaint in 2013
- EC issued decision in 2018
- In September 2022, EU General Court affirmed EC's decision
- Appeal pending before CJEU
  - Hearing in January 2025
  - Advocate General Kokott Opinion in June 2025

The Fundamental Issues

- AG begins by identifying the question that "in essence" underlies Google's appeal: "Is the omnipresence of the Google search engine in the daily life of the majority of the world's population, especially in the context of the use of smart mobile devices running its operating system Android, . . . due to the abuse of a dominant position"? (AG 2-3)

The Fundamental Issues

- This question arises against the factual background of the contractual conditions Google imposed on manufacturers of Android mobile devices to obtain licenses for Google's most important apps – Play Store, Google Search, and Chrome (AG 4)

The Fundamental Issues

- AG identifies two key legal issues of principle the CJEU must address:
  - Does proof of the abuse require (1) a but-for **counterfactual analysis** of the state of competition without the contested behavior and (2) analysis of the capacity of the behavior to produce an exclusionary effect on undertakings **as efficient** as the dominant undertaking? (AG 6)

Preliminary Observations

- Google's business model was initially developed in a personal computer (PC) environment where the web browser was the core entry point to the internet (GC 59, AG 11)
- Google achieved search dominance in the PC environment by 2005 – vast majority of revenues from search advertising
- In the mid-2000s, Google realized the world was moving towards the mobile internet (GC 59)
- And that this would involve a fundamental change in users' behavior, where apps would provide the key avenues to search
- And offer new advertising opportunities to search engine providers, including by virtue of geolocation (GC 59 AG 11)
- So mobile presented both an *opportunity* and a *threat* to Google

Preliminary Observations

- An **opportunity** because mobile (1) would lead to more searches by users and (2) presented new ways to monetize data in search (*e.g.*, via geolocation)
- And a **threat** because the shift to mobile created opportunities for others in search
  - Bing, for example, could challenge Google's position
- So Google decided to undertake a strategy to leverage its existing desktop search dominance into mobile (GC 60, AG 11)

Preliminary Observations

- In 2005, Google acquired the company that had originally developed Android (pars 3, 61)
  - Note absence of merger control
- Google made Android OS available free of charge to OEMs under an open-source licence, the AOSP licence (par 61)
- Android OS became part of an 'ecosystem' incorporating all Google Mobile Services (GMS), including Google's Play Store, the Google Search app and the Chrome browser (par 61)
- Google imposed contractual restrictions on OEMs related to this ecosystem that were challenged by the EC and found unlawful by the GC

Preliminary Observations

- Parallel to its Android conduct, in 2007 Google entered into an agreement with Apple whereby Google Search became the *default* general search service on all of Apple's smart mobile devices (par 62)
  - Google Search accounted, in 2010, for more than half the internet traffic on the iPhone and almost a third of *all* mobile internet traffic (par 62)
  - Google was found in August 2024 to have violated Section 2 of the U.S. Sherman Act for entering contracts with Apple and others to make Google Search the default on their systems (Judge Mehta: "After having carefully considered and weighed the witness testimony and evidence, the court reaches the following conclusion: Google is a monopolist, and it has acted as one to maintain its monopoly.")

So What Happened?

- Google maintained its search dominance in the mobile era and indeed expanded it
  - Over 90% market share in virtually all national search markets in the EU, and nearly 100% in the mobile sphere

EC's Basic Contention

- Google imposed contractual restrictions on OEMs to ensure traffic on Google Android devices – and hence advertising opportunities and data -- would be directed to the Google search engine (GC 65)
- In EC's view, those practices – *at a critical moment* -- deprived Google's search competitors – such as Qwant, Bing and Seznam – of the possibility of taking advantage of the opportunities presented by the growth of mobile internet (GC 65)
- Search competitors could not compete with Google on their own merits and EU consumers were deprived of the advantages of effective competition, such as:
  - the possibility of using a search engine prioritising the protection of privacy, adapted to particular linguistic features or focusing on value-added content (GC 65)

Restrictions at Issue

- Provisions in Google's **Mobile Application Distribution Agreements (MADAs)** requiring manufacturers of mobile devices (OEMs) *inter alia* to **pre-install** its general search app (Google Search) and (Chrome) browser app in order to obtain a licence to use its app store (Play Store) (GC 68)

- **Revenue Share Agreements (RSAs)**, under which Google granted OEMs a percentage of its advertising revenue, ***but only*** if they agreed not to pre-install a competing general search service on any device within an agreed portfolio of devices (GC 68) (not addressed in FairSearch complaint)

- Restrictions contained in the **Anti-Fragmentation Agreements (AFAs)**, under which the licenses necessary to install Google Search and Play Store could be obtained by OEMs only if they undertook not to sell devices running versions of (supposedly open source) Android *not approved by Google* (GC 68)

Objectives of Google's Restrictions

- The EC and the General Court found the restrictions at issue formed part of an overall strategy by Google to **cement its dominant position** on the general search market at a *critical moment* in the development of the mobile internet (GC 67, 1092-93)
- Objective was to **maximise consumers' use of Google's search engine**, not only to *preserve and expand its search advertising revenue*, but also to ensure it would *acquire the data* from mobile searches necessary to maintain its technological edge (CG 68)

Common Objectives of Google's Restrictions

- Purpose of **MADAs**: ensure that ***every*** Google Android device had the Google Search app and Chrome browser, the two main entry points for general search, pre-installed (GC 68)
  - pre-installation of those apps enabled Google to take advantage of '*status quo bias*'

Common Objectives of Google's Restrictions

- Purpose of the portfolio-based **RSAs** was to enable Google to obtain ***exclusive*** pre-installation of Google Search for the portfolios of devices they covered(GC 68)
- Restrictions were **complementary and interdependent** – **cumulative effect** (GC67)
  - E.g., the guaranteed presence achieved by the MADAs on every Google Android device, although non-exclusive, was strengthened by the exclusivity conferred by the RSAs on those devices covered by the RSA portfolios (GC 72)

Common Objectives of Google's Restrictions

- Purpose of **AFAs**: to prevent emergence of Android forks that could serve as vehicle for competing search providers (GC 68)
  - Amazon did not succeed in using ASOP Android to develop its own mobile ecosystem

Theory for MADA Infringement

- Applying the *Microsoft* tying criteria, EC found and GC agreed (GC 284 *et seq*) :
  - Play Store is a **separate product** from Google Search and Play Store and Google Search app are **separate products** from Chrome Browser
  - Play Store is **dominant** in the market for **Android appstores and Google Search app is dominant** in the market for **general search**
  - Google does **not** give customers (OEMs) a **choice** to obtain the Play Store without Google Search and Chrome Browser *or* the Play Store or Google Search app without Chrome Browser
  - This tying is **capable of foreclosing competition**
  - And is **not objectively justified**

MADA Infringement

- Google did not contest before the General Court the EC's conclusions that the first three criteria (separate products, dominance in tying markets, compulsion) were met, but contested the latter two findings before both the GC and CJEU
- GC rejected Google's arguments, as does the AG in her opinion

GC's Conclusions on RSAs

- Contrary to Google's claims, the financial advantage conferred on OEMs if they did not pre-install competing general search services **constituted exclusivity payments** (par 657)
  - This is because the RSAs gave an incentive to OEMs to contract solely with Google, thereby excluding Google's competitors from an important segment of *mobile devices*
- But mobile devices account for only a portion of the overall market *for general search*. So the Court found that the EC had failed to prove that the RSAs had foreclosed the requisite "significant" part of that market (GC 693)

Court's Conclusions

- The Court, however, does not seem to exclude that Google's RSAs *could have* been exclusionary. Even a small segment of the market could be significant in certain circumstances, *e.g.*, if it comprises particularly important customers, especially at a critical time. But the EC had not formulated its case that way. (GC 696-698)
- Note that approximately 80% of smart mobile devices used in Europe and worldwide run Android
- And that ___

Anti-Fragmentation Agreements

- Android is supposedly open source
- Undisputed that OEMs had to enter an AFA to be able to have PlayStore and Google Search on their devices (par 830)
- AFAs forbid OEMs who market *any* devices containing Google apps (including must-have Google Play and Google Search) from selling *even a single* device that did not comply with Google's compatibility rules
- Google thereby effectively prevented OEMs from selling any devices based on non-compatible Android forks – devices that did not meet Google's technical rules (GC 830)
- Court concluded that Google sought to **prevent emergence of non-compatible Android forks** (GC 830-834; 837-839; 841), that Google achieved its objective, and that it had anti-competitive effects

Conclusion by GC

- GC largely confirmed EC's decision
- In exercising its general jurisdiction, reduced fine slightly (to EUR 4.125 billion)

Google's Appeal to CJEU

- Google raised five grounds to challenge finding of infringement and a sixth ground regarding the way in which the GC exercised its unlimited jurisdiction to change the fine
- AG's opinion rejects all of Google's grounds of appeal and focuses especially on two points that raise fundamental issues of Article 102 jurisprudence
  - Requirement of counterfactual analysis
  - As-efficient competitor principle

Is a Counterfactual Analysis Required?

- Google claims the GC should have undertaken a counterfactual analysis to assess whether an open license model like that of Android, the pro-competitive component of which it had acknowledged, would have been possible without the contested restrictions contained in the MADAs (AG 85)
- Google argued throughout the administrative proceedings and before the GC that the MADA pre-installation conditions were the non-monetary consideration it received from OEMs in exchange for providing the Android OS, the Play Store, the GMS suite and other related services free of charge (AG 86)
- Google claims this non-monetary exchange enabled more distribution opportunities for rivals and more competition than any realistic alternative licensing arrangement (AG 86)

Is a Counterfactual Analysis Required?

- Google claims the EC/GC erroneously assessed the question whether the MADA preinstallation conditions had anti-competitive effects, because it did not analyse how competition would have unfolded without the contested restrictions (AG 88)
- The GC should have examined whether an open and free-of-charge licensing system for Android would have been realistic without the non-monetary exchanged embodied in the MADA conditions (AG 88)

AG Says No Counterfactual Analysis Required

- AG concludes the GC had no obligation to undertaken a counterfactual analysis of how competition would have unfolded without the conditions at issue (AG 92)
- The EC must of course establish a causal link between the contested abusive conduct and its anti-competitive effects (AG 93)
- BUT in doing so the EC may “rely on a range of evidence” and “is not required systematically to use any single tool, especially a counterfactual analysis, to prove the existence of such a causal link” (AG 93)
- This is “particularly true when such an analysis is not required in the circumstances of the actual case to establish the (especially potential) effects of the behaviour at issue.” (AG 93)

AG Says No Counterfactual Analysis Required

- The EC need prove only that the behaviour at issue is *capable* of producing exclusionary effects. It is not, however, required that its actual effects be proved. (AG 94)
- It was sufficient to establish the requisite causal effect for the GC to establish that users' decision to use Google Search and Chrome rather than competing apps had been influenced in a discriminatory way by the '*status quo bias*' achieved by the MADA conditions (which competitors could not offset) (AG 94-96)

AG Says No Counterfactual Analysis Required

- Furthermore, the EC cannot be required to reflect on how the dominant undertaking "might have behaved if it had not adopted the contested abusive conduct." (AG 97)
- "[I]n a case such as the present one, the functioning of the relevant markets is characterised by variables such as innovation, access to data, multi-sidedness, user behaviour and network effects. [And] this functioning and, in particular, the behaviour of users have already been substantially influenced by Google's strategies." (AG 97)
- "Thus, it does not appear to be possible to establish realistic or plausible prognostics of options that Google could have chosen instead of the MADAs, or how those options would have influenced the relevant markets." (AG 97)

AG Says No Counterfactual Analysis Required

- Why has this issue been so hard-fought and why does it matter to the future of Article 102, especially in cases such as this one?

As-Efficient Competitor Principle

- Did EC have to show not only MADAs' capacity to foreclose competition, but also their particular capacity to foreclose competitors *as efficient as Google*?
- "It is common ground that Article 102 TFEU does not aim to protect less-efficient competitors. Does that mean, *a contrario*, that in a case such as the present one the establishment of the abuse of a dominant position always requires an examination as to whether the practice at issue is capable of producing exclusionary effects on as-efficient competitors? And, if so, how should such an assessment be carried out?" (AG 104)

As-Efficient Competitor Principle

- EC claims that "[i]n instances of tying . . ., which fall outside the scope of competition on the merits, there is no need to assess whether they are capable of producing exclusionary effects on as-efficient competitors, but only whether they are capable of restricting competition." (AG 103)
- AG begins by reviewing case law on tying, concluding that instances of tying "fall outside the scope of competition on the merits" and "are in principle to be classified as abusive." (AG 106, citing *Tetra Pak* and *Hilti*)
- "However, in its (definitive) judgment in *Microsoft,"* the GC went beyond this principle and agreed with the Commission "that it was right, in light of the particular circumstances of that case, not to restrict itself to establishing that the behaviour at issue was an instance of tying, but to examine further whether it had been capable of restricting competition." (AG 107)

As-Efficient Competitor Principle

- "Google acknowledged that the pre-installation of an app in itself confers an advantage over competing apps because the app is available on the device when it is first used and does not need to be installed before use. This increases the likelihood of users trying the apps that are pre-installed."
- GC concluded this established a "*status quo bias*" in favour of usage of Google's tied apps and that "the Commission correctly considered that Google's usage shares [of tied apps, including Search] corroborated the '*status quo bias*' linked to preinstallation." (AG 123)

As-Efficient Competitor Principle

- AG concluded the GC correctly rejected Google's contention that the superior quality of its apps explained their high usage (rather than the *status quo bias* achieved by the tying), in light of an appropriate analysis of the evidence, including the absence of proof of the impact of the superior quality claimed by Google (AG 123)
- In view of the appropriateness of its analysis of the effects of the tying and in particular its rejection of Google's alternative factual explanations for the high usage shares, the AG concluded "the *Commission was not obliged additionally to examine not only whether the contested pre-installation conditions were capable of restricting competition, but also whether they were capable of producing exclusionary effects, especially* ***on competitors as efficient as Google***" (AG 125)

As-Efficient Competitor Principle

- "The case-law has already acknowledged that the analysis of a practice in view of its effects in relation to as-efficient competitors is only one of a number of methods for assessing whether a practice is capable of producing exclusionary effects. Consequently, the competition authorities cannot be under a legal obligation to use that method in each case." (AG 130)
- "Even more, it is apparent from the case-law that there may be cases in which *it just does not make sense to base the analysis as to whether a practice is anticompetitive on the question of whether a hypothetical competitor could replicate that conduct*. This is *especially* the case when such an analysis is not appropriate because the *market structure makes the entry or ongoing presence of an as-efficient competitor or the replication of the conduct at issue by that competitor practically impossible*." (AG 130)

As-Efficient Competitor Principle

- "In other words, if there cannot be a hypothetical competitor that would be as efficient as the dominant undertaking or if a competitor would not be able to compete from the outset, however efficient it might be, then it does indeed make no sense to analyse the harmfulness of the conduct of the dominant undertaking by reference to the efficiency of its (hypothetical) competitors." (AG 132)
- "Such a situation may exist, for example, in the case of a market where the dominant undertaking holds a very high market share, has substantial structural advantages, or where there are high barriers to entry." (AG 132)

As-Efficient Competitor Principle

- Especially true in digital markets, “where variables such as innovation, access to data, multi-sidedness, user behaviour or network effects play an important role.” (AG 133)
- “Those markets are characterised by high barriers to entry and complex interactions that influence and determine each other.” (AG 133)

As-Efficient Competitor Principle

- Google held a dominant position in several markets of the Android ecosystem and could thus benefit from network effects that enabled it to ensure that users used Google Search (AG 134)
  - As a result it obtained access to data that enabled it to improve its service
- AG concluded that "[n]o hypothetical as-efficient competitor could have found itself in such a situation" (AG 134)
- So "not realistic to compare the situation of Google with that of a hypothetical as-efficient competitor" (AG 134)
- To require, in those circumstances, a comparison of Google with a hypothetical as-efficient competitor **would be to undermine the prohibition of the abuse of a dominant position under Article 102** TFEU.

As-Efficient Competitor Principle

- AG also notes that “especially on markets with high barriers to entry, where competition is already weakened because of the presence of the dominant undertaking, [competitors that are not (yet) as efficient] can play an important role in serving the object of maintaining competition” (AG 136)

AG's bottom line on as-efficient point

- ["I]t has been established to the requisite legal standard that the *users' choice was distorted because of the pre-installation conditions*, which Google obtained *by using a means that did not fall within the scope of competition on the merits*. This is *sufficient*, on the one hand, *to establish* that the *conditions* at issue *were capable of producing abusive exclusionary effects*, *and*, on the other hand, to *make it impossible to find out whether the users' choice was (also) due to the alleged higher quality of Google's apps*." (AG 144)
- "Google's *claim* that the *General Court erred in not requesting proof that the MADAs' exclusionary effects were not due to the higher quality of Google and that they were capable of foreclosing as-efficient competitors* **must thus be rejected**." (AG 145)