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AG Opinion in Google Android

Christian Bergqvist (University of Copenhagen) · Wednesday, June 25th, 2025

Advocate General Kokott has delivered her Opinion in the *Google Android* appeal, recommending that Google's appeal be dismissed in its entirety and that the General Court's 2022 judgment be upheld. In that judgment, the Court confirmed all relevant aspects of DG COMP's 2018 decision, including the finding that Google had abused the Android mobile Operating System to safeguard its dominant position in online advertising – its primary source of revenue. However, the Court accepted only two of the three abusive restrictions, resulting in a 5% reduction in the initial fine.

Before examining Advocate General Kokott's Opinion in detail, it is necessary to first outline DG COMP's Decision in *Google Android* (Case AT.40099 – *Google Android*), with particular attention to the rationale DG COMP identified as underpinning Google's abusive conduct. In this case, DG COMP found that, since January 2011, Google had engaged in abusive practices concerning the Android Operating System for smartphones. These practices comprised three elements:

1. Access to the Play Store – used for downloading applications to Android smartphones – was contractually tied, through the Mobile Application Distribution Agreement (MADA), to the pre-installation of (**i**) the Google Search app and (**ii**) the Google Chrome browser. This arrangement conferred a competitive advantage on both applications at the expense of rival offerings. This constituted the first abuse of tying, comprising two distinct infringements, and was upheld by the General Court.
2. The licensing of both the Play Store and Google Search was made conditional upon the conclusion of an Anti-Fragmentation Agreement (AFA), which restricted (**i**) modifications to, (**ii**) fragmentation of, and (**iii**) the distribution of software derived from the Android operating system. This constituted the second abuse of tying, which was likewise upheld by the General Court.
3. Under a Revenue Sharing Agreement (RSA), Google made payments to smartphone manufacturers and mobile network operators to incentivize them not to pre-install competing search applications. This practice constituted exclusive abuse; however, the General Court did not uphold it as a separate infringement, but did accept it as contributing to the overall abuse.

Although the restrictions in question were formally distinct, they were closely interconnected. First, all originated from Google's strategic use of the Android Operating System (OS) and were implemented with the overarching aim of safeguarding its dominance in general search services and protecting the substantial revenue generated from search advertising (Case AT.40099 – *Google Android*, recital 1341). Second, participation in the Revenue Sharing Agreement (RSA) was

contingent upon entering into the Mobile Application Distribution Agreement (MADA), which governed the pre-installation of applications. In turn, the MADA was itself conditional upon acceptance of the Anti-Fragmentation Agreement (AFA) (Case AT.40099 – *Google Android*, recitals 155–191).

These interlinked practices were treated as a Single and Continuous Infringement – a legal concept that allows multiple, seemingly discrete abuses to be treated as one ongoing infringement. Furthermore, the General Court found that Google had pursued these policies irrespective of a full appreciation of their potentially anti-competitive effects (Case T-604/18 – *Google (Android)*, paras 841 and 1043–1051). On this basis, the Court upheld the imposition of a record fine, reducing the amount only to €4.12 billion to reflect its finding that the RSA, considered in isolation, did not constitute a distinct abuse.

To properly assess the legal and economic principles established by this case, it is first necessary to examine Google's broader business model and the specific practices that were condemned in DG COMP's Decision.

1. Google Business Case and Google Android

Google's core business centers on the operation of a two-sided search platform, which enables users to access internet search services free of charge, while offering advertisers the opportunity to display their advertisements alongside search results or on web pages linked to those results. On the user-facing side, Google provides general search results in response to queries, delivered via its search engine and associated web browser. Although users do not pay for these services, Google derives significant value from the interaction by collecting user data, which both enhances its search algorithms and is monetized through targeted advertising on the advertiser-facing side of the platform.

As part of this two-sided platform, Google has developed a broad ecosystem of complementary services – including Google Maps, Google Chrome, Gmail, YouTube, and hundreds of other applications – often provided at no cost. This open ecosystem strategy, designed to maximize user reach and engagement, distinguishes Google from companies such as Apple, which follow a vertically integrated business model wherein key technologies and services (e.g., Operating Systems) are typically not licensed to third parties.

Separate from its search platform and associated ecosystem, Google also offers Android, an Operating System (OS) for smartphones and other mobile devices. Android enables end users to operate both hardware and installed applications. Smartphone manufacturers and mobile network operators may choose to use Android as a lower-cost alternative to proprietary operating systems. Although Google did not invent the smartphone, the smartphone OS, or the Android OS itself, it acquired the Android platform in 2005 and began distributing it as free, open-source software from 2007. This decision generated significant interest and substantially increased the OS's early adoption and global rollout.

Despite Android's open-source nature, Google retained substantial influence over its development through a system of authorizations, technical requirements, and compliance monitoring. These mechanisms enabled Google to ensure a consistent level of quality and interoperability across the Android ecosystem, thereby reinforcing its strategic interests and commercial objectives.

1.1 Google conditioning for installing apps

As part of the Android ecosystem, Google offered a suite of applications known as Google Mobile Services (GMS), which could be installed free of charge by device manufacturers and other partners, provided they entered into a Mobile Application Distribution Agreement (MADA). Under the terms of the MADA, the entire GMS package, including Google Search, Google Chrome, and the Play Store, was required to be accepted in full and prominently displayed on the device's home screen.

Access to the MADA, however, was conditional upon the acceptance of an Anti-Fragmentation Agreement (AFA), which prohibited the use of modified versions of the Android Operating System – so-called Android "forks." In addition, Google offered financial incentives under a Revenue Sharing Agreement (RSA) to encourage manufacturers and network operators to pre-install the full suite of Google applications provided through GMS. In principle, this pre-installation was optional, as the Google applications were not technically required for the functioning of Android smartphones (Case AT.40099 – *Google Android*, recitals 282 and 1092–1113).

Nonetheless, from Google's perspective, pre-installation was strategically crucial. With the growing dominance of mobile devices as the primary access point to the internet – surpassing desktop use since 2015 – ensuring that its applications were pre-installed on smartphones became central to maintaining its position in the search and advertising markets (Case T-604/18 – *Google (Android)*, para. 149). DG COMP's case against Google thus implicitly rests on the recognition that this shift in user behavior motivated Google's investment in the Android Operating System and its subsequent efforts to secure widespread adoption through aggressive distribution practices.

2. DG COMP had relied on a narrow market approach

In its Decision (Case AT.40099 – *Google Android*, recitals 73–104), DG COMP identified a distinct market for the **a**) *licensing of smart mobile Operating Systems*. As further elaborated in recitals 218–267 of the same case, this market was considered separate from: (**i**) operating systems for stationary personal computers (PCs); (**ii**) basic (non-smart) mobile Operating Systems; and (**iii**) non-licensable Operating Systems. Accordingly, the relevant market was defined as encompassing all licensable Operating Systems for smartphones and tablets.

Significantly, and much to Google's dissatisfaction, Apple's iOS was excluded from this market definition, as Apple does not license its Operating System to third parties, reserving its use exclusively for its own devices. In practice, Google was the only major provider of licensable mobile operating systems, rendering its dominant position in the market largely inevitable.

Other involved markets was the market for **b**) *Android app stores* (Case AT.40099 – *Google Android*, recitals 268–322), that enable users to download, install, and manage mobile applications on Android devices, and **c**) *general search services*, (Case AT.40099 – *Google Android*, recitals 323–366), which enable users to search for information across the entire internet, regardless of the device (PC or mobile) or access point used.

In terms of geographical scope, all markets, except general search services (considered national

due to language reasons), were accepted as international, excluding only China, as Google has limited operations there (Case AT.40099 – *Google Android,* recitals 400-430).

2.1 Google was unhappy with the narrow market definition.

Unsurprisingly, Google was unhappy with DG COMP's narrow definition of the market for licensable Operating Systems, which excluded Apple's iOS. Google argued that consumers make choices at the downstream level of smartphone retail, and that these choices indirectly shape competition in the upstream market for mobile Operating Systems. On this basis, Google maintained that Apple's iOS represented a clear and effective competitive constraint on Android.

Neither DG COMP nor the General Court accepted this position. Instead, both institutions upheld a market delineation that separated licensable from non-licensable Operating Systems, thereby excluding Apple's iOS and framing the market from the perspective of smartphone manufacturers.

Crucially, this conclusion was not based on a definitive rejection of Google's arguments, but rather on Google's failure to produce compelling evidence to support its claims – particularly the assertion that non-licensable Operating Systems exerted a direct or indirect competitive constraint on Android (see Case T-604/18 – *Google (Android)*, paras 102–254; especially paras 146–147 and 268).

2.2 Google was dominant in the identified market

Given these narrowly defined product markets, Google's market share appeared exceedingly high – ranging between 70% and 90 % – leading to an inevitable finding of dominance across all markets (Case AT.40099 – *Google Android*, recitals 446, 596–598, and 681–685). Nevertheless, the case illustrates a more nuanced and balanced approach to market definition and dominance analysis, particularly within digital markets.

While the General Court ultimately accepted DG COMP's market definitions, it also offered critical reflections on the limitations of a rigid market delineation approach. In particular, the Court acknowledged that digital markets are often highly interrelated, with overlapping functionalities and complex user dynamics. This interconnectivity, the Court noted (Case T-604/18 – *Google (Android)*, paras 109 and 116–120), calls for a multi-level or multi-dimensional analysis that goes beyond traditional indicators such as market shares. Factors such as innovation, control over data, and user behavior must also be considered.

Moreover, although DG COMP rejected the inclusion of Apple's iOS in the relevant product market, it nevertheless considered whether Apple and other vertically integrated providers exerted indirect competitive pressure on Google – a factor integrated into the dominance assessment (Case AT.40099 – *Google Android*, recitals 147 and 268). While this argument was ultimately not upheld, its consideration reflects an evolving methodology – one that allows for the operationalization of a multifaceted dominance analysis, where market power is not treated as a mere function of narrowly defined markets and numerical thresholds, but is instead evaluated in light of broader ecosystem dynamics.

2.3. Google's motive to engage in the abuse

Recognizing that abuse may be defensive in nature – intended to protect an already established dominant position – is crucial for understanding the *Google Android* case and other abuse cases involving Big Tech. Unlike more traditional competition cases – including *Google Shopping* – where dominance in one market is leveraged to enter or monopolize another, the conduct in *Google Android* largely involved leveraging power within markets already dominated by Google. Specifically, Google was found to have used its dominance in the markets for **a**) licensable smart mobile Operating Systems and **b**) Android app stores to protect and reinforce its position in the market for **c**) general search services. In this instance, dominance was not used to expand into a new market but to foreclose potential threats to an existing stronghold.

Because Google already held a dominant position in the general search market, it had comparatively little to gain – but a great deal to lose – if the market evolved in a way that diverted users to rival services. This provided a strong incentive to ensure that Google Search remained the default choice across platforms. As outlined earlier, Google appears to have recognized early on the strategic importance of default status and the risks posed to its search business by shifts in user behavior and technological developments.

Additionally, the potential proliferation of Android "forks" – modified versions of the Android Operating System – posed a direct threat to Google's control over the Android ecosystem and, by extension, the search market. Thus, efforts to restrict or regulate the development and distribution of Android forks also served a defensive purpose, aimed at safeguarding Google's broader commercial interests.

3. An abuse with three linked elements but one objective

Once Google was established as dominant, Article 102 became applicable to assess potentially exclusionary conduct. Case law has progressively emphasized the importance of evaluating whether the conduct in question risks excluding an As-Efficient Competitor (AEC). In *Google Android*, the General Court confirmed the relevance of the AEC standard, reaffirming that it is for DG COMP to demonstrate a plausible risk of foreclosure (Case T-604/18 – *Google (Android)*, paras 639–643). The Court also acknowledged DG COMP's margin of appreciation in this context, including its discretion to take into account post-decision events and market developments to support its assessment (paras 89–90) if relevant.

Of the involved actions, only the tying abuses were accepted by the General Court. The exclusivity abuse – linked to Google's Revenue Sharing Agreements (RSA) – was rejected, primarily due to what the Court identified as a misapprehension of the scope and impact of the payments, and consequently, their potential anti-competitive effects (Case T-604/18 – *Google (Android)*, paras 657 and 693–698).

In its assessment of the RSA, the General Court found that DG COMP had committed several methodological errors, particularly in its evaluation of (**i**) the size of the contestable market share, (**ii**) the costs faced by an As-Efficient Competitor (AEC), and (**iii**) the feasibility of such a competitor matching Google's payments (paras 798 and 962–1005). Furthermore, the Court held

that DG COMP had infringed Google's right to be heard, particularly in its handling of the AEC test's structure and application.

As a result of these procedural and substantive deficiencies, the General Court concluded that the RSA-related payments did not constitute separate abuse under Article 102. Rather, they were found to reinforce the anti-competitive effects of the Mobile Application Distribution Agreement (MADA), without constituting an infringement in their own right (paras 451, 800–802, 1005, and 1018). Accordingly, the Court held that a partial reduction of the fine was justified – from €4.34 billion to €4.12 billion (paras 1032–1114).

4. Google's appeal to the Court of Justice and the AG Opinion

Before the Court of Justice, Google did not contest its dominant position (AG Opinion, para 18), whereas DG COMP accepted the annulment of the finding of abuse concerning the Revenue Sharing Agreements (RSAs) (AG Opinion, para 43). The case was therefore limited to three main issues: (**1**) the alleged abusive tying practices, (**2**) the application of the doctrine of Single and Continuous Infringement (AG Opinion, para 44), and (**3**) the calculation of the fine. In this, Google rested its appeal on six grounds.

4.1. The MADAs had been misinterpreted

In its first and second grounds of appeal, Google challenged the General Court's assessment (AG Opinion, para 45) of: **a**) the causal link between the Mobile Application Distribution Agreements (MADAs) and their alleged exclusionary effects, and **b**) the capacity of the MADAs to produce anti-competitive effects on an As-Efficient Competitor.

4.1.1 No Causal Link Between the MADAs and Exclusionary Effects

To support its first ground of appeal – that there was no causal link – Google raised three main arguments (AG Opinion, para 48). It claimed that the General Court erred in law by: **(i**) considering the RSAs as contextual elements, regardless of having been rebutted as abusive **(ii**) failing to distinguish between the effects of default settings and those of pre-installation, and (**iii**) not accounting for the state of competition that would have existed in the absence of the MADA pre-installation conditions.

Regarding the first point, AG Kokott rejected the argument (AG Opinion, paras 61–69), offering three main observations. First, factual elements may be included in the assessment even if they are not themselves abusive. Second, when an infringement is characterized as a Single and Continuous Infringement, it may comprise elements that are not independently abusive. Third, while a counterfactual analysis may sometimes be useful, it was not meaningful in this case. Google had made access to the RSAs contingent on the signing of the MADA, which in turn was necessary for access to the Play Store. Moreover, the market was characterized by dynamic network effects, making it practically impossible to analyze how each contextual element, taken in isolation, specifically contributed to the exclusionary effects.

Regarding the alleged failure to distinguish between pre-installation and default settings, Google referred to how only the former had been recognized as abusive. Consequently, the General Court should not have permitted evidence concerning default settings to influence its assessment of pre-installation practices. AG Kokott considered this argument largely inadmissible, as it effectively called for a reassessment of the facts (AG Opinion, paras 78–84). Insofar as the argument was admissible, it could be refuted on the same grounds previously used to dismiss the first claim concerning an alleged failure to properly assess the effects. Moreover, in practice stakeholders tended to conflate the two concepts.

Concerning Google's argument about the lack of a counterfactual analysis, AG Kokott again found no merits (AG Opinion, paras 92–97). She emphasized that the assumption that a case can only succeed if based on a counterfactual analysis was incorrect. DG COMP enjoys a margin of discretion, and the pre-installation conditions in the MADAs provided Google with a competitive advantage that rivals could not offset. Furthermore, while counterfactual analysis may be informative, it is only useful when both meaningful and feasible.

4.1.2 Absence of Exclusionary Effect

In support of its second ground of appeal, that the MADAs could not produce anti-competitive effects, Google pointed to the ability of end-users to download alternative applications, thus allegedly neutralizing any advantage conferred by pre-installation.

AG Kokott (AG Opinion, paras 106–108) acknowledged that EU case law adopts an effects-based approach to tying practices. She then find that the General Court had correctly applied this standard, (AG Opinion, paras 125–145 and 146-157), including its assessment of whether competing applications were pre-installed by manufacturers prior to the sale of mobile devices or whether their subsequent installation by end-users was realistically feasible. This reasoning applies generally, and specifically in relation to the tying of the Play Store with Google Search and Google Chrome. Consequently, AG Kokott recommended rejecting Google's argument.

In this process, AG Kokott (AG Opinion, paras 128-140), addressed the relevance of the As-Efficient Competitor (AEC) test, noting how companies remained at liberty to submit such, and how it holds value for price-based and non-price-based abuse. Given the characteristics of the digital sector and Google's exceptionally high market shares, the AEC test was not appropriate or necessary in this context.

4.2. The AFA had not been properly evaluated

In its third and fourth grounds of appeal (AG Opinion, para 159-160), Google challenged the General Court's findings on three fronts, by arguing that the Court had **a**) rewritten DG COMP's conclusions regarding the Anti-Fragmentation Agreements (AFAs); **b**) attributed the alleged exclusionary effects of the AFA to conduct that had not been found abusive, and **c**) not adequately consider the AFAs as being objectively justified.

In DG COMP's Decision, DG COMP had expressed concerns about how the AFAs were implemented, while at the same time acknowledging that they pursued a legitimate aim. The

General Court clarified (AG Opinion, para 165) that the AFAs were deemed abusive only to the extent that they restricted manufacturers from selling devices running non-compatible Android forks – even in cases where no Google applications were pre-installed. However, Google argued that this interpretation diverged from DG COMP's original findings, effectively accusing the General Court of having rewritten DG COMP's Decision. This submission was ultimately unpersuasive; AG Kokott firmly rejected the argument (AG Opinion, paras 170–180), finding no indication that the Court had distorted or substituted DG COMP's reasoning.

As to the second aspect of the third ground of appeal, Google contended that the AFAs did not hinder the development or use of incompatible Android forks, since manufacturers were generally unwilling to market such devices. Google maintained that a proper counterfactual analysis would have revealed this, thereby undermining the General Court's conclusions. Once again, AG Kokott disagreed (AG Opinion, paras 186–188), emphasizing that this line of argument relied on the erroneous assumption that counterfactual analysis is a prerequisite for establishing abuse. Furthermore, she emphasized Google's strategic interest in restricting the proliferation of Android forks, as such forks could compromise Google's control over the broader Android ecosystem – an interest acknowledged in the original assessment.

Regarding Google's assertion that the AFAs were objectively justified, the fourth ground of appeal, Google argued that the General Court failed to evaluate this defense adequately. AG Kokott (AG Opinion, paras 191–200) recommended dismissing this claim, primarily on grounds of inadmissibility, as it amounted to a request for a reassessment of the facts. Moreover, the claim was predicated on the same flawed insistence on counterfactual analysis previously rejected by the AG. It also overlooked the fact that the General Court had, in fact, addressed the issue of justification in its judgment.

4.3. The Single and Continuous Infringement and the fine

In its fifth ground of appeal, Google argued that the General Court erred (AG Opinion, para 202) in accepting the inclusion of the Revenue Sharing Agreement (RSA) payments within the framework of a Single and Continuous Infringement, on the grounds that these agreements did not, in themselves, constitute abusive conduct. However, in the view of AG Kokott (AG Opinion, paras 209–215), this argument was ultimately immaterial. The remaining instances of abuse had been upheld, and the RSA pursued the same overarching anti-competitive objectives as the other forms of misconduct. Accordingly, there was no issue with the General Court's decision to incorporate the RSA within the broader finding of a Single and Continuous Infringement.

In its final and sixth ground of appeal, Google challenged the calculation of the fine (AG Opinion, para 217). However, AG Kokott (AG Opinion, paras 225–241) found no merit in this argument and recommended its dismissal.

5. Google Android in reflection

The General Court's ruling in *Google Android* was well-reasoned and should be broadly welcomed by the antitrust community. The ruling reaffirms the applicability of Article 102 in addressing abusive leveraging by dominant digital platforms, whether such conduct targets adjacent markets,

as in *Google Shopping,* or serves to ring-fence an existing ecosystem, as in *Google Android*. Importantly, the judgment underscores that intervention under Article 102 is appropriate only when the evidentiary record plausibly supports a finding of abuse, thereby mitigating the risk of over-enforcement. The guiding standard remains the holistic assessment of "all relevant circumstances," and in particular, whether foreclosure is plausible – an approach set out in *Intel* and reaffirmed in *Google Android.*

In this context, it is significant that AG Kokott not only recommended that the judgment be upheld in its entirety but also delivered a well-reasoned and meticulously drafted Opinion. Her Opinion contains several bold, yet factually inaccurate, assertions. For instance, when opening by claiming how Google search engine is omnipresent in the daily lives of the majority of the world's population (AG Opinion, para. 2). This assertion overlooks significant geopolitical realities: Google has limited operations in China and is entirely blocked in Russia – two countries that together account for approximately one-fifth of the global population.

Additionally, AG Kokott references older cases such as *Tetra Pak* and *Hilti* (AG Opinion, para. 106) as foundational precedents for identifying tying as abusive conduct suggesting this as the base line. This reliance appears misaligned with recent case law, her own observations, and DG COMP Article 102 enforcement framework, as articulated in its guidance papers.

Despite these problematic statements, AG Kokott's analysis is otherwise rigorous. She systematically examined and rebutted Google's arguments, even those directed at reevaluating factual matters, which are in principle inadmissible at this stage of judicial review. In evaluating potentially abusive conduct, DG COMP retains a degree of discretion, provided its analysis is coherent, methodologically sound, and based on reliable and transparent data. AG Kokott affirms this principle and underscores the relevance, where feasible, of analytical tools such as the As-Efficient Competitor (AEC) test and counterfactual analysis. She even confirmed the availability of the AEC test for price-based and non-price-based abuse.

The next step will be the actual judgment, which will close another chapter in the Google saga.

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