

Android Anti-Fragmentation Agreements and Abusive Tying: Is There Room for Objective Justification?

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When last 14 September 2022 the General Court largely confirmed ([Case T-604/18](#)) the Google Android decision ([Case AT.40.099](#)) of the European Commission, the sensationalism it provoked ('highest fine ever imposed on a single undertaking for a breach of competition law', 'most significant legal defeat in Google's history', *etc.*) might veil some of its transcendental consequences and precedential value.

This brief commentary will point out two elements about the Anti-Fragmentation Agreements ('AFAs'): their purported abusive nature under Article. 102 TFEU, and the rejection of the objective justification defence alleged by Google.

The AFAs made the licensing of the Play Store and Google Search conditional on original equipment manufacturers ('OEMs') and mobile network operators ('MNOs') abiding by minimum compatibility (anti-fragmentation) standards set by Google for the implementation of Android open-source code. This practice prevented manufacturers who intended to pre-install Google apps from selling smart mobile devices running on alternative versions of Android which were not approved by Google (the so-called 'non-compatible Android forks').

Tying and its Anticompetitive Effects

Unlike other platforms, such as Apple (and Microsoft), which operate under a closed and vertically integrated business model, Google has developed their Operating System (OS) for mobile phones and other devices as an open digital ecosystem, where developers can freely acquire Android as open source and modify it. This has undoubtedly contributed to the success of the product; as the judgment notes, '*developers have, since 2010, largely been switching from iOS to Android*', ([Case T-604/18](#), para. 217). Today, Android is being used by millions of users worldwide.

Unsurprisingly, as the Commission acknowledged in its decision, '*Google has an important influence on the key steps of the development of Android*' ([Case AT.40.099](#), para. 125). This was achieved through a system of authorisation, recommendation, and a certain amount of monitoring to ensure quality and technical interoperability within the Android ecosystem.

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When can such ‘influence’ cease to be a legitimate reason based on the need to protect the dominant company’s business model and turn into an abusive practice? This question becomes especially important where such a business model is particularly exposed to fragmentation due to the fact that it is open. This poses the question of whether it would be a more pro-competitive alternative to simply close it off. The Court’s line of reasoning seems to encourage building a ‘walled garden’ around one’s ecosystem instead of making it open access, thus impeding competitors access to useful inputs.

In EU case law, the standard for assessing exclusionary conduct under Art. 102 TFEU is established in *Intel* (Case [C-413/14P](#), paras. 133-136) and *Post Danmark I* (Case [C-209/10](#), para. 22). In particular, for assessing the Mobile Application Distribution Agreements (‘MADAs’) related to the abuse, the Court relies (para. 284) on the well-known test established in *Microsoft* (Case [T-201/04](#), para. 869) that comprises the five conditions applicable in order to find tying abusive.

When assessing the AFAs, the Court applies the same test and establishes that ([Case T-604/18](#), para. 815: (i) the anti-fragmentation obligations are unrelated to the Play Store licence and Google Search licence; (ii) Google is dominant in the Android app stores market and in the markets for general search services; (iii) the Play Store and Google Search cannot be obtained other than by accepting the anti-fragmentation obligations. So, the issue at stake relates to the other two conditions; whether the anti-fragmentation obligations are capable of restricting competition and if any objective justification applies.

According to the Commission’s findings ([Case AT.40.099](#), paras. 157-171), when Google adopted the AFAs in 2011 and restricted the sale of devices based on Android forks, it did so out of fear that they would become the starting point for the development of an alternative OS to Android. This, in turn, would ultimately lead to an erosion of Google’s market power when any Internet search was performed. In essence, the AFAs sought (paras. 1097-1105) to raise barriers to entry or expansion for alternative applications that would forego revenue from its Internet advertising activity. The General Court confirms this reasoning, citing the example of the alleged failure of Amazon’s Fire OS due to the AFAs: ‘*the Commission has nevertheless established that the AFAs deprived Fire OS of the markets which the OEMs that had entered into an AFA with Google could have constituted for it*’ ([Case T-604/18](#), para. 850).

Thus, the alleged theory of harm is clear: Google’s AFAs reduced the prospect for devices running on Android forks to be developed and sold and therefore foreclosed a relevant market for competitors to introduce alternative apps and services. It is worth noting here that the Commission’s decision, explicitly citing *Microsoft* ([Case T-201/04](#), para. 867), considered this foreclosure condition of the ‘*tying test*’ satisfied merely when the conduct of the dominant company is ‘capable of restricting competition’.

The General Court endorses this approach and goes far beyond, asserting that ‘*having sufficiently demonstrated the existence of the restrictions at issue and of their effects on competition, the Commission was not also required to carry out a counterfactual analysis to evaluate the hypothetical consequences that might have been observed, in the absence of the second abuse*’ ([Case T-604/18](#), para. 893).

It is difficult to understand what exactly justifies departing from the established case law regarding the sort of effects which need to be proven for establishing an infringement of Article 102 TFEU, and how can it be properly achieved without a counterfactual analysis ([Case T-235/18](#), *Qualcomm*). It is also hard to explain



the reluctance of the General Court in moving away from tying per se rule in regard to this specific practice, unlike what it did for RSA exclusivity payments, following *Intel* ([Case C-413/14P](#)). The counterfactual would be indeed an optimal tool to assess the potential foreclosure effects of the AFAs.

The Useless ‘Objective Justification’ Defence in the Digital Ecosystems

Naturally, Google tried to argue all sorts of objective justifications in its defence, mainly centred on the fact that the AFAs were necessary to protect the basic functionalities of its OS, such as interoperability in the Android ecosystem. The AFAs would also help to protect Android’s brand and product reputation and image and assure its users of a standard of quality and technical service. They would eliminate windfall effects. Finally, Google also argued that, since the OS was free for developers, these agreements allowed to recover the economic investment made in the product and were necessary to prevent developers of non-compatible Android forks from benefiting from unmerited externalities.

There is even a hesitant acceptance by the Court of the need to protect the Android ecosystem: ‘*Admittedly, it cannot be ruled out that Android’s situation could have been likened, at the time of its launch, to that of pre-existing ‘open-source’ OSs, such as Unix, Symbian and Linux*’ ([Case T-604/18](#), para. 880).

Arguably, in line with the long-established principle of proportionality under EU case law, the Commission had already pointed out in its 2018 decision ([Case AT.40.099](#), paras. 170-171), that there were less restrictive instruments to achieve the same end (such as, for example, the *Android Compatibility Commitments* adopted in 2017).

In the end, none of these arguments are accepted. On the contrary, the Court upheld the restriction of competition, and denied the existence of any objective justification, given Google’s conduct was not justified by pro-competitive advantages or served legitimate interests (paras. 876-891). Thus, the ruling endorsed the Commission’s assessment and confirmed the AFAs’ abusiveness (paras. 892-894).

This rejection of Google’s defence, although a victory for the Commission, may also pose a threat to one of the key goals that competition law also tries to achieve: fostering innovation and encouraging entrepreneurship within the EU. This is particularly relevant in the modern context of digital markets which are fast-paced, ever changing and pose low barriers to entry for potential competitors who wish to penetrate a market with an innovative product or service. There is absolutely no room for any sort of objective justification in the Court’s reasoning when endorsing the Commission’s assessment of the AFAs. Yet, it is legitimate for a company which offers a product for free, under open-source conditions, to at least establish some boundaries for manufacturers and developers. This may be another lost opportunity to finally endorse the efficiency defence under Article 102 TFEU.

In addition, since the early dictum of *Hoffmann-La Roche* ([Case 85/76](#)), the abuse of dominance has been characterised as an objective conduct, leaving intentionality for the end of the authority’s analysis, when calculating the fine. However, both the Commission and the Court seem to place it at the start of their line of reasoning. The ‘*overall aim of shielding its dominance in the internet searches*’ justified gathering the four separate abuses in a single and continuous infringement.



In these new digital ecosystems, for which there is an absolute lack – on the side of regulators and agencies – of expertise and precedential decisions, a more cautious approach is required. By way of the somehow ‘*blunt wording*’ of some of the statements of the General Court, it seems that not a single thread of good faith is placed on the policies implemented by Google.

On the contrary, a Machiavellian purport is attributed to the defendant, which is tantamount to depriving it of the presumption of innocence, or at least the benefit of the doubt. However, according to the Court ‘*there is no doubt that Google, as the Commission rightly pointed out, implemented the practices at issue intentionally, that is to say, in full knowledge of the effects which those practices were going to have on the relevant markets*’ ([Case T-604/18](#), para. 1043).

All in all, even if Android’s AFAs are anticompetitive, given the departure from traditional tying case law, the absence of a counterfactual analysis and that the Commission is to some extent questioning a firm’s core business, further consideration for the arguments put forward for the defence (as in the annulment of the RSAs) would be appreciated. Despite the recently [published](#) and allegedly ‘business-model agnostic’ Digital Markets Act, this approach is doing just the opposite and challenging how enterprises choose to run their businesses.

