Google 15 Years On-Key Learnings, Antitrust Challenges and the Road Ahead

Google Android

Alfonso Lamadrid

Google Android

Appeal before the CJEU

€ 4.340 million fine (almost 10% of all antitrust fines ever imposed by the Commission under Regulation 1/2003)

Three agreements to compete with vertically integrated rivals and maximize distribution of free and interoperable Android devices

EC and GC accept that Google's development of Android expanded opportunities for rivals (GC, 590=

Market definition

- Relevant markets
  - Non-licenseable mobile OSs (excludes Apple's iOS)
  - App stores for non-licenseable mobile OSs (excludes Apple's AppStore)
  - *Worldwide* market for non-OS specific mobile browsers (excludes Safari and Edge) (Btw, GC missed this, see GC, 465)
  - National markets for general search services
- SSNDQ in zero-price markets (analysis vs conjecture)

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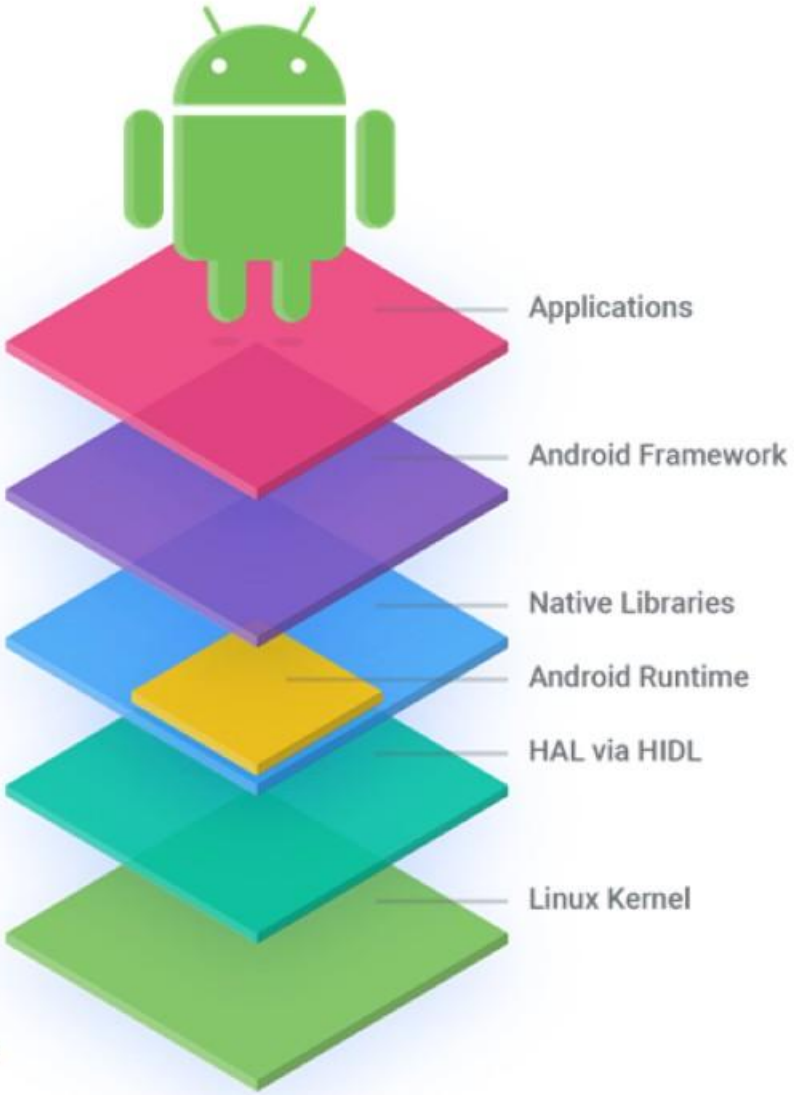
Pending appeal before the CJEU



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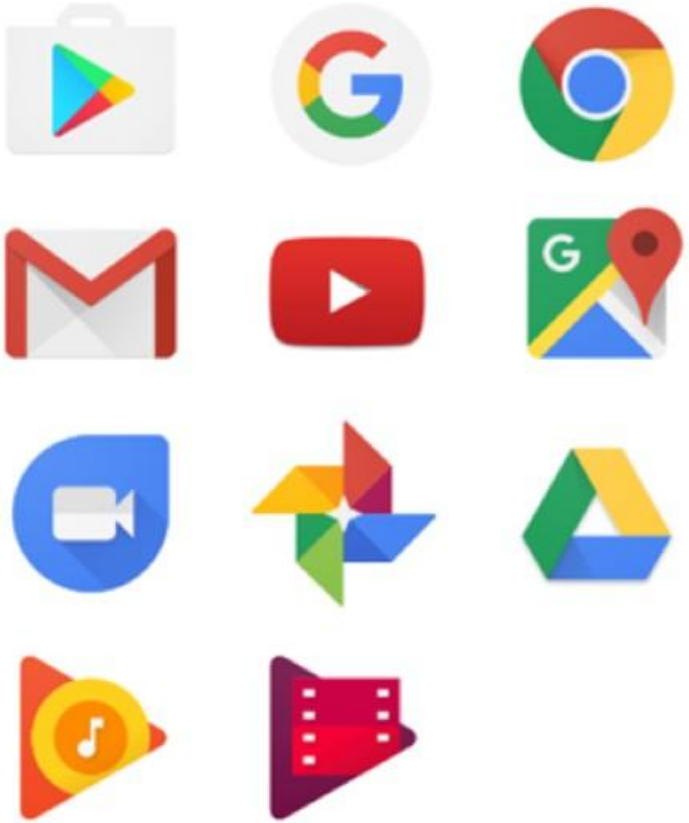

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The broader legal questions (1)

- **Legal threshold to establish effects: competitive advantage vs foreclosure**
  - Capability to foreclose as the appropriate standard (GC, 281)
  - Is coverage a relevant factor for a foreclosure analysis in tying cases (e.g. coverage of the Search tie was between 10-29%; Decision, 796) - GC found 10-20% coverage was insufficient re RSAs (GC, 692-693
  - Is foreclosure plausible where the conduct did not prevent rivals' access to any device/user throught every available distribution channel (downloading, parallel preinstallation, default-setting, access via the browser)?
  - Need to look at all cumulative opportunities available to rivals, or only at each of them in isolation?

The broader legal questions (2)

- **Causality/ Attributability**

(i) If there were no technical/economic obstacles for users to use rivals, did the EC need to inquire about *why* they did not do so in greater numbers?

- EC, GC and AG Kokott say no, what matters is what users actually do (does this mean that tying/preinstallation is only lawful in relation to products that consumers do not want?)
- Comparison with Google's similar shares in other platforms (e.g. Decision 957 shows Chrome's share was higher on PCs than on relevant market)
- EC and GC argue there is no evidence that users consider Google to be superior to rivals (e.g. Play Store ratings suggest EU users consider Russian search engine Yandex to be a better search service; Decision, 851)

(ii) The Decision does not challenge default setting (compare with US case and arguments re "power of defaults"!), but invoques evidence relating to default setting. GC says ok because one "*cannot rule out the possibility that a similar effect may arise in the case of preinstallation*" (GC, para. 334).

Counterfactual/Burden of proof (3)

- **Does the EC need to address Google's arguments that there was no realistic counterfactual in which there would have been greater competition in the relevant markets absent the impugned practices?**
  - Google argued in administrative proceedings that any realistic alternative to MADA preinstallation conditions/barter would have resulted in less opportunities for rivals (pointing to iOS, Windows Mobile)
  - Decision (paras. 875, 991 says no need to examine "procompetitive effects" as these belong to the objective justification stage), but argument is not about countervailing efficiencies but about the absence of a restriction in the first place (see CJEU Budapest Bank, 71-83)
  - EC does not need to systematically conduct a counterfactual analysis in Article 102 TFEU cases (CJEU Shopping), but does it need to engage with arguments put forward by company to deny capability to restrict competition?

The broader legal questions (4)

- **Do we need to distinguish the effects attributable to context vs effects attributable to impugned conduct?**
  - Decision and GC rely on cumulative effects of impugned conduct and presumptively lawful conduct (default setting, portfolio RSAs, per-device RSAs)
  - No one disputes that the EC can/must take into account all the relevant context: Google's contention is that context is a baseline to assess alleged incremental effects of impugned conduct

The broader legal questions (5)

- **Does the As-Efficient Competitor *principle* apply in tying cases?**

  - Decision and GC applied AEC principle/test in relation to RSAs, but GC says the same standard does not apply to tying

  - When assessing RSA, GC ruled that preinstallation was not capabpe of excluding as-efficient rivals (GC, 777-788; not appealed by EC).
  - Is it posible to condemn as abusive conduct that has been found as incapable of foreclosing as-efficient competitors?