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EUROPEISKA UNIONENS DOMSTOL
CVRIA
LUXEMBOURG

JUDGMENT OF THE COURT (Second Chamber)

2 July 2026 *

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* Language of the case: English.

EN

(Appeal – Competition – Abuse of dominant position – Market for online general search services – Market for the licensing of smart mobile operating systems – Market for online app stores for the Android mobile operating system – Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement – Contractual restrictions – Tying – Exclusionary effects – Relevance of context – Counterfactual scenario – As-efficient competitor – Payments subject to exclusive pre-installation – Obstruction of the development and distribution of Android forks – Single and continuous infringement – Fine – Unlimited jurisdiction)

In Case C-738/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 30 November 2022,

Google LLC, established in Mountain View (United States),

Alphabet Inc., established in Mountain View,

represented initially by G. Forwood, J. Killick and N. Levy, avocats, D. Gregory, Barrister-at-Law, and P. Stuart, Barrister-at-Law, A. Komninos, dikigoros, A. Lamadrid de Pablo, abogado, H. Mostyn, Barrister, M. Pickford KC and J. Schindler, Rechtsanwalt, and subsequently by G. Forwood, J. Killick and N. Levy, avocats, D. Gregory, Barrister-at-Law, and P. Stuart, Barrister-at-Law, A. Komninos, dikigoros, A. Lamadrid de Pablo, abogado, H. Mostyn, Barrister, and M. Pickford KC,

appellants,

the other parties to the proceedings being:

European Commission, represented initially by F. Castillo de la Torre, A. Dawes, N. Khan and C. Urraca Caviedes, acting as Agents, and subsequently by F. Castillo de la Torre, A. Dawes and C. Urraca Caviedes, acting as Agents,

defendant at first instance,

Application Developers Alliance, established in Washington (United States), represented by R. Baena Zapatero, abogado, A. Parr and S. Vaz, Solicitors,

Computer & Communications Industry Association, established in Washington, represented by B. Byrne, Solicitor, M. Levitt, avocat, and P. Lugard, advocaat,

Gigaset Communications GmbH, established in Bocholt (Germany), represented by J.-F. Bellis, avocat,

HMD global Oy, established in Helsinki (Finland),

Opera Norway AS, formerly Opera Software AS, established in Oslo (Norway),

represented by M. Glader and M. Johansson, advokater,

BDZV – Bundesverband Digitalpublisher und Zeitungsverleger eV, formerly Bundesverband Deutscher Zeitungsverleger eV, established in Berlin (Germany), represented by T. Höppner and P. Westerhoff, Rechtsanwälte,

Bureau européen des unions de consommateurs (BEUC), established in Brussels (Belgium), represented by A. Fratini, avvocata,

FairSearch AISBL, established in Brussels, represented by K. Missenden and D. Paemen, avocats, and T. Vinje, advocaat,

Qwant, established in Paris (France),

Seznam.cz, a.s., established in Prague (Czech Republic), represented by J. Dobrý and M. Felgr, advokáti,

Verband Deutscher Zeitschriftenverleger eV, established in Berlin (Germany), represented by T. Höppner and P. Westerhoff, Rechtsanwälte,

interveners at first instance,

THE COURT (Second Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, F. Schalin, M. Gavalec and Z. Csehi, Judges,

Advocate General: J. Kokott,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 28 January 2025,

after hearing the Opinion of the Advocate General at the sitting on 19 June 2025,

gives the following

Judgment

1 By their appeal, Google LLC and Alphabet Inc. ask the Court of Justice to set aside the judgment of the General Court of the European Union of 14 September

2022, *Google and Alphabet* v *Commission (Google Android)* (T-604/18, 'the judgment under appeal', EU:T:2022:541), by which the General Court:

– annulled Articles 1, 3 and 4 of Commission Decision C(2018) 4761 final of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android) ('the decision at issue') in so far as they concern the fourth element of the single and continuous infringement, consisting in having made the conclusion of revenue share agreements ('RSAs') with certain original equipment manufacturers ('OEMs') and mobile network operators ('MNOs') conditional on the exclusive pre-installation of the Google Search application on a predefined portfolio of devices;

– set the amount of the fine imposed on Google in Article 2 of the decision at issue for the single and continuous infringement which it committed, as follows from the preceding indent, at EUR 4 125 000 000, for which Alphabet was to be jointly and severally liable in the amount of EUR 1 520 605 895;

– dismissed their action as to the remainder.

I. Legal context

2 Article 102 TFEU provides:

'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,

(b) limiting production, markets or technical development to the prejudice of consumers,

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

3 Article 23(2)(a) and (3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) provides:

‘2. The [European] Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [101] or Article [102 TFEU]; ...

...

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.’

4 Article 31 of that regulation provides:

‘The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.’

II. Background to the dispute and the decision at issue

5 The background to the dispute and the content of the decision at issue may be summarised as follows for the purposes of the present appeal.

A. Factual context

6 Google is an undertaking in the information and communications technology sector specialising in internet-related products and services and operating within the European Economic Area (EEA).

7 In 2005, in order to take account of the emergence and development of the mobile internet and of the likely change in user behaviour to which that would lead as regards general searches performed online, Google acquired the undertaking that had originally developed the Android operating system (‘OS’) for smart mobile devices. According to the Commission, in July 2018 approximately 80% of smart mobile devices used in Europe and worldwide were running Android.

8 When Google develops a new version of Android, it publishes the source code online. This allows third parties to download and modify that code to create Android ‘forks’ (a fork being a new OS created from the source code of existing software). The Android source code released under an open-source licence (Android Open Source Project licence) covers the basic features of an OS, but not the Android applications (‘apps’) and services owned by Google. OEMs who wish to obtain Google apps and services must therefore enter into agreements with Google. Google also enters into such agreements with MNOs who wish to be able to install Google’s proprietary apps and services on devices sold to end users.

B. The procedure before the Commission and the decision at issue

9 On 25 March 2013, FairSearch AISBL, an association of undertakings active in the information and communications technology sector, lodged a complaint with the Commission regarding some of Google's business practices in the mobile internet. Following that complaint, the Commission sent requests for information to Google, its customers, its competitors and other entities operating in that sector. Other entities also complained to the Commission about Google's conduct in the mobile internet.

10 On 15 April 2015, the Commission initiated a procedure against Google in relation to Android, which led to the adoption of the decision at issue on 18 July 2018. By that decision, the Commission imposed a fine on Google and, in part, on Alphabet for having infringed competition rules by imposing anticompetitive contractual restrictions on OEMs and MNOs in order to protect and consolidate Google's dominant position on the national markets, within the EEA, for general search services.

11 In that decision, the Commission criticises Google for having included certain conditions in its agreements for the use of Android and of certain proprietary mobile apps and services.

12 Four sets of contractual restrictions are thus identified in the decision at issue:

– two sets of restrictions contained in the Mobile Application Distribution Agreements ('MADAs') under which Google required OEMs to pre-install its general search app (Google Search) and browser app (Chrome) in order for them to be able to obtain a licence to use its app store (Play Store);

– restrictions contained in the Anti-Fragmentation Agreements ('AFAs') under which OEMs that wished to pre-install Google apps could not sell devices running versions of Android that were not approved by Google;

– restrictions contained in the RSAs under which Google granted OEMs and MNOs a percentage of its advertising revenue, provided that those manufacturers or operators had agreed not to pre-install a competing general search service on any device within an agreed portfolio ('portfolio-based RSAs').

13 The Commission found that the various contractual restrictions (together, 'the restrictions at issue') amounted to four separate infringements of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area of 2 May 1992 and that they also constituted a single and continuous infringement of those provisions, on account of their interdependence and their common objective.

1. Tying of the Google Search app

14 Since at least 1 January 2011, Google has tied the Google Search app with the Play Store. The Commission concludes that this conduct constitutes an abuse of Google's dominant position on the worldwide market (excluding China) for online app stores for the Android OS ('Android app stores').

15 In the first place, the Commission finds, first, that the Play Store and the Google Search app are two distinct products. Second, Google holds a dominant position on the market for the tying product (Play Store), that is to say, the worldwide market (excluding China) for Android app stores. Third, the tying product cannot be obtained without the tied product, namely the Google Search app.

16 In the second place, the Commission concludes in the decision at issue that the tying of the Google Search app with the Play Store is capable of restricting competition. This tying gives Google a significant competitive advantage that competing providers of general search services cannot offset. It also helps to maintain and strengthen Google's dominant position on each national market for general search services, increases barriers to entry, deters innovation and tends to harm, directly or indirectly, consumers.

17 In the third place, the Commission finds, in the decision at issue, that Google has not demonstrated the existence of any objective justification for the tying of the Google Search app with the Play Store.

2. Tying of the Chrome browser

18 Since 1 August 2012, Google has tied the Chrome browser with the Play Store and the Google Search app. The Commission concludes that this conduct constitutes an abuse of Google's dominant position on the worldwide market (excluding China) for Android app stores and in the national markets for general search services.

19 In the first place, the Commission finds, first, that the Chrome browser is a product that is distinct from the Play Store and the Google Search app. Second, Google holds a dominant position on the markets for the tying products (Play Store and the Google Search app), that is to say, the worldwide market, excluding China, for Android app stores and the national markets for general search services. Third, the tying products cannot be obtained without the tied product, the Chrome browser.

20 In the second place, the Commission finds that the tying of the Chrome browser with the Play Store and the Google Search app is capable of restricting competition. This tying gives Google a significant advantage which competing non-OS-specific web browsers designed for mobile use ('mobile web browsers') cannot offset. It also deters innovation, tends to harm, directly or indirectly,

consumers of mobile web browsers and helps to maintain and strengthen Google's dominant position on each national market for general search services.

21 In the third place, the Commission concludes that Google has not demonstrated the existence of any objective justification for the tying of the Chrome browser with the Play Store and the Google Search app.

3. Licensing of the Play Store and the Google Search app conditional on the anti-fragmentation obligations in the AFAs

22 Since at least 1 January 2011, Google has made the licensing of the Play Store and the Google Search app conditional on hardware manufacturers agreeing to the anti-fragmentation obligations contained in the AFAs.

23 The Commission concludes that this conduct constitutes an abuse of Google's dominant position on the worldwide market (excluding China) for Android app stores and in the national markets for general search services.

24 In the first place, it finds that acceptance of the anti-fragmentation obligations is unrelated to the licensing of the Play Store and the Google Search app. However, those licences cannot be obtained without acceptance of the anti-fragmentation obligations.

25 In the second place, the Commission states in the decision at issue that the anti-fragmentation obligations are capable of restricting competition. First, Android forks constitute a credible competitive threat to Google. Second, Google actively monitors compliance with, and enforces, the anti-fragmentation obligations. Third, the anti-fragmentation obligations hinder the development of Android forks. Fourth, Android-compatible forks do not constitute a credible competitive threat to Google. Fifth, the capability of the anti-fragmentation obligations to restrict competition is reinforced by the unavailability of Google's proprietary application programming interfaces ('proprietary APIs') to fork developers. Sixth, Google's conduct helps to maintain and strengthen its dominant position on each national market for general search services, deters innovation and tends to harm, directly or indirectly, consumers.

26 In the third place, Google has not demonstrated the existence of any objective justification for making the licensing of the Play Store and the Google Search app conditional on the anti-fragmentation obligations.

4. Payment of a percentage of revenue conditional on there being no pre-installation of competing general search services on a given range of products

27 In the period from 1 January 2011 to 31 March 2014, Google granted payments to OEMs and MNOs on condition that they did not pre-install any competing general search service on any device whatsoever within an agreed range of products. In

the decision at issue, the Commission describes that conduct as an abuse of Google's dominant position on the national markets for general search services.

28 In the first place, according to the Commission, Google's revenue share payments in respect of a range of products constituted exclusivity payments.

29 In the second place, the Commission finds that Google's revenue share payments in respect of a range of products were capable of restricting competition. First, those payments reduced the interest of OEMs and MNOs in pre-installing competing general search services. Second, those payments made access to the national markets for general search services more difficult. Third, the payments deterred innovation.

30 In the third place, the decision at issue concludes that Google has not demonstrated the existence of any objective justification for the revenue share payments in respect of an agreed range of products.

31 According to the Commission, the objective of the restrictions at issue was to protect and strengthen Google's dominant position in relation to general search services and thus its revenues via search advertisements. The common objective and the interdependence of the restrictions at issue led the Commission to classify them as a single and continuous infringement of Article 102 TFEU and Article 54 of the EEA Agreement.

5. Duration of the restrictions at issue and the fine

32 So far as the duration of the restrictions at issue is concerned, those linked to the MADAs lasted, with regard to the tying of the Google Search app with the Play Store, from 1 January 2011 to the date of adoption of the decision at issue, and, with regard to the tying of the Chrome browser with the Google Search app and the Play Store, from 1 August 2012 to the date of adoption of the decision at issue. The restrictions linked to the AFAs lasted from 1 January 2011 to the date of adoption of the decision at issue. Lastly, the restrictions linked to the RSAs lasted from 1 January 2011 to 31 March 2014, the date on which the last portfolio-based RSA ended.

33 In order to penalise those practices, which it considered to be abusive, the Commission imposed on Google a fine of EUR 4 342 865 000, of which EUR 1 921 666 000 jointly and severally with Alphabet. In determining that amount, the Commission took into consideration the value of relevant sales within the EEA, in relation to the single and continuous infringement, achieved by Google during the last year of participation in the infringement (2017), and applied a gravity coefficient of 11%. The Commission then multiplied the amount obtained by the number of years of participation in the infringement (approximately 7.52) and added an additional amount equivalent to 11% of the value of sales in 2017 in order to deter similar undertakings from engaging in the same practices. The Commission also considered that it was not appropriate to

find that there were mitigating or aggravating circumstances, or to take particular account of Google's significant financial capacity in order to decrease or increase the amount of the fine.

34 The Commission also required Google and Alphabet to bring those practices to an end within 90 days of notification of the decision at issue.

III. The procedure before the General Court and the judgment under appeal

35 By application lodged at the Registry of the General Court on 9 October 2018, Google and Alphabet brought an action for, principally, the annulment of the decision at issue and, in the alternative, cancellation or reduction of the fine imposed on them by that decision.

36 By order of the President of the Third Chamber of the General Court of 23 September 2019, *Google and Alphabet* v *Commission* (T-604/18, EU:T:2019:743), leave to intervene in support of the form of order sought by Google and Alphabet was granted to Application Developers Alliance ('ADA'), Computer & Communications Industry Association ('CCIA'), Gigaset Communications GmbH ('Gigaset'), HMD global Oy ('HMD') and Opera Norway AS, formerly Opera Software AS ('Opera'), while leave to intervene in support of the form of order sought by the Commission was granted to Bureau européen des unions de consommateurs (BEUC), Verband Deutscher Zeitschriftenverleger eV, BDZV – Bundesverband Digitalpublisher und Zeitungsverleger eV, Seznam.cz, a.s. ('Seznam'), FairSearch and Qwant. Certain elements of the decision at issue and of the Commission's defence were treated as confidential.

37 Google and Alphabet relied on six pleas in law in support of their action, alleging (i) that the assessment of market definition and dominance was incorrect; (ii) that the finding that the pre-installation conditions laid down by the MADAs ('the MADA pre-installation conditions') were abusive was incorrect; (iii) that the finding that the sole pre-installation condition included in the portfolio-based RSAs was abusive was incorrect; (iv) that the finding that it was abusive for Google to make Play Store and Google Search app licences conditional on compliance with the anti-fragmentation obligations was incorrect; (v) infringement of the rights of the defence; and (vi) that the various factors taken into account to calculate the fine were incorrectly assessed.

A. First plea in law, alleging that the assessment of market definition and dominance was incorrect

38 By the first plea in law of the action, Google and Alphabet complained that the Commission made a number of errors of assessment in the definition of the

relevant markets and in the subsequent assessment of the existence of Google's dominant position on those markets.

39 In the decision at issue, the Commission identified four types of relevant market: (i) the worldwide market (excluding China) for the licensing of OSs, in the sense of the licensing of operating systems for smart mobile devices; (ii) the worldwide market (excluding China) for Android app stores; (iii) the various national markets, within the EEA, for the provision of general search services; and (iv) the worldwide market for non-OS-specific mobile web browsers.

40 In that regard, the General Court stated, in paragraphs 125 and 126 of the judgment under appeal, that, for the purposes of the case before it, it had to be held, in the first place, that the Commission had duly established in the decision at issue that Google, being in a position to behave, to an appreciable extent, independently of its competitors, its customers and consumers, held a dominant position on the various national markets for general search services in the EEA. In the second place, it pointed out that while the relevant markets were presented separately in the decision at issue, they could not be artificially separated in so far as they all had complementary aspects that were duly mentioned by the Commission.

41 As is apparent from paragraph 129 of the judgment under appeal, it is against that factual background of distinct but interconnected relevant markets and the implementation of an overall strategy aimed essentially, according to the Commission, at securing Google's dominant position on the national markets for general search services that the General Court considered it appropriate to examine the arguments relating to the first plea. At the end of that examination, the General Court rejected the three parts of that plea as being unfounded, in paragraphs 234, 254 and 267 of that judgment, respectively, and, therefore, rejected the first plea in law in its entirety.

B. Second plea in law, relating to the first and second abuses, alleging that the finding that the MADA pre-installation conditions were abusive was incorrect

42 By the second plea in law of the action, which was divided into two parts, Google and Alphabet submitted that the Commission had erroneously concluded that the MADA pre-installation conditions, under which, on the one hand, the pre-installation of the Google Search app was a prerequisite for obtaining the Play Store and, on the other, the pre-installation of the Chrome browser was a prerequisite for obtaining the Play Store and the Google Search app ('the first abuses'), were abusive.

1. Observations of the General Court on contextual matters

43 The General Court first of all set out, as a preliminary point, in paragraphs 275 to 316 of the judgment under appeal (i) the conditions for finding that the practices at

issue constitute an abuse of a dominant position; (ii) the various factors which the Commission set out in the decision at issue to characterise the exclusionary effects produced by those practices; and (iii) the relationship between those practices.

44 With regard to those conditions, the General Court recalled, in paragraphs 278 to 280 of the judgment under appeal, by reference to paragraphs 134 to 136 of the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), that not every exclusionary effect is necessarily detrimental to competition. The onus is, however, on the dominant undertaking not to allow its behaviour to impair competition on the merits on the internal market. That is why Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, just as with all competition on price, not all competition on other parameters may therefore be regarded as being legitimate.

45 In the present case, the practices at issue in the case of the first abuses are instances of tying. In order to assess the abusive nature of such practices, the General Court recalled, in paragraph 284 of the judgment under appeal, the five criteria referred to in paragraph 869 of its judgment of 17 September 2007, *Microsoft* v *Commission* (T-201/04, EU:T:2007:289), on which the Commission was entitled to rely:

– first, the tying and tied products are two separate products;

– second, the undertaking concerned is dominant in the market for the tying product;

– third, that undertaking does not give customers a choice to obtain the tying product without the tied product;

– fourth, the practice in question ‘forecloses competition’

– fifth, that practice is not objectively justified.

46 With regard to the fourth criterion, the General Court found, in paragraph 295 of the judgment under appeal, that the Commission had correctly found, as it had in the decision which gave rise to the judgment of the General Court of 17 September 2007, *Microsoft* v *Commission* (T-201/04, EU:T:2007:289), that close examination of the actual effects or further analysis, according to the terminology used in the past in that regard, was required before it could be concluded that the tying in question was harmful to competition. According to the General Court, such an examination serves, first, to reduce the risk that penalties may be imposed for conduct which is not actually detrimental to competition on the merits and, second, further to clarify the gravity of the conduct in question, which facilitates determination of the appropriate level of any penalty.

47 However, the General Court noted, in paragraph 297 of the judgment under appeal, that it is not a question of the Commission carrying out a prospective analysis which would be based on effects that will arise in the light of assumptions that cannot yet be verified in practice, as might be the case in other circumstances, and referred in that regard to the judgment of 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, paragraph 145).

48 In paragraph 299 of the judgment under appeal, the General Court concluded its preliminary remarks in relation to the applicable concepts by finding, first of all, that the difference between the 'restriction of competition' and the 'capacity to restrict competition' has no bearing on the establishment of a restriction of competition in cases where, as in this instance, the Commission has characterised such a restriction on the basis of the effects which the implementation of the practices at issue have had over a significant period of time, effects which may be observed and which enable the Commission to determine the nature and scope of the ensuing anticompetitive foreclosure, and the Court to review those findings.

49 The General Court went on to state, in paragraph 300 of that judgment, that the Commission had, in the decision at issue, found that the first abuses consisted of two tying arrangements. These were in the form of the MADA pre-installation conditions, which OEMs and MNOs wishing to be able to market devices with all Google Mobile Services ('the GMS suite') were required to accept. Thus:

– in the first instance of tying, in which the Google Search app was tied with the Play Store, Google had abused its dominant position on the worldwide market (excluding China) for Android app stores from 1 January 2011 to the date of adoption of the decision at issue (recitals 752 and 1009 of the decision at issue);

– in the second instance of tying, in which the Chrome browser was tied with the Google Search app and the Play Store, Google had abused its dominant positions on the worldwide market (excluding China) for Android app stores and in the national markets within the EEA for general search services from 1 August 2012 to the date of adoption of the decision at issue (recitals 753 and 1010 of the decision at issue).

50 The General Court noted, lastly, in paragraph 301 of that judgment, that the arguments put forward by Google and Alphabet in the context of the second plea related mainly to the matters set out in the decision at issue in relation to the fourth and fifth criteria of the judgment of the General Court of 17 September 2007, *Microsoft* v *Commission* (T-201/04, EU:T:2007:289), concerning, respectively, foreclosure of competition and the objective justifications put forward by them in that regard.

2. First part, concerning the 'foreclosure of competition'

51 In support of the first part of the second plea, Google and Alphabet submitted that the Commission had failed to demonstrate in the decision at issue that the MADA pre-installation conditions were likely to foreclose competition.

52 Google and Alphabet put forward five complaints in support of their arguments and criticised the decision at issue in so far as, first, it did not establish that the pre-installation conditions created a 'status quo bias'; second, it ignored the fact that the MADAs left OEMs free to pre-install rival services and to set them as defaults; third, it also ignored the fact that rivals had other effective means of reaching users; fourth, it failed to show that Google's search and browser usage shares were attributable to the contested pre-installation conditions; and, fifth, it failed properly to consider the full economic and legal context in coming to the conclusion that the pre-installation conditions provided rivals with new opportunities, rather than foreclosing them.

53 As regards the first complaint, relating to the 'status quo bias' generated by the pre-installation conditions, the General Court made two preliminary observations.

54 The first of these concerns the lack of practical relevance of the proposed distinction between the concepts of 'pre-installation' and 'default setting', Google and Alphabet having complained that the Commission had failed to make a distinction or apply a weighting as between those concepts in terms of what each of them would cover.

55 After examining the evidence from Google and Alphabet, the General Court found, in paragraph 349 of the judgment under appeal, that, given the contractual context of the documents relied on, namely that of the MADA pre-installation conditions, Google and Alphabet's arguments as to the need to make such a distinction had to be rejected and it had to be accepted that arguments put forward in the context of one of those two concepts could apply equally in the context of the other.

56 Moreover, when examining evidence from third parties, the General Court noted, in paragraph 356 of that judgment, that there was a certain consensus among the OEMs that premium placement or default setting, or a combination of those techniques, facilitates the usage of the apps that benefit from it. In paragraph 383 of that judgment, it concluded from that examination that, taken together, the various elements set out in the decision at issue supported the Commission's finding that, from the point of view of market participants, the pre-installation of the Google Search app and Chrome browser under the conditions laid down by the MADAs made it possible to 'freeze the situation' and to deter users from turning to a competing app.

57 The second preliminary observation concerns the quantitative importance of the pre-installation conditions. In that regard, the General Court noted, in paragraphs 336 and 337 of the judgment under appeal, that the pre-installation of

the Google Search app and Chrome browser, coupled in the case of the former with premium placement and, in the case of the latter, with the setting of the Google Search app as default, had significant consequences in quantitative terms. As a result of the MADA pre-installation conditions, the Google Search app and Chrome browser were pre-installed on a large number of smart mobile devices.

58 In the light of those preliminary observations, the General Court examined the evidence used, and the comparisons made, by the Commission for the purposes of establishing whether there was a status quo bias, the relevance and use of which were criticised by Google and Alphabet. The General Court concluded, in paragraph 418 of the judgment under appeal, that the arguments put forward by Google and Alphabet to refute the advantage conferred by the pre-installation of the Google Search app and Chrome browser on smart mobile devices running the Android OS ('Google Android devices') could not call into question the conclusions drawn by the Commission from that material.

59 As regards the second complaint, Google and Alphabet essentially claimed that the pre-installation conditions did not prevent OEMs from pre-installing competing general search services and browsers on Google Android devices sold in the EEA in the same way as the Google Search app and Chrome browser were pre-installed.

60 In that respect, the General Court noted, as a preliminary point in paragraphs 425 and 426 of the judgment under appeal, that the Commission did not dispute this in the decision at issue. Rather, that decision states, on the one hand, that the MADAs 'prevent' OEMs from pre-installing such apps exclusively instead of the Google Search app and Chrome browser (recital 832 of that decision) and, on the other, that the RSAs require of OEMs and MNOs the exclusive pre-installation of the Google Search app for the part covered by those agreements (recital 833 of that decision), which includes portfolio-based RSAs and device-based RSAs, as the Commission had confirmed in response to the General Court's measures of inquiry. It is apparent, in fact, from recital 197 of the decision at issue that Google gradually replaced portfolio-based revenue share agreements ('portfolio-based RSAs') in the European Union and the Republic of Korea with agreements under which the payment of Google revenue shares was conditional on OEMs and MNOs pre-installing no competing general search service on a given device ('device-based RSAs').

61 In that context, the General Court considered, in paragraph 427 of that judgment, that, in view of the market shares and their evolution from 2011 for the Google Search app and from 2012 for the Chrome browser to the date of adoption of the decision at issue, the debate on the options available for competitors to offset the competitive advantage granted by the MADA pre-installation conditions remained largely theoretical. However, a distinction had to be made in that respect between theoretical competition assumptions and the practical reality, where the competitive alternatives to which Google and Alphabet referred appeared to have little credibility or real impact due to the 'status quo bias' arising from the MADA

pre-installation conditions and the combined effects of those conditions with Google's other contractual arrangements, including RSAs.

62 So far as the Google Search app is concerned, the General Court concluded, in paragraph 436 of that judgment, that, contrary to the assertions of Google and Alphabet, competing general search service providers had not been able to offset the competitive advantage conferred by the pre-installation conditions. By contrast, in the case of browsers, the General Court considered, in paragraph 438 of the judgment under appeal, that their arguments could not be rejected automatically.

63 Nevertheless, the General Court observed, in paragraphs 449 and 450 of that judgment, that, between 2011 and 2016, more than 50% of Google Android devices sold in the EEA were covered by RSAs concluded with Google, whether portfolio-based or device-based, all of which required the Google Search app to be set as the default search engine on pre-installed browsers and prohibited the installation of a competing search service. It follows that when a browser was pre-installed alongside Chrome, which was set by default to the Google Search app, that browser was also set by default to that app.

64 According to the findings of the General Court in paragraph 451 of the judgment under appeal, that observation serves to illustrate the complementarity of Google's various practices and necessarily means that the combined effects of the MADAs and RSAs must be taken into account. The result of the RSA-linked contractual obligation not to install any app other than the Google Search app for general searches is that the theoretical possibility of pre-installing a service competing with Google's apps, although permitted in principle by the MADAs, was in fact excluded, between 2011 and 2016, for at least half of the Google Android devices sold in the EEA. In other words, the RSAs guaranteed exclusivity on the devices concerned, and that had to be taken into account when assessing the anticompetitive effects of the MADAs. The General Court also stated in that regard, in paragraph 452 of that judgment, that the taking into account as a factual element of the combined effects of MADAs and RSAs did not in any way depend on whether or not the RSAs were abusive, irrespective of whether they were portfolio-based RSAs constituting an abuse according to the Commission's analysis, which was challenged by Google and Alphabet in the context of the third plea, or device-based RSAs which are not considered abusive in the decision at issue.

65 Furthermore, in paragraph 464 of that judgment, the General Court noted that the question whether a competing browser could be set as default was irrelevant. Google and Alphabet did not, moreover, dispute the theoretical nature of that question in view of the combined effects of the MADAs and AFAs. According to the General Court, what is important in the present case is to examine the various practical possibilities for competing general search services to reach users, Google ensuring that OEMs comply, in respect of browsers competing with the Chrome

browser, with their obligation under the AFAs to treat the Google Search app in at least the same way as they might treat another general search service.

66 Next, the General Court examined the arguments of Google and Alphabet concerning the aspects of the reasoning relating to OEMs' interest in pre-installing competing apps; to the share of potential revenues that OEMs would derive from one or more general search apps in addition to the Google Search app; to the effect of transaction costs on the likelihood of pre-installation agreements being concluded for a small volume of devices; and to the negative impact of the duplication of too many apps on the user experience or on the storage space on certain devices. Following that examination, it concluded, in paragraph 537 of the judgment under appeal, that while some of those arguments might diminish or qualify the scope of the decision at issue, the Commission was nevertheless in a position to conclude that, even though providers of general search services competing with the Google Search app were free to provide OEMs and MNOs with the same pre-installation as that provided in respect of the Google Search app and Chrome browser on Google Android devices sold in the EEA, that had not happened for much of the infringement period and that, at the very least, part of the explanation for the lack of such pre-installation lay in the combined effects of the MADAs, the RSAs and the AFAs.

67 As regards the third complaint, Google and Alphabet submitted that Google's competitors could offset the tendency for the situation to be frozen as a result of the MADA pre-installation conditions by relying on the behaviour of users, who can download their apps or access their general search service via the browser.

68 As to the possibility of downloading competing apps, the General Court concluded, in paragraph 557 of the judgment under appeal, that even though general search or browser apps can readily be downloaded free of charge, examination of the decision at issue showed that they are not downloaded in practice, or in any event are downloaded for an insufficient proportion of the devices concerned.

69 As regards access to a competing general search service via the browser, the General Court found, in paragraphs 561 and 562 of the judgment under appeal, that the setting of a competing general search service as the default in mobile web browsers on Google Android devices could not be compared in reach and effectiveness to the pre-installation of the Google Search app. In particular, it was necessary, according to the General Court, to take account in that regard of the fact that Google does not allow any search service other than the Google Search app to be set as default on the Chrome browser and that that browser had a usage share of approximately 75% of non-OS-specific mobile web browsers in Europe and 58% worldwide. It was also apparent from the decision at issue that users do not, in practice, access other general search services through browsers and only rarely change the default settings of those browsers. Such observations are relevant, contrary to what is claimed by Google and Alphabet, and serve to

establish that despite the possibility of setting a different search engine, the search engine remains in practice the one that was originally set.

70 As regards the fourth complaint, concerning the failure to show a connection between Google's shares of general search and browsing requests and the pre-installation of the Google Search app and Chrome browser, the General Court stated, in the first place, in paragraph 571 of that judgment, that the Commission's references to the evolution of those usage shares are not in themselves open to criticism. They provide a basis for the Commission to be able to demonstrate that, first, pre-installation confers an advantage on Google's general search and browser apps that are pre-installed and, second, that advantage could not be offset by competitors.

71 In the second place, as regards the factor that is the quality and performance of the Chrome browser and the Google Search app, the General Court held, in paragraph 575 of that judgment, that in a situation such as this, the Commission was not required to determine precisely whether those usage shares could be explained not only by pre-installation but also, or rather, by the superior quality claimed by Google and Alphabet. While pre-installation was not disputed, the impact of quality on the lack of pre-installation or downloading of a competing app was not substantiated by evidence that was sufficient or particularly relevant. In any event, according to paragraphs 577 and 578 of the judgment under appeal, the superiority in terms of quality of Google's products, if established, would not be decisive since it was not claimed that the services offered by rivals were not technically capable of meeting consumer needs; variables other than technical quality may also play a role.

72 In the third place, the General Court noted, in paragraphs 579 and 582 of the judgment under appeal, that the Commission had stated in the decision at issue that such a quality advantage did not seem to be apparent from the ratings given to competing services in the Play Store. However, those ratings could be taken into account in finding that the respective quality of the various competing search and browser services is not a decisive criterion in their use, since they all offer a service capable of meeting demand.

73 The General Court concluded from those points, in paragraph 583 of that judgment, that, in view of the tendency to freeze the situation associated with the MADA pre-installation conditions and in the absence of proof of the precise impact of the superior quality claimed by Google and Alphabet in respect of Google's general search and browser apps, the Commission had correctly considered that Google's usage shares confirmed the 'status quo bias' linked to pre-installation.

74 As regards the fifth complaint, Google and Alphabet submit that the decision at issue fails to assess whether the MADA pre-installation conditions were capable of restricting competition that would have existed in their absence, having regard to their full economic and legal context. The MADA pre-installation conditions

were a part of the free licensing model developed for the Android OS and therefore could not be reviewed in isolation.

75 The General Court nevertheless found, in paragraph 589 of the judgment under appeal, that the line of argument developed by Google and Alphabet in support of that complaint did not reflect the content of the decision at issue. The abusive conduct described in that decision did not relate to the development and maintenance of the Android OS, including the fact that it was open and free of charge, aspects decided on by Google to address what it considers to be lock out from other operating systems by their owners. The General Court stated, moreover, in paragraph 590 of the judgment under appeal, that the Commission had acknowledged before the General Court that the Android OS had increased opportunities for Google's competitors. The line of argument put forward by Google and Alphabet was therefore taken into account by the Commission in its assessment of all the relevant circumstances.

3. Second part, concerning objective justifications

76 By the second part of the second plea, Google and Alphabet submitted that the MADA pre-installation conditions are objectively justified because they enable Google to provide the Android OS free of charge by ensuring that the revenue-generating apps, namely the Google Search app and Chrome browser, are not excluded from pre-installation and associated promotional opportunities. Those legitimate and procompetitive conditions contributed to the diversity and widespread adoption of mobile devices, decreased barriers to entry and created opportunities for competitors.

77 In the first place, the General Court held, in paragraph 614 of the judgment under appeal, that Google and Alphabet had not established that the MADA pre-installation conditions were objectively justified in the sense that, by ensuring that the Google Search app and Chrome browser would be pre-installed on Google Android devices, they had enabled Google to recoup the expenditure incurred in respect of the development and maintenance of the Android OS.

78 In the second place, as to the arguments of Google and Alphabet that, first, the MADA pre-installation conditions had allowed Google to offer the Play Store free of charge, because its value to OEMs and users correlated to the value to Google of the promotion by those OEMs of its general search service and, second, the Commission's suggestion of a licence fee being payable for the Play Store called that model and its positive effects on competition into question, the General Court considered, in paragraph 616 of the judgment under appeal, that Google and Alphabet had again failed to discharge their burden of proof with regard to the demonstration of objective justifications.

79 It concluded, in paragraph 619 of the judgment under appeal, that the second part concerning objective justifications for pre-installation therefore had to be rejected,

along with the second plea in law in its entirety, by which it was alleged that the finding that the MADA pre-installation conditions were abusive was incorrect.

C. Third plea in law, alleging that the finding that the sole pre-installation condition included in the portfolio-based RSAs was abusive was incorrect

80 By the third plea in law of the action, Google and Alphabet submitted that the Commission had erred in concluding that certain provisions included in the portfolio-based RSAs were abusive.

81 In paragraphs 657, 660 and 662 of the judgment under appeal, the General Court ruled that Google and Alphabet were not justified in claiming that the Commission had made an error of assessment when it found that the payments in question were exclusivity payments and that the complaint alleging a failure to state reasons had to be rejected as being unfounded.

82 However, it held, in paragraph 698 of that judgment, that it followed from the analysis of the coverage of portfolio-based RSAs that this had been incorrectly described as 'significant' in recital 1286 of the decision at issue. In paragraph 798 of that judgment, the General Court, moreover, identified four errors of reasoning that were such as to raise doubts as to the correctness of the result of the 'as-efficient competitor test' ('the AEC test') carried out by the Commission and, consequently, of the alleged exclusionary effect of the portfolio-based RSAs on a hypothetical at least as efficient competitor. It inferred from this, in paragraph 799 of that judgment, that the AEC test conducted by the Commission could not support the finding of an abuse resulting from the portfolio-based RSAs.

83 As a result of the Commission's errors of reasoning, the General Court held, in paragraphs 800 to 802 of the judgment under appeal, that the conclusion that the portfolio-based RSAs were abusive could not be considered sufficiently established and that the decision at issue had to be annulled in so far as it considered the portfolio-based RSAs in themselves to have constituted an abuse.

D. Fourth plea in law, alleging that the finding that it was abusive for the Play Store and Google Search app licences to have been made conditional on compliance with the anti-fragmentation obligations was incorrect

84 By the fourth plea in law of the action, which was divided into two parts, Google and Alphabet disputed the notion that their practice of making the grant of licences for the Play Store and the Google Search app conditional, in the context of the MADAs, on acceptance of the anti-fragmentation obligations could be characterised as an abuse of a dominant position on the markets for Android app stores and for general search services.

85 In preliminary observations, the General Court clarified the scope of the second abuse identified in the decision at issue. It thus stated, in paragraphs 805 to 807 of

the judgment under appeal, that Google had required OEMs wishing to be able to market smart mobile devices on which the Play Store and Google Search app were pre-installed to enter into an AFA. Indeed, the signing of a MADA was conditional on the conclusion of an AFA. According to the anti-fragmentation obligations, those devices were required to observe a minimum compatibility standard for implementation of the Android source code, those devices being subjected to a series of compatibility tests.

86 While, admittedly, those anti-fragmentation obligations apply to all mobile devices marketed by every OEM that has entered into an AFA, if those devices run the Android OS or an Android fork, the General Court made clear, in paragraph 810 of the judgment under appeal, that the AFAs were considered abusive in the decision at issue only in so far as they required OEMs to ensure that all the devices which they marketed and whose OS was Android or an Android fork, including those on which Google's apps were not pre-installed, were compatible with the Android Compatibility Definition Document ('the CDD'). In other words, the AFAs were considered to be abusive only in so far as they prohibited the marketing of smart mobile devices that had an OS which was a non-compatible Android fork even if no Google apps were pre-installed on those devices. According to the findings of the General Court in paragraph 811 of the judgment under appeal, the Commission's assessment that making the licensing of the Play Store and the Google Search app conditional on compliance with the anti-fragmentation obligations was capable of restricting competition (recital 1036 of the decision at issue) nevertheless had to be compared to the assessment that, while there might be some justification in the case of smart mobile devices on which the GMS suite was pre-installed, the same could not under any circumstances be said in the case of devices running Android forks on which Google's apps were not installed.

87 In the first part of the fourth plea relied on before the General Court, Google and Alphabet disputed the Commission's findings to the effect that the practice at issue was restrictive of competition. In the second part of that plea, they submitted that Google's conduct was, in any event, objectively justified.

1. First part, concerning the restriction of competition

88 The General Court found, in paragraph 828 of the judgment under appeal, that 'the Commission criticises Google for making the licensing of the Play Store and [the] Google Search [app] conditional on a set of obligations that restrict the freedom of OEMs wishing to obtain those licences, specifically in so far as they prohibit OEMs from marketing any other device running a non-compatible Android fork. That restriction stems from the AFAs and, in so far as it applies to smart mobile devices on which Google's apps are not pre-installed, is the only obligation that is considered in the [decision at issue] to be abusive. The Commission does not dispute Google's right to impose compatibility requirements in respect of devices on which its apps are installed. However, it considers that Google's practice of preventing the development and market presence of devices

running a non-compatible Android fork to be abusive'. The General Court infers from this that it was therefore required to examine whether the Commission had succeeded in establishing, as it found in the decision at issue, that Google had implemented a practice designed to exclude non-compatible Android forks, and whether that practice could be classified as anticompetitive for the purposes of Article 102 TFEU.

89 As regards, first, the material existence of the practice considered by the Commission to constitute the second abuse, the General Court held, in paragraph 834 of the judgment under appeal, that the existence of that practice, admitted by Google and Alphabet, had been established and that it had actually been implemented, from the inception of the Android OS.

90 Second, concerning the anticompetitive nature of the objectives pursued, the General Court found, in the first place, in paragraphs 837 to 841 of the judgment under appeal, that it was apparent from the internal documents mentioned in the decision at issue that the anti-fragmentation obligations had been designed, inter alia, to prevent any development of Android source code not approved by Google, by depriving non-compatible Android fork developers of commercial markets. According to the General Court, it is apparent from Google's own statements, supported by the documents in the file, that the practice characterised as abusive in the decision at issue was knowingly implemented with the aim of limiting market access of non-compatible Android forks.

91 On the basis of that finding, the General Court went on to examine, in the second place, whether Google and Alphabet were justified in maintaining that the Commission had not sufficiently established in the decision at issue that the practice in question was capable of restricting competition. It thus assessed, initially, the potential threat posed by non-compatible forks. In paragraph 847 of the judgment under appeal, the General Court found in that respect that Google and Alphabet had not established that non-compatible Android forks could not in any event have constituted a competitive threat to them. Accordingly, the General Court went on to examine whether the AFAs were likely actually to have made entry into the OS market more difficult for Google's competitors.

92 In that context, it found, in paragraph 849 of that judgment, that it had to be regarded as having been established that, during the period of the infringement, the largest economic operators capable of offering a commercial market to developers of non-compatible Android forks were prevented from doing so by the AFAs.

93 In that regard, it rejected, in paragraph 850 of that judgment, the argument that the Commission had misinterpreted the failure of the non-compatible Android fork which had been developed by Amazon.com, Inc., namely Fire OS, that failure having been due to various factors, including, according to Google and Alphabet, the unavailability of the Play Store. While the General Court acknowledged that the Play Store is a 'must have' deliberately reserved for participants in the

Android ecosystem, it nevertheless found that Google and Alphabet had not adduced any evidence that might invalidate the findings in the decision at issue to the effect that six of the largest OEMs in terms of sales had refused to conclude agreements for the development of devices running Fire OS, expressing concerns to Amazon.com that that would be a clear breach of the AFAs (recital 1094 of the decision at issue). The General Court concluded that, even if there could also be other reasons for the commercial failure of Fire OS, which, moreover, are not independent of Google's commercial policy, the Commission had nevertheless established that the AFAs had deprived Fire OS of the markets which the OEMs that had entered into an AFA with Google could have constituted for it.

94 The General Court also held, in paragraph 855 of the judgment under appeal, that the commercial policy adopted by Google in respect of the availability of its proprietary APIs had to be taken into consideration, as a contextual element, in assessing the effect of the market restrictions put in place in the AFAs. That effect was important in so far as Google and Alphabet did not dispute that the technological gap between Google's proprietary APIs and the basic versions of the source code increased throughout the infringement period. Access to Google's proprietary APIs was thus of strategic interest to developers and OEMs as, without those proprietary APIs, apps would not function correctly and the correction of those malfunctions would entail further and significant costs.

95 On the basis of the examination of the second plea, the General Court held, in paragraph 856 of the judgment under appeal, that OEMs wishing to avail of Google's proprietary APIs were required to enter into MADAs, which presupposed prior acceptance of the terms of the AFAs. The General Court concluded from this that Google's policy in relation to the development and distribution of its proprietary APIs had constituted an incentive to enter into an AFA, which limited the markets for non-compatible Android forks.

96 By contrast, since the Commission found that the second abuse consisted in the application of all the technical standards defined in the CDD to devices on which the GMS suite was not installed, and carried out an overall assessment of the effects of the restriction of competition caused by the practice at issue, the General Court ruled, in paragraph 864 of the judgment under appeal, that the Commission was not required, contrary to the submissions of Google and Alphabet, to identify precisely the CDD standards which gave rise to those effects. The criticisms levelled at Google in the decision at issue did not concern the content of the compatibility obligations defined by Google, but its practice aimed at preventing non-compatible Android forks from finding commercial markets.

97 Following its analysis, the General Court found that Google and Alphabet had not established that non-compatible Android forks could not in any event have constituted a competitive threat to them.

2. Second part, concerning objective justifications

98 In paragraph 866 of the judgment under appeal, the General Court noted that the Commission had concluded, in the decision at issue, that none of the objective justifications put forward by Google and Alphabet could be accepted.

99 As regards, first, the need to protect compatibility within the Android ecosystem and to prevent fragmentation – that is to say, the proliferation of mutually incompatible platforms – the General Court found, first of all, in paragraph 878 of the judgment under appeal, that the Commission had not taken the view in the decision at issue that the introduction of obligations to ensure the compatibility of Android forks on which the Play Store and the Google Search app were installed constituted an infringement of Article 102 TFEU. The Commission had merely concluded that it was abusive to prohibit OEMs marketing devices on which the GMS suite was installed from also offering commercial markets to non-compatible Android forks.

100 It follows, according to the General Court's findings in paragraph 878 of the judgment under appeal, that the justification put forward by Google and Alphabet in relation to the need to ensure compatibility within the Android ecosystem was unrelated to the second abuse and, therefore, irrelevant. Next, the ground relating to the risk that fragmentation would pose to the 'survival' of the Android OS could not alone justify the AFAs depriving non-compatible Android forks of all markets. It was not necessary to settle the dispute between the parties as to the harmfulness or benefits which fragmentation might have represented for Google and for the entire sector; the General Court considered it sufficient to note that Google and Alphabet did not call into question the findings set out in the decision at issue relating to the superior market power of the Android ecosystem.

101 As regards, second, the alleged need by Google and Alphabet to protect their reputation, the General Court found, in paragraph 883 of the judgment under appeal, that they had merely argued that the measures envisaged by the Commission to eliminate any confusion as to the commercial origin of devices running Android-compatible forks (such as, for example, registration of trade marks that would reserve the name 'Android' for them) were insufficient.

102 According to the General Court, Google and Alphabet did not adduce any detailed evidence in support of that claim. It could not, therefore, be established that the defence of their intellectual property rights for the purpose of protecting their reputation by prohibiting, for example, the use of the names 'Google' and 'Android' on devices running non-compatible Android forks, outside the Android ecosystem, would be ineffective. Such measures would certainly have been less restrictive of competition than the foreclosure of non-compatible Android forks resulting from the AFAs which was, therefore, disproportionate to the alleged aim.

103 As regards, third, the need for Google to eliminate the windfall effects of its technology being made available to third parties, the General Court stated, in

essence, in paragraph 886 of the judgment under appeal, that that availability was inherent in the choice made by Google to disclose the Android source code.

104 As regards, fourth, the argument of Google and Alphabet relating to the failure to weigh the procompetitive effects of the AFAs against their anticompetitive effects, the General Court found that there was no relationship of necessity between the exclusion of non-compatible Android forks, on the one hand, and compatibility within the Android ecosystem – which, moreover, is the objective of the anti-fragmentation obligations – on the other. In those circumstances, it considered, in paragraph 891 of the judgment under appeal, that Google and Alphabet were not justified in maintaining that the Commission should have weighed, on the one hand, the procompetitive effects of the anti-fragmentation obligations within the Android ecosystem, which participants in that ecosystem derive from the advantages of compatibility, and, on the other, the restrictions of competition that arise outside that ecosystem, those restrictions being the only ones identified as constituting the second abuse.

105 The General Court considered, in concluding its examination of the fourth plea, that the anticompetitive nature of the foreclosure of non-compatible Android forks by means of the AFAs had to be regarded as being established. Contrary to what was claimed by Google and Alphabet, the General Court found, in paragraph 893 of the judgment under appeal, that the Commission had duly taken into account the relevant economic and legal context and the actual effects of the second abuse. Therefore, having sufficiently demonstrated the existence of the restrictions at issue and of their effects on competition, the Commission was not also required – contrary to the views taken by Google and Alphabet and the parties intervening in their support – to carry out a counterfactual analysis to evaluate the hypothetical consequences that might have been observed, in the absence of the second abuse, on the markets for Android app stores; for general search services, on which that abuse had been identified; and for licensable OSs, in which Google also held a dominant position.

E. Fifth plea in law

106 By the fifth plea in law of the action, which is divided into two parts, Google and Alphabet submitted that the Commission had infringed their rights of defence by failing to respect, first, their right to be heard and, second, their right of access to the file. They argued that those procedural irregularities invalidated the findings in the decision at issue and justified its annulment.

107 By the second part of the fifth plea, which the General Court examined first, Google and Alphabet complained, in essence, that the Commission had provided them with notes of meetings with third parties that had not enabled them to understand the substance of the discussions held and the nature of the information provided in relation to the matters discussed during those meetings or, therefore, properly to assert their rights of defence in that regard.

108 While the General Court concluded, in paragraph 932 of the judgment under appeal, that a good number of the notes provided by the Commission had been too late and too cursory to be capable of constituting the record of an interview, within the meaning of Regulation No 1/2003, it nevertheless stated, in paragraph 939 of the judgment under appeal, that Google and Alphabet had failed to establish that, had the procedural errors noted not been made, they would have been better able to ensure their defence.

109 By the first part of the fifth plea, Google and Alphabet submitted that, instead of sending them letters of facts, the Commission should have adopted one or more supplementary statements of objections and thus again afforded them the right to a hearing.

110 However, the General Court found, in paragraphs 966 to 969 of the judgment under appeal, that, in this case, Google and Alphabet had stated in their response to the statement of objections that they declined their right to a hearing. Accordingly, the General Court ruled, in paragraph 971 of the judgment under appeal, that, irrespective of the difficulties referred to by Google and Alphabet in deciding whether it would be useful for a hearing to be held, they could not criticise the Commission for having failed to organise a hearing following the statement of objections.

111 By contrast, the General Court observed, in paragraph 976 of that judgment, that the Commission had subsequently sent two letters of facts to Google and to Alphabet, one on 31 August 2017 and the other on 11 April 2018. While Google and Alphabet had the opportunity to make written submissions, the Commission found that the sending of those letters excluded any right to the organisation of a new hearing, which justified the hearing officer's refusal of the request to that effect that was made by Google and Alphabet on 7 May 2018.

112 In that regard, the General Court found, in paragraphs 981 and 982 of the judgment under appeal, that although those letters did not formally add any objection to those set out in the statement of objections, they substantially supplemented the substance and scope of the objection relating to the abusive nature of the portfolio-based RSAs, which were not sufficiently substantiated in the statement of objections, with the result that those letters significantly altered the evidence of the contested infringements. This concerned in particular the AEC test, which, in the present case, had played an important role in the Commission's assessment of whether the portfolio-based RSAs were capable of having foreclosure effects on as-efficient competitors.

113 The General Court inferred from this, in paragraphs 995 and 996 of the judgment under appeal, that, by communicating only at the stage of the second letter of facts the data which it intended to use to conduct the AEC test, the Commission had to be regarded as having substantially altered the content of the objection relating to the portfolio-based RSAs. Thus, in that particular context, the Commission, which

was not under any time pressure, should have adopted a supplementary statement of objections.

114 By sending two letters of facts, instead of a supplementary statement of objections, and by not granting an oral hearing on the observations submitted in response to those two letters of facts, the Commission had circumvented the right of Google and Alphabet to be able to develop their arguments on those observations orally, and had infringed their rights of defence.

115 In the light of those considerations, the General Court upheld the first part of the fifth plea in law of the action in paragraph 1005 of the judgment under appeal and annulled the decision at issue in so far as it characterised the portfolio-based RSAs as abusive, thereby confirming the finding that followed its examination of the third plea in law of the action.

F. Sixth plea in law

116 After having examined the first five pleas in law of the action, the General Court considered it necessary to assess the consequences for the decision at issue of the conclusions drawn. In so far as those consequences affected the fine, it considered, in paragraph 1009 of the judgment under appeal, that it was necessary to clarify to what extent the assessment it was required to make in the exercise of its unlimited jurisdiction had to take account of the arguments raised in connection with the sixth plea of the action, which concerned various factors taken into account in the calculation of the fine.

117 By the sixth plea in law of the action, which was in three parts, Google and Alphabet observed that even if, contrary to the arguments put forward in the first five pleas, the Court were to uphold the findings of the decision at issue as to the existence of an infringement of Article 102 TFEU, three errors nevertheless required that the fine be cancelled or substantially reduced.

118 In that context, Google and Alphabet contended, first, that the infringement had not been committed either intentionally or negligently; second, that the decision at issue breached the principle of proportionality; and, third, that it contained important errors of calculation in the light of the Commission's application of its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the Guidelines on the method of setting fines'). In that regard, Google and Alphabet claimed that the Commission had wrongly calculated the relevant value of sales, applied an incorrect gravity multiplier, added an unwarranted additional amount and failed to take account of various mitigating circumstances, including the limited duration of certain conduct.

119 First of all, the General Court drew a series of conclusions concerning the infringement following its examination of the first five pleas of the action. In paragraph 1015 of the judgment under appeal, it found that, as was apparent from

the examination of the first, second and fourth pleas, as regards the substantive aspects, and from the second part of the fifth plea, as regards the procedural aspects, the Commission had established that the first, second and third abuses of the single and continuous infringement were indeed abusive.

120 In paragraph 1015, it nevertheless found that it was apparent from the examination of the third plea and the first part of the fifth plea of the action that, in so far as the Commission had found that the fourth separate abuse in the decision at issue constituted an abuse of a dominant position, within the meaning of Article 102 TFEU, the Commission had infringed Google and Alphabet's rights of defence and vitiated the decision at issue by a number of errors of assessment.

121 It therefore annulled, in paragraph 1016 of the judgment under appeal, Articles 1, 3 and 4 of the decision at issue, in so far only as it was declared, in Article 1, that Google and Alphabet had committed a single and continuous infringement of Article 102 TFEU consisting of four separate abuses, the fourth of which consisted of having made the sharing of revenue with OEMs and MNOs, under certain RSAs, conditional on the exclusive pre-installation of the Google Search app on a predefined portfolio of devices and in so far as that fourth abuse was referred to in Articles 3 and 4. Consequently, the General Court decided to vary Article 2 of the decision at issue, in so far as it imposed a fine for Google and Alphabet's participation in a single and continuous infringement of Article 102 TFEU that included the fourth abuse.

122 The General Court found, however, in paragraph 1018 of that judgment, that, irrespective of the merits of their characterisation in the light of Article 102 TFEU, the portfolio-based RSAs had been correctly taken into consideration in the decision at issue – as indeed, moreover, had the device-based RSAs – as elements of the factual context for the purpose of assessing the exclusionary effects caused by the first and second aspects of the single and continuous infringement, described in the decision at issue as first, second and third separate abuses, the abusive nature of which had not been called into question by the second and fourth pleas of the action.

123 In that regard, the General Court noted, in particular, in paragraph 1019 of that judgment that, irrespective of the characterisation of the RSAs in terms of competition law, the combined effects of the practices established by Google had given it the benefit, as regards the Google Search app, of exclusive pre-installation covering, at least until 2016, more than half of all devices marketed in the EEA running an Android-based OS (recital 822 of, and footnote 908 to, the decision at issue).

124 In addition, the MADAs provided that devices equipped with the GMS suite were required to comply with the technical compatibility standards contained in the CDD, which were, moreover, applicable to OEMs, for all of their devices with an Android-based OS, under the AFAs, the conclusion of which was a prerequisite for entering into a MADA. According to the General Court, that link between the

CDD and MADAs facilitated implementation of the overall strategy pursued by Google. The Commission was therefore right, according to the General Court, to take the CDD into account in order to assess the effects of the MADAs on the markets for general search services.

125 The General Court thus found, in paragraph 1021 of the judgment under appeal, that those points, which were regarded as facts that were relevant to the assessment of the abusive nature of the conduct alleged against Google, established that there was a link between the first aspect of the single and continuous infringement and the RSAs concluded by Google throughout the infringement period, on the one hand, and between the first and second abuses of the single and continuous infringement, on the other.

126 According to the General Court, examination of the first, second and fourth pleas in law of the action also showed that the first and second restrictions at issue formed part of an overall strategy. On the basis of that finding, the Commission was justified in taking the view that Google's conduct, consisting in attaching special conditions to the use of the Android OS, on the one hand, and of certain apps and services, on the other, had to be characterised as a single and continuous infringement of Article 102 TFEU (recital 2 and Article 1 of the decision at issue).

127 On the basis of those considerations, and in accordance with the request made by Google and Alphabet to that effect, the General Court then proceeded to rule on the amount of the fine, pursuant to the unlimited jurisdiction conferred on it by Article 261 TFEU and Article 31 of Regulation No 1/2003.

128 In that regard, the General Court found, first of all, in paragraph 1051 of the judgment under appeal, that the infringement had been committed intentionally, which had to be taken into account in determining the amount of the fine. Next, the General Court considered the extent to which the gravity and duration of the infringement were required to be taken into consideration.

129 As regards gravity, the General Court considered it appropriate, first, in paragraph 1060 of the judgment under appeal, to take account of the value of sales made by Google during the last year of its full participation in the infringement and, second, in paragraph 1066 of that judgment, not to exclude from the value of sales taken into account in the calculation of the basic amount of the fine the revenues generated from general search queries conducted on Google's homepage. Third, it found, in paragraph 1071 of that judgment, that traffic acquisition costs could not be deducted from the value of sales. In that context, the General Court considered, in paragraph 1081 of that judgment, that the application of a fixed coefficient of 11% of the value of sales did not sufficiently reflect the reality of the implementation of the infringement and, in particular, its intensity during the period concerned, particularly as regards Google's anticompetitive conduct in the years 2012 to 2014.

130 So far as concerns the duration of the infringement, in paragraph 1085 of the judgment under appeal, the General Court also rejected the Commission's choice in using a single overall multiplier (recital 1461 of the decision at issue). According to the General Court, it was more appropriate in this case to take account of other parameters also, in order better to reflect certain particularities of the progress of the infringement over time in the light, in particular, of its variable intensity.

131 In paragraph 1086 of the judgment under appeal, the General Court therefore used a different technique rather than the arithmetical and linear technique defined by the Commission pursuant to the general methodology set out in the Guidelines on the method of setting fines. According to the General Court, doing so better ensured, in accordance with the principle of proportionality and the principle that penalties should be specific to the offender and the offence, that the particularities of the present case would be duly taken into account, without thereby undermining the need to achieve a satisfactory level of deterrence.

132 Thus, in paragraphs 1087 and 1088 of that judgment, the General Court, first, took into consideration the complementarity of the first abuses and, second, distinguished several periods in order to take particular account of the intensity of the anticompetitive conduct over time and of the other factual elements surrounding that conduct.

133 The General Court identified three periods in paragraph 1088 of that judgment. The first period, described as 'exploratory', runs from 1 January 2011 to 1 August 2012. It is said to be marked by deployment of the overall strategy Google wanted in order to ensure the transition to the mobile internet. The second period begins on 1 August 2012 and runs until the end of the portfolio-based RSAs, that is on 31 March 2014. It is during that second period that the intensity of the infringement was at its highest; this was because its effects combined the restrictive aspects of the MADAs (for both types of bundling) and of the AFA, in a context in which the exclusivity conferred by the portfolio-based RSAs accordingly reduced the theoretical possibilities of joint pre-installation on devices equipped with the GMS suite. The third period runs from 31 March 2014 to the date of adoption of the decision at issue. The General Court considered that, during that third period, competitors enjoyed a greater margin of freedom with the device-based RSAs than they had under the portfolio-based RSAs. However, it did consider it necessary to take account, during that period, of the development of proprietary APIs which aggravated the exclusionary effects of the AFAs.

134 That segmentation enabled the General Court to take into consideration the fact that Google had ended the portfolio-based RSAs of its own accord, as from 31 March 2014, in order to replace them with device-based RSAs. That had necessarily had the effect of diminishing the foreclosure resulting from the exclusive pre-installation of the Google Search app and the Chrome browser on certain devices equipped with the GMS suite marketed within the EEA. Moreover, the effects of the practices at issue in the second period had been particularly

significant, which also had to be taken into account, since those effects had occurred at a critical time both for Google and for its competitors, that of the development of the mobile internet.

135 Quite apart from those circumstances, the General Court considered that the factual context did not justify granting Google the benefit of mitigating circumstances or, conversely, taking aggravating circumstances into account.

136 On the basis of those considerations, in particular the intentional implementation, over a significant period of time, of an overall strategy the existence of which was not called into question by the Commission's errors concerning the third conduct examined in the decision at issue which had effects of variable intensity during the period of the infringement, the General Court concluded, in paragraphs 1099 and 1100 of the judgment under appeal, that setting the amount of the fine imposed on Google at EUR 4 125 000 000 instead of EUR 4 342 865 000 represented a fair assessment of the gravity and duration of the infringement. Alphabet, moreover, was held jointly and severally liable to pay EUR 1 520 605 895 as the parent company for the unlawful conduct of Google from 2 October 2015 to 18 July 2018.

137 The General Court also stated, in paragraph 1111 of the judgment under appeal, that the amount of the fine as determined in the exercise of its unlimited jurisdiction did not exceed the amount provided for in the second subparagraph of Article 23(2) of Regulation No 1/2003, namely 10% of the total turnover of Alphabet in the preceding business year.

138 In the light of the circumstances taken into consideration in the exercise of its unlimited jurisdiction, the General Court did not deem it necessary to rule on the merits of the arguments put forward by Google and Alphabet concerning the additional amount equivalent to 11% of the value of relevant sales made in 2017 (see recitals 1467 and 1468 of the decision at issue), since that parameter was not taken into account by the General Court.

139 Consequently, in paragraph 1113 of the judgment under appeal, the General Court varied Article 2 of the decision at issue so that the amount of the fine imposed on Google for the single and continuous infringement referred to in Article 1 of the decision at issue was set at EUR 4 125 000 000, Alphabet being jointly and severally liable in respect of the period from 2 October 2015 to the date of adoption of the decision at issue for the amount of EUR 1 520 605 895.

140 The General Court dismissed the action as to the remainder.

IV. Forms of order sought by the parties to the appeal and the procedure before the Court of Justice

141 By their appeal, Google and Alphabet, supported by ADA, CCIA, Gigaset, HMD and Opera, claim that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue;

– in the alternative, refer the case back to the General Court;

– in the further alternative, set aside paragraph 2 of the operative part of the judgment under appeal and fix the amount of the fine imposed to a significantly lower amount; and

– order the Commission to pay all the costs in connection with the present proceedings and the proceedings before the General Court.

142 The Commission, BEUC, FairSearch and Seznam contend that the Court should:

– dismiss the appeal; and

– order Google to pay the costs.

143 By orders of the President of the Court of 19 January 2023, *Google and Alphabet* v *Commission* (C-738/22 P, EU:C:2023:44), and of 18 April 2023, *Google and Alphabet* v *Commission* (C-738/22 P, EU:C:2023:326), the document contained in Annex A.2 to the appeal and certain information contained in footnote 98 to the Commission's response, respectively, were to be treated as confidential vis-à-vis the interveners at first instance, and only the non-confidential versions of that document and of that response were served on those interveners.

V. The appeal

144 Google and Alphabet put forward six grounds in support of their appeal, alleging (i) that the General Court erred in its review of the causal link between the MADA pre-installation conditions and their alleged exclusionary effects; (ii) that the decision at issue was erroneously upheld despite the Commission's failure to establish capability to foreclose as-efficient rivals; (iii) that the General Court erred by rewriting that decision's abuse finding on the anti-fragmentation obligations and attributing the alleged exclusionary effects to conduct that the Commission did not find to have been abusive; (iv) that an error of assessment was made in relation to the anti-fragmentation obligations' objective justifications; (v) that the decision at issue was erroneously upheld despite the absence of portfolio-based RSA abuse; and (vi) that the General Court erred in exercising its unlimited jurisdiction to vary the fine.

A. First ground of appeal

1. Arguments of the parties

145 By their first ground of appeal, which is divided into four parts, Google and Alphabet claim that the General Court made an error of law in its review of the causal link between the MADA pre-installation conditions and their alleged exclusionary effects.

146 They argue that it is apparent from the case-law, and in particular from the judgment of 6 October 2015, *Post Danmark* (C-23/14, EU:C:2015:651, paragraph 47), that the Commission must establish that the exclusionary effects of an abuse are attributable to the specific conduct at issue; those effects cannot be presumed. However, the Commission failed to fulfil that obligation with respect to the MADAs and the General Court confirmed that incorrect approach.

147 The Commission, supported by BEUC, contends that that ground of appeal is entirely ineffective, as it is based on the erroneous premiss that a counterfactual analysis is the only way to establish whether conduct is contrary to Article 102 TFEU.

148 FairSearch maintains that that ground of appeal is new and, therefore, inadmissible. It argues that, before the General Court, Google and Alphabet claimed that the Commission had failed to establish any causal connection between MADA pre-installation conditions and Google's market shares. Yet, in their appeal, Google and Alphabet claimed that the error consisted of the failure to exclusively attribute the alleged exclusionary effects to the abusive conduct.

(a) First part

149 By the first part, it is alleged that the General Court wrongly ruled that the Commission could legitimately examine, in recitals 765 and 888 of the decision at issue, the legality of the MADA pre-installation conditions by reference to the combined effects of the MADAs and RSAs. The General Court thus took into account, wrongly, the impact of RSAs when assessing both the Google Search app tie, in paragraphs 433 to 435 of the judgment under appeal, and the Chrome browser tie, in paragraphs 442 to 457 of that judgment. The General Court thus erred in law in that it failed to show that the alleged exclusionary effects were attributable to the MADA pre-installation conditions.

150 Google and Alphabet put forward five arguments to that effect. First, since MADAs and RSAs were separate agreements, MADA signatories had no obligation to enter into RSAs, so that the legality of the MADA pre-installation conditions could not be assessed in the light of the combined effects of MADAs and RSAs. Second, both device-based and portfolio-based RSAs were legitimate. Their effects therefore necessarily result from competition on the merits. Third, under the General Court's reasoning, any counterfactual scenario would have to

include RSAs as a legitimate means of securing exclusive pre-installation and default setting of the Google Search app. Consequently, the MADA pre-installation conditions could not have had any exclusionary effect of their own, since the RSAs could have produced similar effects by themselves. Fourth, the General Court should not, in paragraphs 451 and 452 of the judgment under appeal, have taken into account the combined effects of MADAs and device-based RSAs, since the latter were outside the scope of the decision at issue. Google and Alphabet were not able to defend themselves on that point before the General Court. Fifth, and in any event, the General Court failed to explain how the combined effects of MADAs and RSAs produced anticompetitive foreclosure, given the low coverage of the RSAs.

151 Gigaset asserts that the General Court erred in taking into account the lawful RSAs as relevant factors in the analysis of the legality of the conditions laid down by the MADAs. Not only can the effects of the RSAs not be attributed to those of the MADAs, but it must also be observed that not all OEMs that entered into MADAs had necessarily entered into RSAs, and therefore it is not possible to make such a generalisation. Gigaset, moreover, claims to be one such case.

152 HMD also takes the view, for reasons similar to those relied on by Google and Alphabet, that the General Court was not required to take account of the RSAs in assessing the legality of the MADA pre-installation conditions.

153 Opera submits that, generally, it is surprising that the General Court ruled that the non-exclusive pre-installation conditions were abusive while the mechanisms culminating in exclusive pre-installation were not. Such an approach ultimately results in fewer opportunities for Google's rivals, such as Opera. Attributing the restrictive effects of the RSAs to the MADA pre-installation conditions is ultimately a more restrictive model, one that is based on an exclusivity that is promoted, such as that of Apple Inc. and Microsoft Corp.

154 The Commission, BEUC, FairSearch and Seznam maintain that this part is unfounded.

(b) Second part

155 By the second part, it is alleged that the General Court erred, in paragraphs 546 to 558 of the judgment under appeal, in rejecting Google and Alphabet's argument that users' choice not to download rival apps more frequently was attributable to user preferences. When assessing the legality of Google's conduct, the General Court took into account not whether users could easily access competing apps, but only the frequency with which users actually chose to download them. In so doing, it failed to examine the real reasons for the low number of downloads of rival apps.

156 Four additional reasons must, according to Google and Alphabet, lead to that error being established. First, in their submission, the General Court's approach was

contrary to the case-law of the Court of Justice, cited in paragraph 79 of the judgment under appeal, according to which, where the Commission finds an infringement of the competition rules on the basis that the facts established cannot be explained other than by the existence of anticompetitive behaviour, the Court will find it necessary to annul the decision in question if the undertaking concerned puts forward arguments which cast the facts established by the Commission in a different light and which thus allow another plausible explanation of the facts to be substituted. Second, the General Court's approach is in breach of the principle of legal certainty, as it does not enable a determination to be made as to the proportion of downloads of rival apps that would be sufficient to offset pre-installation. Third, that approach creates irrational outcomes in that it would not be an abuse to pre-install a low-quality service, but it would be an abuse to pre-install a high-quality one. Fourth, the General Court's view that the alleged superiority of Google's apps is not decisive because rival services might also address user needs and compete on other variables is flawed. In fact, the General Court contradicted itself, in paragraphs 551 and 577 of the judgment under appeal, because it also found that the significant download rates for rival apps, in certain geographic areas, can be explained by specific linguistic features.

157 HMD contends that the General Court could not uphold the decision at issue while failing to review whether the users' choice not to download rival apps more frequently was attributable to abusive pre-installation rather than user preferences. It should, on the contrary, have applied the case-law arising from the judgment of the General Court of 11 December 2013, *Cisco Systems and Messagenet* v *Commission* (T-79/12, EU:T:2013:635, paragraph 79), under which, in the absence of technical or economic constraints which prevent users from downloading another rival app, an app from a dominant undertaking cannot be regarded as restricting competition.

158 Opera argues that, without an analysis of the causal link between the MADA pre-installation conditions and their alleged effects on downloads of rival apps, it cannot be concluded that a low level of such downloads indicates the presence of anticompetitive foreclosure.

159 The Commission, BEUC and FairSearch contend that this part should be rejected as inadmissible. In any event, according to the Commission, BEUC, FairSearch and Seznam, this part is unfounded.

(c) Third part

160 By the third part of the first ground of appeal, Google and Alphabet submit that the General Court wrongly held that evidence relating to default setting was relevant to the analysis of the MADA pre-installation conditions.

161 In so doing, the General Court wrongly endorsed the Commission's approach of taking default setting into account, as relevant context, for the assessment of those pre-installation conditions when that default setting was not in issue and had its

own purpose and effects. That led the General Court, in paragraph 349 of the judgment under appeal, to accept the Commission's reliance on evidence that was not relevant and to fail to distinguish between pre-installation and default setting. That approach distorted the decision at issue and enabled the Commission to avoid its obligation to assess the causal link between the impugned conduct and the anticompetitive effects.

162 Google and Alphabet criticise, in particular, five reasons set out by the General Court in support of that approach. First, the General Court found, in paragraphs 329 and 330 of the judgment under appeal, that it is not easy to distinguish between the effects of pre-installation and default setting. That assessment, however, calls into question the rule according to which the burden of proof lies with the Commission. Second, the judgment under appeal relies, in paragraphs 329 and 330, on the fact that a Google executive conflated the concepts of 'default setting' and 'pre-installation'. An error by an executive does not, however, justify the same error when it is made by the Commission or by the General Court. Third, the General Court did not specify, in paragraph 332 of that judgment, which of premium placement or default setting were in place or which were said to be problematic, although the Commission did not, in the decision at issue, challenge any default setting provided for in the MADA. Fourth, the General Court wrongly considered, in paragraph 334 of that judgment, that what could be inferred in the case of pre-installation also applied *mutatis mutandis* and a fortiori in the case of default setting, which contradicts the Commission itself. Fifth, in so doing, the General Court reversed the burden of proof, contrary to the principles of case-law set out in paragraph 80 of the judgment under appeal.

163 CCIA claims that the General Court wrongly refused to distinguish pre-installation and default setting. In so doing, it relieved the Commission of its burden of proof, by endorsing the Commission's ability to rely on mere presumptions.

164 HMD is also of the view that it is crucial to distinguish the effects of pre-installation from those of default setting. The General Court held that it had to be accepted that arguments put forward in the context of one of those two concepts could apply equally in the context of the other. However, the Commission never made such an argument. The General Court therefore substituted its assessment for that of the Commission on that point, which, in itself, is an error of law. Moreover, it also erred in law by failing to review whether the evidence on which the Commission relied was attributable to the MADA pre-installation conditions, as opposed to default setting.

165 Opera argues that the General Court's finding, in paragraph 334 of the judgment under appeal, that pre-installation and default setting are the same, because 'what may be inferred in the case of pre-installation also applies *mutatis mutandis* and a fortiori in the case of default setting', is both illogical and substantively incorrect. First, that conclusion is illogical because default setting has a much higher commercial value than mere pre-installation. Second, it is substantively incorrect

because, by failing to examine that difference, the Commission and the General Court failed to establish a causal link between the pre-installation conditions at issue and exclusionary effects on as-efficient competitors.

166 The Commission, BEUC, FairSearch and Seznam maintain that this part is inadmissible, ineffective and, in any event, unfounded. In particular, in their view, this part is inadmissible for two reasons. First, Google and Alphabet challenge the factual findings. Second, reference is made to paragraphs 337 to 418 of the judgment under appeal, although those paragraphs are not concerned with the complaints made. The same part is also ineffective, it is argued, because Google and Alphabet admitted during the hearing before the General Court that pre-installation of an app confers an advantage over rival apps.

(d) Fourth part

167 By the fourth part of the first ground of appeal, Google and Alphabet contend that the General Court erred in its analysis of the MADA pre-installation conditions by failing to consider a counterfactual scenario and the procompetitive effects of those conditions.

168 Those conditions were the non-monetary consideration that Google received from OEMs in exchange for providing a software suite, including in particular the Android OS and the Play Store, free of charge. That economic model had procompetitive effects which the Commission had overlooked by failing to examine whether any realistic alternatives would have resulted in equal or greater distribution opportunities for rivals. The General Court wrongly endorsed that approach, in paragraphs 590, 592 and 594 of the judgment under appeal, by confirming that it was not necessary to consider a counterfactual scenario.

169 CCIA submits that the General Court failed to consider whether, under any realistic alternative scenario absent the MADA pre-installation conditions, rival search engines and browsers would have enjoyed greater competitive opportunities. According to settled case-law, the Commission was required to conduct a counterfactual analysis. In so doing, the General Court wrongly confirmed that the procompetitive benefits of the Android OS would only become relevant at the stage of objective justification and that it was for Google and Alphabet to establish that the MADA pre-installation conditions were the only legitimate means of achieving Android's procompetitive objectives.

170 First, CCIA argues that, contrary to the General Court's ruling, the onus was on the Commission to show that the conduct at issue is anticompetitive by carrying out a counterfactual analysis. That is the means of establishing a causal connection between the alleged restriction of competition and its effects in order to determine whether the alleged anticompetitive effects are attributable to the conduct of the dominant undertaking.

171 Second, CCIA maintains that the General Court erred in finding that the Commission could legitimately disregard the state of competition enabled by the MADA pre-installation conditions. That is particularly the case in the context of an ecosystem comprising different multi-sided markets. Thus, the interactions between those markets should have been considered by the Commission, as should the procompetitive effects which should have been examined at the stage of demonstrating the restriction identified and not only at the stage of the objective justification of that restriction. The Commission's approach, endorsed by the General Court, served to circumvent the obligation to examine whether realistic alternatives to the MADA non-monetary exchange could have resulted in the same or superior opportunities for rivals.

172 According to Gigaset, the General Court erred in considering the MADA pre-installation conditions in isolation and wrongly ignored the fact that those conditions formed an integral part of the licensing model developed for the Android OS, which had enabled Google to keep it open and free of charge. Gigaset's entry into the smart mobile devices market illustrates the procompetitive effects of that model, which, moreover, was not disputed by the General Court. The latter had, however, endorsed the Commission's approach of artificially isolating those conditions without taking into account the model as a whole. In so doing, the General Court failed to examine whether Google could offer OEMs a realistic alternative to the non-monetary exchange envisaged by the MADAs.

173 HMD also submits that the General Court erred in law by failing to examine whether the open and free licensing system proposed by Google would have been possible without the MADA pre-installation conditions.

174 Opera argues that the MADAs were the cornerstone of Google's economic model, which consisted in the open and free licensing of the Android OS with the aim of expanding opportunities to distribute its revenue-generating services, particularly the Google Search app. That model was procompetitive for Google's rivals, particularly on the market for mobile web browsers. However, by failing to examine what the competitive situation would have been in a realistic counterfactual scenario absent the MADA pre-installation conditions, the Commission and the General Court ignored those procompetitive effects and wrongly assumed that Google would have been able to maintain that economic model even in the absence of those conditions. Furthermore, the General Court did not address that criticism by Google and Alphabet against the decision at issue and avoided the problem by mischaracterising that decision.

175 According to Opera, the General Court also erred in law by accepting that the Commission could assess the specific procompetitive effects of those pre-installation conditions only at the stage of the objective justification of the restriction.

176 The Commission, BEUC and FairSearch claim that this part is unfounded.

2. Findings of the Court

(a) Admissibility and effectiveness of the first ground of appeal

177 In the first place, FairSearch submits that the first ground of appeal is inadmissible in its entirety because it constitutes a new plea in law.

178 According to settled case-law, a plea raised for the first time in an appeal before this Court must be rejected as inadmissible. In an appeal, the Court's jurisdiction is confined to examining the assessment by the General Court of the pleas argued before it. To allow a party to put forward in an appeal before the Court of Justice a plea in law which it has not raised before the General Court would amount to allowing that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a wider case than that heard by the General Court (judgments of 16 June 2022, *Toshiba Samsung Storage Technology and Toshiba Samsung Storage Technology Korea* v *Commission*, C-700/19 P, EU:C:2022:484, paragraph 158, and of 3 September 2024, *Illumina and Grail* v *Commission*, C-611/22 P and C-625/22 P, EU:C:2024:677, paragraph 133).

179 In the present case, it is sufficient to note that, by their first ground of appeal, Google and Alphabet seek specifically to criticise the judgment under appeal in so far as the General Court rejected their argument that the Commission had failed to establish a causal link between the MADA pre-installation conditions and the exclusionary effects associated with them.

180 That plea does not therefore seek to widen the subject matter of the dispute beyond that which was heard by the General Court. Accordingly, this ground of appeal is admissible.

181 In the second place, the Commission contends that the first ground of appeal is ineffective. It is based entirely on the erroneous premiss that a counterfactual analysis is the only way to establish whether conduct is capable of restricting competition, when in fact such an analysis is just one of a number of ways of establishing such a restriction.

182 It should, however, be observed that, by their first ground of appeal, Google and Alphabet do not base all of their arguments on that premiss. The supposedly mandatory nature of the counterfactual analysis under Article 102 TFEU is the subject of only the fourth part of that ground of appeal. Thus, the potentially erroneous nature of that premiss does not affect the first ground of appeal as a whole, the arguments put forward in connection with it being, moreover, capable of calling into question the findings of the General Court that underpin the operative part of the judgment under appeal.

183 Consequently, the Commission's argument that the first ground of appeal is ineffective must be rejected.

(b) First part

184 By the first part of the first ground of appeal, Google and Alphabet contend, in essence, that the General Court erred in law by taking account, in its assessment of the effects of the MADA pre-installation conditions, of the effects of device-based RSAs and portfolio-based RSAs, although the former agreements were not challenged by the Commission and the General Court found the latter agreements not to be abusive. In so doing, the General Court did not try to ascertain whether the Commission had shown that the alleged exclusionary effects were caused by the MADAs.

185 In that regard, it must be recalled that Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, in so far as it may affect trade between Member States. The purpose of Article 102 is to prevent competition from being restricted to the detriment of the public interest, individual undertakings and consumers, by sanctioning the conduct of undertakings in a dominant position that has the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition (judgment of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, EU:C:2024:726, paragraph 87 and the case-law cited).

186 It must be stated that, whilst a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market, Article 102 TFEU does not sanction the existence per se of a dominant position, but only the abusive exploitation thereof (judgment of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, EU:C:2024:726, paragraph 163 and the case-law cited).

187 In order to find, in a given case, that conduct must be categorised as ‘abuse of a dominant position’ within the meaning of Article 102 TFEU, it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market or markets concerned, or by hindering their growth on those markets, although the latter may be either the dominated markets or related or neighbouring markets, where that conduct is liable to produce its actual or potential effects (judgment of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, EU:C:2024:726, paragraph 165 and the case-law cited).

188 That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that the conduct at issue, at the very least, is capable of producing exclusionary effects (judgment of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, EU:C:2024:726, paragraph 166 and the case-law cited).

189 The Court has made clear that that demonstration, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must always be made in the light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s) (judgments of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130 and the case-law cited, and of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, EU:C:2024:726, paragraph 166). Thus, the circumstances relating to the context in which the conduct of the undertaking in a dominant position is implemented, such as the characteristics of the sector concerned, must be regarded as relevant (judgment of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, EU:C:2024:726, paragraph 168).

190 An assessment as to whether conduct is abusive cannot be made in the abstract. Conduct may prove to be capable of producing exclusionary effects in certain specific circumstances when that might not be the case were that conduct to have taken place in a different context. It is in that sense that the Court has previously held that a competition authority cannot rely on the effects that particular conduct might have produced if certain specific circumstances, which were not prevailing on the market at the time of that conduct, had arisen (judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, paragraph 43).

191 As the Advocate General observed in point 61 of her Opinion, it follows from that case-law that the taking into account of a factual element as a relevant contextual factor for the purpose of assessing the effects of conduct in the light of Article 102 TFEU does not depend on whether that element amounts to a behaviour that in itself is characterised as abusive. It is, in particular, a question of being able to assess in concrete terms whether the effects of the behaviour are amplified or, on the contrary, attenuated by the context in which that behaviour takes place.

192 In the present case, the General Court annulled the decision at issue in so far as it characterised portfolio-based RSAs as abusive, under Article 102 TFEU. It held, in paragraph 800 of the judgment under appeal, that the abusive nature of those agreements had not been demonstrated to the requisite legal standard. Google and Alphabet rely on that annulment and criticise, in essence, the fact that the General Court nevertheless took account, in its assessment of the first part of the second plea in law at first instance, of the RSAs as relevant contextual elements for the purpose of assessing the effects of the MADA pre-installation conditions.

193 In that part, Google and Alphabet relied, before the General Court, on the fact that the MADAs did not prevent OEMs from pre-installing rival search engines or browsers alongside the Google Search app and Chrome browser.

194 In rejecting that part of the plea, the General Court stated in its preliminary observations, in paragraphs 425 to 427 of the judgment under appeal, that, in the decision at issue, the Commission did not dispute the theoretical possibility of

joint installation, but that this possibility disregarded the particular context of the MADAs, and in particular the RSAs which required exclusive pre-installation of the Google Search app for a significant number of devices.

195 The General Court went on to analyse, in paragraphs 431 to 436 of that judgment, the effects of the MADA pre-installation conditions on competing search engine providers and, in paragraphs 437 to 465 of that judgment, the effects of those conditions on competing browser providers.

196 In that context, it must be noted, first, that, contrary to what is claimed by Google and Alphabet, the General Court correctly took account of the fact that MADAs and RSAs were separate agreements and that signatories of MADAs were not obliged to enter into RSAs. In fact, the General Court took the latter agreements into account only as relevant contextual elements, among others, and duly took account, notably in paragraphs 426, 447 and 449 of the judgment under appeal, of the fact that those RSAs did not cover all devices covered by MADAs.

197 Second, the General Court did not disregard the case-law set out in paragraphs 188 and 189 of the present judgment when it found that the Commission had correctly taken RSAs into account as relevant contextual elements, irrespective of their legality or illegality in the light of Article 102 TFEU, for the purpose of assessing the effects of the MADAs. That approach is clear from paragraphs 426 and 443 of the judgment under appeal, in which the Court took into consideration portfolio-based RSAs and device-based RSAs without distinction, and without attributing any relevance to the question of their legality. Those agreements were therefore properly taken into account as contextual elements without which the effects of the MADAs could not be assessed in the light of their complementarity, as is apparent in particular from paragraphs 451 and 452 of that judgment, in that they accentuated the exclusionary effects of the MADAs.

198 Third, the Court must reject the claim by Google and Alphabet that the anticompetitive effects of the MADAs are not established, since, in a counterfactual scenario not involving those agreements, the RSAs would have had the same exclusionary effects, to the detriment of rival search services.

199 That claim seeks to call into question the General Court's factual finding that, on the one hand, MADAs and RSAs were complementary and, on the other, their effects were indissociable. Moreover, drawing an artificial distinction between the effects of those two types of agreement would make it impossible to demonstrate the abusive nature of conduct on the basis of specific, tangible points of analysis and evidence, as follows from paragraph 451 of the judgment under appeal, particularly where the conduct at issue takes place against the background of markets that are characterised by network effects. That would be tantamount to ignoring the context in which the conduct at issue takes place.

200 Accordingly, the first part of the first ground of appeal must be rejected as unfounded.

(c) Second part

201 By the second part of the first ground of appeal, Google and Alphabet complain that, in paragraphs 546 to 558 and 570 to 584 of the judgment under appeal, the General Court wrongly rejected their argument that users' choice not to download rival apps more frequently was attributable not to the status quo bias but to user preferences. In their view, the Commission should have demonstrated that the MADA pre-installation conditions were the real reasons for the low number of downloads of competing apps, instead of merely presuming that they were.

202 As regards, first, the rules on the allocation of the burden of proof, it is for the Commission to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement of competition law. By contrast, it is for the undertaking raising a defence against the finding of such an infringement to prove that that defence must be upheld. However, although, according to those principles, the burden of proof is borne either by the Commission or by the undertaking concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the rules on the burden of proof have been satisfied (see, to that effect, judgment of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 120 and the case-law cited).

203 Second, as regards the level of proof required to assess the effects of particular conduct on end users, it should be noted, as the Advocate General did in points 137 to 139 of her Opinion, that there are situations in which it is not possible to analyse whether users' behaviour is attributable to the qualitative characteristics of the services or products of the dominant undertaking. Where it has been shown to the requisite legal standard that the manner in which consumers or users made their choice was distorted by particular conduct in such a way as to favour the dominant undertaking to the detriment of its competitors, the existence of such bias precludes a finding that that choice was, in principle, attributable to the superior performance of the dominant undertaking (see, to that effect, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 99 and 102). In such a case, it may be impossible in practice for the Commission to distinguish the effects of such bias from the intrinsic characteristics of the product or service concerned.

204 In this case, Google and Alphabet criticise the General Court's assessment of the arguments put forward in the first part of their second plea at first instance, according to which, first, the Commission ignored the fact that Google's competitors had other equally effective means of reaching consumers, particularly via downloads and the browser for general search services. End users were free to download rival apps and to use a search engine other than the Google Search app

on the internet. Second, Google and Alphabet claimed that the Commission had failed to show a link between usage shares and pre-installation.

205 In the context of that first part of the second plea at first instance, Google and Alphabet were critical of the evidence used by the Commission, in its assessment of the anticompetitive nature of the tying of the Google Search app and the Play Store, to support the Commission's finding that the pre-installation of those apps created a status quo bias which deterred users from downloading rival apps or using another search engine available online. The arguments of Google and Alphabet before the General Court did not seek, therefore, to call into question the existence of a status quo bias which, moreover, was the subject of a specific complaint that was rejected by the General Court in paragraphs 326 to 418 of the judgment under appeal.

206 In that context, the General Court stated, first of all, in paragraph 546 of that judgment that Google and Alphabet did not dispute that users could easily download apps competing with the Google Search app or Chrome browser. It intended thereby to establish the framework for its assessment, by making clear that the theoretical possibility of downloads was not disputed; rather, it was a matter of assessing the evidence available to the Commission in order to characterise the actual and specific effects of the conduct at issue and to confirm the status quo bias. It is in that light that the General Court found, in paragraph 557 of that judgment, that it was not disputed in the decision at issue that downloads can, in principle, offset the advantage that would be conferred by pre-installation.

207 Thus, in paragraph 557, the General Court held that, for the reasons set out in that decision, it was apparent that even though general search or browser apps can readily be downloaded free of charge, they are not downloaded in practice or are downloaded for an insufficient proportion of the devices concerned, leading it to reject the evidence used to confirm a status quo bias. This led the General Court, in paragraph 558 of the judgment under appeal, to reject Google and Alphabet's complaint regarding the possibility of downloading competing apps.

208 Next, in the context of its assessment of Google and Alphabet's complaint relating to the alleged failure to show a link between usage shares and pre-installation, the General Court confirmed, in paragraphs 570 to 584 of the judgment under appeal, that the material put forward by the Commission served to demonstrate that pre-installation constituted an advantage which could not be offset by competitors. In that regard, the General Court stated, in paragraph 574 of that judgment, that the Commission took as its starting point the status quo bias which it had, moreover, established. As regards, in particular, Google and Alphabet's argument relating to the superior quality of their products, which would explain the changes in market shares, the General Court found, in paragraph 575 of that judgment, that the Commission was not required, in the specific context of the assessment of evidence confirming an established status quo bias, to determine precisely whether that change was attributable to that superior quality.

209 Lastly, the General Court concluded, in paragraph 583 of that judgment, that, in view of the tendency to freeze the situation associated with the MADA pre-installation conditions and in the absence of proof of the precise impact of the superior quality claimed by Google and Alphabet in respect of their general search and browser apps, the Commission had correctly considered that Google's usage shares confirmed the status quo bias linked to pre-installation.

210 It thus follows from the judgment under appeal that Google and Alphabet cannot criticise the General Court for finding that the legality of conduct depends only on an analysis of actual consumer choices. That criticism is the result of a misreading of that judgment in that it ignores the context of the General Court's assessment and, in particular, the fact that it analyses evidence which supports the demonstration of a status quo bias, which is not merely presumed.

211 Likewise, the General Court cannot be criticised for having ruled, in paragraph 575 of that judgment, that the Commission was not required to establish whether rival apps' lower usage was attributable to the pre-installation conditions or to users' preferences for the superior quality of Google's apps. First, that criticism overlooks the fact that the General Court assessed the evidence challenged by Google and Alphabet which confirmed the status quo bias linked to pre-installation. Second, in accordance with the case-law recalled in paragraph 202 of the present judgment, Google and Alphabet cannot criticise the General Court for having rejected their argument based on an unsupported claim as to the superiority of their products, when it found that the evidence provided by the Commission was sufficient to establish the exclusionary effects of the tying under consideration. In fact it was for Google and Alphabet, in accordance with the rules on the allocation of the burden of proof, to demonstrate that their products were of superior quality and that that quality, contrary to the Commission's assertion, accounted for the downloads.

212 That misreading of the judgment under appeal leads Google and Alphabet to conclude that the General Court's approach is contrary to the principle of legal certainty or gives rise to irrational outcomes. They claim that the General Court merely assessed the evolution in users' choices before concluding that pre-installation was abusive, when in fact the General Court merely confirmed that that evolution was capable of confirming what the Commission had in any event established to the requisite legal standard.

213 Furthermore, as is apparent from paragraph 203 of the present judgment, since the Commission had established to the requisite legal standard that users' behaviour had been distorted by pre-installation favouring Google's apps to the detriment of the apps of its rivals, the existence of such a bias precludes a finding that that choice was, in principle, attributable to the superior performance of the dominant undertaking.

214 Accordingly, it must be held that the second part of the first ground of appeal is unfounded, and there is a need to rule on the inadmissibility of that part, as alleged by the Commission, BEUC and FairSearch.

(d) Third part

215 By the third part of the first ground of appeal, Google and Alphabet submit that the General Court wrongly held that evidence relating to default setting was relevant to the analysis of the MADA pre-installation conditions, which governed that pre-installation.

216 In that regard, it should be noted that it has consistently been held that, in accordance with Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court alone has jurisdiction to establish and assess the relevant facts and to evaluate the evidence. The assessment of those facts and that evidence does not therefore constitute, save in the case of their distortion, a question of law subject, as such, to review by the Court of Justice in the context of an appeal. Such distortion must be obvious from the documents in the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (judgment of 28 September 2023, *Changmao Biochemical Engineering* v *Commission*, C-123/21 P, EU:C:2023:708, paragraphs 121 and 122 and the case-law cited).

217 In the present case, as the Advocate General observed in points 72 to 76 of her Opinion, the paragraphs of the judgment under appeal that are disputed by Google and Alphabet form part of the General Court's assessment of the arguments by which they criticised the relevance of evidence used by the Commission relating to default setting rather than pre-installation of the apps concerned. In that context, before examining Google and Alphabet's complaints, the General Court set out in paragraphs 326 to 339 of the judgment under appeal its preliminary observations concerning in particular the lack of practical relevance of their proposed distinction between pre-installation and default setting. Without calling into question the actual distinction between those two concepts, the General Court found that, for the purpose of assessing the effects of those two behaviours, and in the context of the appraisal of the evidence on which the Commission relied to demonstrate the existence of a status quo bias, there was no need to make such a distinction. In other words, it was not necessary, according to the General Court, to distinguish between the effects of pre-installation and default setting.

218 In paragraphs 331 and 332 of that judgment, the General Court justified that conclusion by finding that it was not, in practice, possible to distinguish the effects of pre-installation from those of default setting in the analysis of the evidence used by the Commission in so far as notably Google itself did not, internally, adopt the strict distinction which it put forward in its action at first instance and which therefore proved to be artificial. That distinction was, according to the General Court, particularly irrelevant given that Google had

recognised that pre-installation did increase the likelihood that users would use the apps concerned and, moreover, the MADAs provided not just for pre-installation but also for premium placement or default setting.

219 It is on the basis of those preliminary considerations that the General Court went on to assess the evidence produced by the Commission to demonstrate the existence of a status quo bias that was generated by pre-installation and criticised by Google and Alphabet. Thus, the General Court found that the Commission was entitled to take account of that evidence relating to the effects of pre-installation, taken in the general context of its implementation, that is to say, a context incorporating default setting and premium placement.

220 As it is, the criticisms expressed by Google and Alphabet in respect of that assessment in the context of the third part of their first ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

221 First, as the Advocate General observes in points 79 and 80 of her Opinion, part of Google and Alphabet's argument is aimed, in reality, at obtaining a new assessment of the evidence produced before the General Court. They call into question the meaning of the terms 'default setting' and 'pre-installation' as shown by the evidence examined, or the relevance and scope of the evidence relating to those two behaviours. Thus, since Google and Alphabet do not claim that the General Court distorted that evidence or that such distortion is obvious from the Court's file, their complaints must be considered inadmissible.

222 Second, as regards Google and Alphabet's arguments calling into question the relevance of the context of pre-installation of the apps concerned to the assessment of its effects, it must be held that, in order to demonstrate any anticompetitive effects of particular conduct, that conduct must be analysed in its context, taking into account all of the relevant facts. That is particularly so where different behaviours are interconnected in such a way that they take effect in conjunction with each other, and distinguishing the effects of one from those of the other would be an artificial exercise. Following an assessment of the facts which is not disputed and which it is not for the Court of Justice to call into question, the General Court found that to be the case as regards the pre-installation and default setting of the apps concerned.

223 In view of the above, the third part of the first ground of appeal must be rejected as partly inadmissible and partly unfounded.

(e) Fourth part

224 By the fourth part of their first ground of appeal, Google and Alphabet maintain, in essence, that the Commission was obliged to establish a causal link between the MADA pre-installation conditions and the alleged anticompetitive effects by using a realistic counterfactual scenario in order to examine whether an open licensing model such as that of the Android OS would have been possible without

those pre-installation conditions. They argue that the General Court erred in law when it ruled that the Commission was not under any such obligation.

225 As regards, first, the need to use a counterfactual scenario, it must be noted, as the Advocate General does in points 93 and 94 of her Opinion, that, while the Commission is required to establish a causal link between the contested abusive behaviour and its anticompetitive effects, it may nevertheless, in that context, rely on a range of evidence, without being required systematically to use any single methodology, in particular a counterfactual analysis, to prove the existence of such a causal link (see, to that effect, judgment of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)* (C-48/22 P, EU:C:2024:726, paragraphs 228 and 229).

226 In order to establish an abuse of a dominant position, it is sufficient to prove that the conduct at issue is capable of producing exclusionary effects. It is not, however, necessary to prove its actual effects. It follows that the fact that, unlike its competitors, the dominant undertaking alone was able to influence the behaviour of its customers or users in a discriminatory manner to the detriment of its competitors may be sufficient to establish that the conduct at issue was capable of impairing genuine, undistorted competition (see, to that effect, judgment of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)* (C-48/22 P, EU:C:2024:726, paragraphs 223 to 229).

227 In the present case, Google and Alphabet complained before the General Court that the Commission had not conducted a full analysis of the economic and legal context of the MADAs, having failed to examine the new opportunities created for competitors and the fact that the MADAs constituted an essential prerequisite for the viability of the free licensing model developed for the Android OS.

228 In that regard, it must be pointed out that the General Court found, in paragraphs 590 to 594 of the judgment under appeal, that the Commission was entitled to focus on demonstrating the anticompetitive effects of the MADA pre-installation conditions without drawing on the free licensing model of the Android OS as a whole, and it did not err in doing so. While recalling that the Commission had duly taken all of the relevant circumstances into account, the General Court was not obliged to ascertain whether the Commission had conducted a counterfactual analysis, which is not mandatory, in accordance with paragraphs 225 and 226 of the present judgment.

229 As regards, second, the account taken of procompetitive effects, it should be noted that where a competition authority shows that conduct of an undertaking in a dominant position is capable of impairing effective and undistorted competition in the internal market, it remains possible for that undertaking, in order to prevent that conduct from being regarded as abuse of a dominant position, to show that the conduct is or was justified objectively, either by certain circumstances of the case, which must, inter alia, be external to the undertaking concerned, or, having regard to the objective ultimately pursued by Article 102 TFEU, by the interests of

consumers (judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 84).

230 In accordance with that case-law, Google and Alphabet cannot criticise the General Court for having failed to take account of the procompetitive effects they alleged before it. Although, at the stage of demonstrating the anticompetitive nature of conduct, the competition authority must, in accordance with the case-law recalled in paragraph 190 of the present judgment, take account of the context of that conduct, it is for the undertaking to demonstrate that that conduct was objectively justified. It must, moreover, be noted in that regard that, in paragraphs 599 to 619 of the judgment under appeal, the General Court rejected the arguments relating to possible procompetitive effects which Google and Alphabet had raised before it, and that finding has not been criticised at the stage of the appeal.

231 The fourth part of the first ground of appeal must therefore be rejected as unfounded.

232 In the light of all of the foregoing considerations, the first ground of appeal is rejected in its entirety.

B. Second ground of appeal

1. Arguments of the parties

233 By their second ground of appeal, which is divided into two parts, Google and Alphabet criticise the General Court for erroneously upholding the decision at issue despite the Commission's failure to establish, in that decision, that the MADA pre-installation conditions were capable of foreclosing as-efficient rivals.

234 They submit that it is apparent from established case-law that conduct that is not capable of foreclosing as-efficient rivals falls outside the scope of Article 102 TFEU, and claim that the Commission deviated from that case-law, without being criticised by the General Court.

235 Google and Alphabet, and also HMD, state that, like the Commission, the General Court failed to establish that the MADA pre-installation conditions were capable of foreclosing as-efficient rivals, although it conducted that analysis in the context of the assessment of the legality of portfolio-based RSAs.

236 They argue that the General Court adopted an approach that led it, first, to disregard the concept of 'foreclosure' by failing to take account of existing opportunities for competitors and, second, to rule, wrongly, that the AEC test applies only to conduct relating to pricing. Thus, it wrongly held that the MADA pre-installation conditions were unlawful solely because they were not in fact matched by rivals, irrespective of whether those rivals were less efficient. In so doing, the General Court failed to consider whether the observed effects were the

result of competition on the merits or whether they were the product of anticompetitive foreclosure.

237 CCIA claims, first, that the General Court erred in law by conflating the concepts of 'significant competitive advantage' and 'foreclosure'. In so doing, it relieved the Commission of the burden of conducting an analysis of the effects of the alleged conduct. However, in accordance with the case-law, in order to establish an infringement of Article 102 TFEU, it is necessary to demonstrate both the conduct constituting the infringement and the effects of that conduct. Those two aspects cannot be conflated. The General Court's approach in the judgment under appeal disregards the legal certainty arising from that case-law, as it does not make the legality of the pre-installation of apps dependent, in practice, on whether users remain free to download competing services, but on whether they actually do so. The effect of that is ultimately to conflate, wrongly, the concepts of 'correlation' and 'causation'.

238 Opera notes that the Commission has not shown, in the decision at issue, that there is a risk of foreclosure of rivals. The Commission contended, before the General Court, that it was not required to do so. However, the General Court substituted its own assessment in that respect for that of the Commission when it found that the Commission had actually found a risk of foreclosure. While it is a fact that the MADA pre-installation conditions helped Google to distribute its services widely and efficiently, those conditions did not lead to any foreclosure of rivals. The General Court, however, came to that conclusion by relying on factual approximations, including in its analysis of the effects of the CDD, and by adopting the Commission's formalistic approach.

239 According to the Commission, FairSearch and Seznam, the second ground of appeal is, in part, inadmissible, in part, ineffective, and in any event unfounded.

(a) First part

240 The first part of the second ground of appeal concerns the General Court's alleged failure to consider whether the tying of the Google Search app with the Play Store app was capable of foreclosing the general search services of as-efficient rivals.

241 This part comprises three complaints, alleging that the Commission should have (i) examined the impact of the conduct at issue in the light of its coverage, duration and operation; (ii) carried out that analysis by reference to hypothetical as-efficient rivals; and (iii) determined whether that conduct deprived such rivals of opportunities to compete effectively.

(1) First complaint

242 Google and Alphabet claim that, according to settled case-law, it is necessary to consider the conduct's coverage of the relevant market in order to determine the competitive impact of that conduct. The General Court analysed that rate of

coverage in respect of portfolio-based RSAs but erroneously refused to take it into account in respect of MADAs in paragraph 544 of the judgment under appeal.

243 They argue that the General Court committed two further errors in noting that the coverage of the MADAs was, in any event, significant enough to support a finding of abuse. First, on the basis of similar rates of coverage identified in respect of MADAs and RSAs for 2013 and 2014, the General Court came to opposite conclusions, which is illogical. Second, for 2015 and 2016, the rate of coverage is much lower than is typically found when an abuse is clear-cut.

244 The Commission contends that this complaint is ineffective and, in any event, unfounded. FairSearch regards the complaint as inadmissible in so far as it amounts to a request to the Court of Justice for a new assessment of facts.

(2) Second complaint

245 Google and Alphabet submit that the General Court made an error in upholding the decision at issue when, in that decision, the Commission avoided the requirements of the AEC test, namely its obligation to demonstrate that the MADA pre-installation conditions were capable of foreclosing as-efficient general search and browser app rivals.

246 Whereas the General Court had applied that test correctly in respect of RSAs, it did not do so in respect of MADAs. That test is general in scope, however, and does not apply only to pricing practices. The General Court therefore erred in law in holding, in paragraphs 577 and 578 of the judgment under appeal, that the pre-installation conditions at issue were abusive since they were capable of excluding services that were technically capable of meeting consumer needs, according to numerous variables, such as the protection of privacy, specific linguistic features or technical quality.

247 Likewise, the General Court had failed to review whether as-efficient competitors could have achieved pre-installation of their apps alongside the Google Search app. It had adopted an alternative test, contrary to the test it applied to the portfolio-based RSAs. It had set out its reasoning by reference to actual rivals without showing that they were as efficient.

248 Gigaset adds that the General Court erroneously accepted that it was sufficient for the Commission to show that the MADA pre-installation conditions were capable of excluding services that were technically capable of meeting consumers' needs, regardless of their efficiency and attractiveness. In so doing, the General Court endorsed an approach that is inconsistent with the case-law of the Court of Justice.

249 Gigaset argues that the General Court wrongly relied on user behaviour in order to conclude that those conditions actually produced exclusionary effects. Actual user choice in favour of a dominant undertaking's product cannot, in itself, be the basis for a finding of abusive conduct, as it may simply reflect genuine user preference

that has nothing to do with alleged illegitimate exclusionary effects produced by that undertaking's conduct. That approach thus breaches the principles of the presumption of innocence and of legal certainty.

250 HMD asserts that the failure to carry out the AEC test, as the judgment under appeal shows, creates legal uncertainty. That test is, moreover, generally applicable in the context of the application of Article 102 TFEU, as is apparent from the case-law.

251 The Commission, BEUC, FairSearch and Seznam contend that this complaint is unfounded.

(3) Third complaint

252 According to Google and Alphabet, the General Court failed, contrary to the case-law, to examine whether the opportunities that remained available for rivals were sufficient for rivals to compete viably. In so doing, it conflated the concepts of 'significant competitive advantage' and 'foreclosure', and disregarded the relevant legal standard. They argue that it is not sufficient, in that regard, to show that particular conduct makes competition on the relevant market more difficult.

253 The Commission and BEUC contend that this complaint is unfounded. According to FairSearch, the complaint is inadmissible.

(b) Second part

254 By the second part of the second ground of appeal, in which there are two complaints, Google and Alphabet argue that the General Court wrongly failed to consider whether the tying of the Chrome browser to the Play Store and to the Google Search app was capable of foreclosing as-efficient rival browsers.

255 The Commission contends, however, that the General Court did not make any error of law in concluding that the Commission was fully entitled to conclude that the tying of the Chrome browser with the Play Store and the Google Search app was capable of restricting competition.

(1) First complaint

256 According to Google and Alphabet, the General Court erred in law in reviewing the legality of the Chrome browser tie by reference to a geographic market different from the one defined in the decision at issue. Whereas, in that decision, the Commission had accepted, in respect of that conduct, the existence of a worldwide geographic market (including China), the General Court focused only on the EEA and even called into question the relevance of the existence of a worldwide market. In particular, the General Court did not state the reasons why devices marketed in China had not been taken into account.

257 According to the Commission, BEUC and FairSearch, that complaint is inadmissible and, in any event, unfounded.

(2) Second complaint

258 In Google and Alphabet's submission, the General Court also erred in transposing findings relating to the Google Search app tie to the Chrome browser tie by analogy, disregarding significant differences between the two tying arrangements. First, the Chrome browser was less visible or accessible than the Google Search app. Second, the General Court did not correctly evaluate the capability of rivals to secure parallel pre-installation. The findings relating to RSAs were not relevant in that regard. Third, it deemed download rates of rival browsers to be insufficient without giving any reasons for doing so. Fourth, the General Court failed to assess the competitive conditions in the relevant markets correctly. Fifth, the General Court did not take account of evidence referred to in the decision at issue.

259 According to the Commission, BEUC and FairSearch, that second complaint is inadmissible, as it effectively challenges the factual findings of the General Court, and is in any event unfounded.

2. Findings of the Court

260 By their second ground of appeal, Google and Alphabet maintain, in essence, that the General Court erred in law when it ruled that the Commission was not required to establish that the MADA pre-installation conditions were capable of foreclosing as-efficient rivals even though it had demonstrated this in relation to portfolio-based RSAs.

(a) General considerations

261 As a preliminary point, it is necessary to provide clarification regarding the assessment of the capability of conduct to produce exclusionary effects for the purpose of characterising that conduct as an abuse of a dominant position, within the meaning of Article 102 TFEU.

262 According to settled case-law, the specific purpose of Article 102 TFEU is to prevent conduct of an undertaking in a dominant position that has the effect, to the detriment of consumers, of hindering, through recourse to means or resources different from those governing normal competition, maintenance of the degree of competition existing in the market or the growth of that competition (judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 44 and the case-law cited).

263 On a market where the degree of competition is already weakened precisely because of the presence of one or more undertakings in a dominant position, such conduct covers any practice which, through recourse to means different from those governing normal competition between undertakings, has the effect of

hindering the maintenance of the degree of competition still existing in the market or the growth of competition (see, to that effect, judgments of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 125 and the case-law cited, and of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, EU:C:2024:726, paragraph 88).

264 In order to establish that an exclusionary practice is abusive, a competition authority must show that, first, that practice relied on the use of means other than those which come within the scope of competition on the merits. Second, that authority must show that that practice was capable, when implemented, of producing such an exclusionary effect, in that it was capable of making it more difficult for competitors to enter or remain on the market in question and, by so doing, that that practice was capable of having an impact on the market structure. These two conditions are cumulative (see, to that effect, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 61 and 103 and the case-law cited).

265 As regards, in the first place, the condition that the conduct concerned must deviate from competition on the merits, the Court has previously clarified that the concept of competition on the merits covers, in principle, a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services. Conduct which has the effect of broadening consumer choice by putting new goods on the market or by increasing the quantity or quality of the goods already on offer must, inter alia, be considered to come within the scope of competition on the merits (see, to that effect, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 85).

266 In that sense, the fact that an undertaking holds a dominant position does not disqualify it from protecting its commercial interests if they are attacked, or from the right to take such reasonable steps as it deems appropriate to protect its commercial interests (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 148 and 149 and the case-law cited).

267 Accordingly, it is not the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market. On the contrary, competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors which are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation (judgment of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, EU:C:2024:726, paragraph 164 and the case-law cited).

268 Where a competition authority seeks to show that conduct represents a departure from competition on the merits, it may use an analysis of the capability of a

hypothetical as-efficient but non-dominant competitor to replicate that conduct (see, to that effect, judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 82).

269 However, as the Advocate General noted, in essence, in points 106 and 127 of her Opinion, certain behaviours represent, in principle, means that deviate from competition on the merits, without there being any need for such an analysis. That is the case in particular for tying that consists in offering a certain product ('the tying product') only with another product ('the tied product'). Such an analysis is not necessary to determine whether the customer has the choice of obtaining the tying product without the tied product. An undertaking which is dominant in one or more product markets ('market for the tying product') may harm consumers through a practice of tying by foreclosing the market for the other products that are part of the tie ('market for the tied product') and, indirectly, the tying market.

270 As regards, in the second place, the condition concerning the capability to produce exclusionary effects, as is apparent from the case-law cited in paragraph 187 of the present judgment, the competition authority must demonstrate that the conduct concerned has the actual or potential effect of restricting that competition by excluding hypothetical as-efficient competing undertakings from the market or markets concerned, or by hindering their growth on those markets, although the latter may be either the dominated markets or related or neighbouring markets, where that conduct is liable to produce its actual or potential effects.

271 In addition, conduct may be categorised as 'abuse of a dominant position' not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market(s) concerned, but also where it has been proven to have the actual or potential effect – or even the object – of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 131 and the case-law cited).

272 As regards the question whether Article 102 TFEU imposes a systematic obligation on the Commission to examine the efficiency of actual or hypothetical competitors of the dominant undertaking, the Court of Justice has previously held that, admittedly, the objective of that article is not to ensure that competitors less efficient than the dominant undertaking remain on the market. Nonetheless, it does not follow that any finding of an infringement under that provision is subject to proof that the conduct concerned is capable of excluding an as-efficient competitor (see, to that effect, judgment of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)* (C-48/22 P, EU:C:2024:726, paragraphs 263 and 264).

273 It is true that the Court has held that that analysis may prove to be relevant for pricing practices as well as for non-pricing practices, depending on the circumstances. However, as the Advocate General noted in points 131 and 132 of her Opinion, and in accordance with the case-law recalled in paragraph 271 of the present judgment, there are situations in which it is not possible, nor does it make sense, to base the analysis of exclusionary effects of particular conduct on the question whether an as-efficient competitor could replicate that conduct. That is particularly so where the structure of the market, involving, for example, an ecosystem characterised by significant barriers and network effects, and the conduct at issue make the entry, maintenance or even emergence of an as-efficient competitor practically impossible.

274 Furthermore, it is for the competition authority to demonstrate, on the basis of specific, tangible points of analysis and evidence, that the conduct concerned is capable of having exclusionary effects. As is apparent from the case-law recalled in paragraph 189 of the present judgment, that demonstration, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must, however, always be made in the light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s).

275 In this case, in the context of its response to the second plea at first instance, the General Court recalled the case-law which it intended to apply, in paragraphs 276 to 299 of the judgment under appeal. On that basis, it held, in paragraph 291 of that judgment, that the Commission had followed the steps which the General Court had set out, for the purpose of demonstrating the abusive nature of conduct, in its judgment of 17 September 2007, *Microsoft* v *Commission* (T-201/04, EU:T:2007:289), and that the Commission had not merely found that the MADA pre-installation conditions represented tying that was capable of restricting competition, but that it had, in accordance with that case-law, been careful to set out specifically in the decision at issue the various factors which, in its view, made it possible to establish that the alleged exclusionary effects were real.

276 In that regard, in paragraph 294 of the judgment under appeal, the General Court observed that the Commission had concluded that the conduct at issue had had the effect, inter alia, of making it harder for competing search services to gain search queries and the revenues and data needed to improve their services, that it had increased barriers to entry by shielding Google from competition from other search services and that it had reduced the incentives for the innovations that competitors marketing specialised search services in a particular language or targeting a specific group of users wished to offer.

277 As the Advocate General noted in points 112 to 124 of her Opinion, the General Court dismissed Google and Alphabet's argument criticising the Commission for having failed to establish that the MADA pre-installation conditions restricted competition. Thus, it rejected the arguments relating to the existence of a status quo bias generated by pre-installation (paragraphs 320 to 418 of the judgment

under appeal), the possibility for OEMs of pre-installing competing general search services or setting them as the default (paragraphs 419 to 538 of that judgment), other means of reaching users supposedly available to rivals (paragraphs 539 to 567 of that judgment), the causal link between Google's usage shares and pre-installation (paragraphs 568 to 584 of that judgment) and, lastly, the account taken of the economic and legal context (paragraphs 585 to 596 of the judgment under appeal).

278 In the grounds of the judgment under appeal, the General Court did not depart from the case-law recalled in paragraphs 261 to 274 of the present judgment. In particular, contrary to Google and Alphabet's claims, the General Court was not required to verify whether the Commission had indeed demonstrated the exclusionary effects of the MADA pre-installation conditions by reference to hypothetical as-efficient competitors. As the General Court stated in paragraphs 115, 116 and 294 of the judgment under appeal, the relevant markets in the present case fall within the digital economy, where variables such as innovation, access to data, multi-sidedness, user behaviour or network effects play a decisive part in that those markets, structured in this way, are characterised by high barriers to entry and complex interactions that influence and determine each other. It is precisely in such situations, in accordance with the case-law cited in paragraph 271 of the present judgment, that it is not possible, nor does it make sense, to base the analysis of exclusionary effects of particular conduct on the question whether an as-efficient competitor could replicate that conduct. In such circumstances, conduct that does not fall within the scope of competition on the merits is capable of making the entry, maintenance or even emergence of an as-efficient competitor practically impossible. This applies all the more where the conduct at issue does not lend itself to a quantitative, price-based analysis.

279 The second ground of appeal must be assessed in the light of those general considerations and the resulting interim conclusions.

(b) First part

280 The first part of the second ground of appeal concerns the General Court's alleged failure to consider whether the tying of the Google Search app with the Play Store app was capable of foreclosing the general search services of as-efficient rivals.

281 This part consists of three complaints, alleging that the Commission should have (i) considered the impact of the conduct at issue in the light of its coverage, duration and operation; (ii) conducted that analysis by reference to hypothetical as-efficient rivals; and (iii) determined whether that conduct deprived such rivals of opportunities to compete effectively with Google on the market for general search services.

282 In that regard, it should be noted that Google and Alphabet rely on the premiss that the General Court should have applied the same test when assessing the effects of the MADA conditions and when assessing the effects of portfolio-based

RSAs. In the context of their three complaints, Google and Alphabet refer implicitly to the assessment carried out by the General Court in connection with its examination of the third plea in law at first instance, by which they disputed that portfolio-based RSAs were abusive. More specifically, they reproduce the various complaints which they put forward, in essence, under the third part of that third plea in law at first instance, which are summarised in paragraph 664 of the judgment under appeal.

283 In its examination of those complaints, the General Court assessed the decision at issue in the light of specific case-law, summarised in paragraphs 637 to 647 of the judgment under appeal, relating to the capability of an exclusivity payment, such as the portfolio-based RSAs, to foreclose competitors that are at least as efficient; that exclusionary capability was assessed using the AEC test.

284 However, it is apparent from paragraph 272 of the present judgment that the AEC test or even, more generally, the capability to foreclose an as-efficient competitor is not the only criterion by which conduct may be characterised as being contrary to Article 102 TFEU. The General Court cannot therefore be criticised for having failed to invalidate the decision at issue on the ground that the Commission had failed to apply that criterion when assessing the effects of the MADA pre-installation conditions.

285 Thus, it must be held that all of the complaints in the first part of the second ground of appeal are based on an incorrect premiss, rendering them ineffective.

(c) Second part

286 By the second part of the second ground of appeal, Google and Alphabet argue that the General Court erred in failing to consider whether the tying of the Chrome browser to the Play Store and to the Google Search app was capable of foreclosing as-efficient rival browsers.

287 For the same reasons as those set out in paragraphs 282 to 280 of the present judgment, all of the complaints in that second part must be rejected as being ineffective in that they are based on the incorrect premiss that the General Court should have assessed the capability of the MADA pre-installation conditions by reference to a hypothetical as-efficient competitor.

288 In any event, those complaints are inadmissible.

289 With regard to the first complaint, Google and Alphabet submit that the General Court, like the Commission, took account of only a single sub-segment of the relevant geographic market when assessing the capability of the tying concerned to restrict competition in that market. Since the appellants did not raise that complaint before the General Court when they could have done so, it must be considered to be new and is, therefore, under the case-law cited in paragraph 178 of the present judgment, inadmissible in the context of an appeal.

290 As regards the second complaint, Google and Alphabet submit that the General Court erroneously transposed findings relating to the Google Search app tie to the Chrome browser tie 'by analogy' despite significant differences between those ties. More particularly, the appellants challenge five factual findings made by the General Court, relating to (i) the strength of the status quo bias enjoyed by the Chrome browser in comparison to the Google Search app; (ii) issues with storage space; (iii) the relative significance of downloads of rival browsers; (iv) the assessment of the level of competition on the market for browsers compared to that of search engines; and (v) the impact of rates of parallel downloads of rival apps.

291 However, as noted in paragraph 216 of the present judgment, an appeal lies on points of law only. The General Court alone has jurisdiction to establish and assess the relevant facts and to evaluate the evidence. The assessment of those facts and that evidence does not therefore constitute, save in the case of their distortion, a question of law subject, as such, to review by the Court of Justice in the context of an appeal.

292 In so far as Google and Alphabet do not claim any distortion of the evidence supporting the factual findings which they contest, that complaint must be rejected as inadmissible, as, accordingly, must the second part of the second ground of appeal in its entirety.

293 In the light of all of the foregoing considerations, the second ground of appeal must be rejected in its entirety.

C. Third ground of appeal

1. Arguments of the parties

294 By their third ground of appeal, Google and Alphabet complain that the General Court erred in law by substituting its own assessment in relation to the abuse finding for that contained in the decision at issue concerning OEMs and attributing the alleged exclusionary effects to conduct which the Commission did not find to have been abusive.

(a) First part

295 According to Google and Alphabet, the Commission found, in Article 1(1)(c) of the decision at issue, that they had infringed Article 102 TFEU by making the licensing of the Play Store and the Google Search app conditional on the anti-fragmentation obligations.

296 They submit that, first, while the General Court acknowledged, in paragraph 828 of the judgment under appeal, that the only provision considered to be abusive in the decision at issue was the provision making the licensing of the Play Store and the Google Search app conditional on OEMs agreeing not to market any device

running a non-compatible Android fork, the General Court went on to conduct its assessment by reference to a much wider practice, namely 'Google's practice of preventing the development and market presence of devices running a non-compatible Android fork'.

297 Google and Alphabet argue that, by thus 'rewriting' the decision at issue, the General Court erred in upholding the abuse finding in that decision by reference to conduct that went beyond the obligation which the Commission had found to be abusive.

298 They claim that it was inappropriate for the General Court to dismiss their action on the basis of Google's commercial policy of licensing its proprietary APIs only for use on compatible Google Android devices when the Commission, in the decision at issue, and the General Court, in paragraphs 810 and 811 of the judgment under appeal, had accepted that that policy was justified. Having found that Google was entitled to require compatibility on devices on which Google's proprietary apps and services (including its proprietary APIs) were pre-installed, it was not open to the General Court to treat Google's legitimate choice not to license its proprietary APIs to incompatible Android forks as part of the impugned conduct.

299 Second, Google and Alphabet criticise the General Court for finding that the Commission was not required to identify the specific clauses that restricted competition among the baseline Android compatibility standards with which AFA signatories were required to comply.

300 The General Court had, in that regard, ignored the Commission's error, stating, in paragraph 864 of the judgment under appeal, that the criticisms levelled at Google in the decision at issue did not concern the content of the compatibility obligations defined by Google, but Google's practice aimed at preventing non-compatible Android forks from finding commercial markets. That statement was not an adequate response, since Article 1(1)(c) of the decision at issue was precisely concerned with the anti-fragmentation obligations.

301 In support of the arguments put forward by Google and Alphabet, ADA and HMD submit that, by making a finding of abuse that was wider than that found in the decision at issue, the General Court exceeded the limits of its judicial review, substituting its own assessment for that of the Commission.

302 ADA refers in that respect to three key aspects of the abuse found in the decision at issue. First, the legal and factual analysis in that decision was entirely based on Article 102(d) TFEU and on the judgment of the General Court of 17 September 2007, *Microsoft* v *Commission* (T-201/04, EU:T:2007:289). Second, the Commission had accepted that Google could lawfully impose the anti-fragmentation obligations on devices equipped with the GMS suite. Third, the Commission had also accepted that Google was not required to make its

proprietary apps and services available to developers of non-compatible Android forks.

303 In accordance with the case-law of the Court of Justice, as it appears in the judgments of 6 April 1995, *RTE and ITP* v *Commission* (C-241/91 P and C-242/91 P, EU:C:1995:98, paragraphs 49 and 50), and of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569, paragraph 39), a refusal to license intellectual property rights can infringe Article 102 TFEU only when certain exceptional circumstances exist, which had not been established in the present case. The General Court had thus erred in law in finding, in paragraph 864 of the judgment under appeal, that Google's decision not to license its proprietary APIs to non-compatible forks was part of a practice aimed at preventing those forks from finding commercial markets.

304 The General Court had also made two further errors by ruling, in paragraph 854 of the judgment under appeal, that the exercise of an exclusive right linked to an intellectual property right cannot be accepted when its purpose is precisely to strengthen the dominant position of the party engaging in it and to abuse that position. First, the General Court had thus failed to recognise that the development of intellectual property rights, particularly in technology markets, reflects innovation and investment and therefore constitutes competition on the merits. Second, it had failed properly to take into account the relevant legal context, which is that, in relation to intellectual property rights, incentives to invest in research and development should be attenuated by administrative or judicial intervention only in exceptional circumstances.

305 The Commission contends that the present ground of appeal is ineffective and, in any event, unfounded.

306 It argues that it is ineffective because it is based on the erroneous premiss that the General Court 'rewrote' the characterisation, in the decision at issue, of Google's abusive conduct. That 'rewriting' is the basis for Google and Alphabet's claim, in the second part of the third ground of appeal, that the General Court erred in its assessment of the causal link between the 'rewritten' conduct and the capability of that conduct to restrict competition.

307 However, according to the Commission, first, it is apparent from paragraph 855 of the judgment under appeal that Google's choice not to license its proprietary APIs to developers of incompatible Android forks was taken into account, in the assessment of the capability of anti-fragmentation obligations to restrict competition, only as a contextual element. Second, both the decision at issue and the judgment under appeal found the same conduct, namely 'the licensing of the Play Store and the Google Search app being made conditional on the conclusion of an AFA', to be abusive.

308 Google and Alphabet's claim that the General Court had found a broader practice to be abusive than that taken into account in the decision at issue was based on

two isolated passages of the judgment under appeal, namely the last sentence of paragraph 828 and paragraph 864 of that judgment. However, they had thereby ignored not only the end of that paragraph 828, but also the other considerations in that judgment, particularly paragraphs 232, 247, 805, 809, 811 and 1083 thereof. By contrast, an overall reading of the judgment under appeal would confirm that the decision at issue and that judgment found the same conduct to be abusive.

309 In support of the Commission's arguments, FairSearch adds, referring to the judgment of 27 January 2000, *DIR International Film and Others* v *Commission* (C-164/98 P, EU:C:2000:48, paragraph 42), that the General Court is, in any case, allowed to interpret a decision of the Commission provided that that interpretation does not go against the logic of that decision. As it is, Google and Alphabet provided no evidence that the General Court substituted its own reasoning for that of the Commission.

310 Seznam contends also that the statement in paragraph 828 of the judgment under appeal is not a 'finding' made by the General Court, but a reference to what the Commission had already established in the decision at issue, namely that the obligation preventing the development and market presence of devices with a non-compatible Android fork, which is part of the anti-fragmentation obligations, was abusive. The General Court's reference to that statement by the Commission is not, therefore, broader than that statement.

(b) Second part

311 Google and Alphabet complain that the General Court, first, erred in law when it held, in paragraph 893 of the judgment under appeal, that a counterfactual analysis served no purpose.

312 In their view, without such an analysis, it was not possible to conclude that the alleged potential effects on incompatible forks were attributable to the conduct at issue, that is, the conditioning of a licence to the Play Store and the Google Search app on an OEM signing an AFA.

313 They argue that the relevant question is what the position of incompatible forks would have been had Google not made licensing of the Play Store and the Google Search app conditional on OEMs signing an AFA. In their submission, it is apparent from the General Court's assessment in paragraph 856 of the judgment under appeal that, in that situation, Google would have continued to license its proprietary APIs only to compatible Google Android devices on which Google apps were pre-installed, which Google could legitimately have done. In those circumstances, as the General Court confirmed in paragraphs 855 and 856 of the judgment under appeal, Google's policy in relation to the development and distribution of its proprietary APIs would still have provided OEMs with the incentive to distribute only compatible Google Android devices, as OEMs considered those proprietary APIs to be of 'strategic interest'. It follows from this that, in a counterfactual scenario, the development of incompatible forks would

have faced the same obstacle as had in fact been encountered, namely OEMs' unwillingness to distribute incompatible forks.

314 Second, while Google and Alphabet had explained before the General Court that the development of incompatible forks, such as Fire OS, had failed for reasons other than OEMs signing the AFAs, the General Court had failed to analyse whether Fire OS' failure was attributable to the anti-fragmentation obligations.

315 The General Court had thus again failed to conduct any kind of analysis of causation while stating explicitly, in paragraph 850 of the judgment under appeal, that it was choosing not to examine whether '[reasons other]' than Google's requirement for OEMs to sign an AFA in order to obtain a licence for the Play Store or the Google Search app might explain the commercial failure of Fire OS. In so doing, the General Court had committed the error that the Court of Justice had impugned in the judgment of 6 December 2012, *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:770), namely presuming the existence of a causal link, in breach of the principle that 'doubt must operate to the advantage of the addressee of the decision finding the infringement'.

316 Google and Alphabet maintain, moreover, that, in the present case, there could not even be any doubt since the General Court had already held that access to Google's proprietary APIs was commercially important, and, in the General Court's view, sufficient to mean that an incompatible Android variant would have been unable to counterbalance the alleged dominance of the Android OS. The General Court thereby committed an error of law similar to that which led to the annulment of the Commission's decision in the case giving rise to the judgment of the General Court of 15 June 2022, *Qualcomm* v *Commission (Qualcomm – exclusivity payments)* (T-235/18, EU:T:2022:358).

317 ADA and HMD also submit that the General Court erred in law when it found that the Commission was not obliged to carry out a counterfactual analysis, which would have enabled it to assess the conditions of competition in the absence of the conduct at issue.

318 The Commission counters that Google and Alphabet are wrong to claim that the General Court erred in upholding the findings of the decision at issue that the anti-fragmentation obligations were capable of restricting competition.

319 According to FairSearch, the second part of the third ground of appeal is inadmissible because Google and Alphabet are seeking to debate the General Court's findings of fact as to the reasons why the development of incompatible forks failed.

2. Findings of the Court

(a) First part

320 Google and Alphabet submit that, in examining their fourth plea at first instance, alleging that the finding that it was abusive for Google to make Play Store and Google Search app licences conditional on compliance with the anti-fragmentation obligations was incorrect, the General Court considered it necessary, in paragraph 828 of the judgment under appeal, to examine whether the Commission had succeeded in establishing that, as it found in the decision at issue, Google had implemented a practice designed to exclude non-compatible Android forks, and whether that practice could be classified as anticompetitive for the purposes of Article 102 TFEU.

321 They claim that, in so doing, the General Court 'rewrote' the decision at issue by reference to conduct that went beyond that which the Commission had found to be abusive, in Article 1(1)(c) of that decision. It would, in that regard, be inappropriate to penalise Google on the basis of its commercial policy of licensing its proprietary APIs only for use on compatible Google Android devices when the Commission, in that decision, and the General Court, in paragraphs 810 and 811 of the judgment under appeal, accepted that that policy was justified. It was not, therefore, open to the General Court to find that the fact that Google did not license its proprietary APIs to incompatible Android forks was part of the impugned conduct.

322 Google and Alphabet's reasoning is therefore based on the premiss that one of the abuses found by the Commission in the decision at issue has been extensively reformulated, which constitutes an error of law.

323 In that regard, it must be pointed out that, in reviewing the legality of acts under Article 263 TFEU, the Court of Justice and the General Court have jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Article 264 TFEU provides that if the action is well founded, the act concerned must be declared void. The Court of Justice and the General Court cannot, therefore, under any circumstances, substitute their own reasoning for that of the author of the contested act (judgments of 27 January 2000, *DIR International Film and Others* v *Commission*, C-164/98 P, EU:C:2000:48, paragraph 38, and of 6 October 2021, *World Duty Free Group and Spain* v *Commission*, C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 70).

324 Nonetheless, except where there is no material factor to justify that course of action, the General Court may be led, in proceedings for annulment, to interpret the reasoning of the contested measure in a manner which differs from that of its author, and even, in certain circumstances, to reject the latter's formal statement of reasons (see, to that effect, judgments of 27 January 2000, *DIR International*

Film and Others v *Commission*, C-164/98 P, EU:C:2000:48, paragraph 42, and of 6 October 2021, *World Duty Free Group and Spain* v *Commission*, C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 71).

325 Accordingly, while the terminology used by the General Court in the judgment under appeal differs from that of the decision at issue, it does not necessarily follow that the General Court identified abusive conduct that was substantively different from that identified by the Commission, or that it relied on different reasoning from that of the Commission in the decision at issue (see, to that effect, judgments of 6 October 2021, *World Duty Free Group and Spain* v *Commission*, C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 73, and of 10 September 2024, *Google and Alphabet* v *Commission (Google Shopping)*, C-48/22 P, EU:C:2024:726, paragraph 104).

326 In the present case, it must be noted, first, that the sentence in paragraph 828 of the judgment under appeal that is criticised by Google and Alphabet represents a conclusion. It cannot, therefore, be read independently of the rest of that paragraph.

327 That paragraph begins, first of all, with a formulation of the Commission's complaint that the licensing of the Play Store and Google Search app is made conditional on a set of obligations that restrict the freedom of OEMs wishing to obtain those licences, specifically in so far as they prohibit OEMs from marketing any other device running a non-compatible Android fork.

328 It goes on to state that 'that restriction stems from the AFAs and, in so far as it applies to smart mobile devices on which Google's apps are not pre-installed, is the only obligation that is considered in the [decision at issue] to be abusive. The Commission does not dispute Google's right to impose compatibility requirements in respect of devices on which its apps are installed. However, it considers … Google's practice of preventing the development and market presence of devices running a non-compatible Android fork to be abusive'.

329 The General Court inferred from this, lastly, that it was necessary to examine whether the Commission had succeeded in establishing, as it found in the decision at issue, that Google had implemented a practice designed to exclude non-compatible Android forks, and whether that practice could be classified as anticompetitive for the purposes of Article 102 TFEU.

330 Second, paragraph 828 of the judgment under appeal marks the start of the General Court's analysis of the first part of the fourth plea at first instance, by which it was alleged that the finding that it was abusive for Play Store and Google Search app licences to have been made conditional on compliance with the anti-fragmentation obligations was incorrect. That analysis is preceded, in paragraph 816 of the judgment under appeal, by a summary of recital 1036 of the decision at issue, according to which the Commission developed six lines of

argument to establish that the anti-fragmentation obligations were capable of restricting competition.

331 It follows from these preliminary observations that Google and Alphabet's claim concerning the alleged reformulation of the abuse referred to must be examined in the light of the whole of paragraph 828 of the judgment under appeal and of that summary.

332 Among the reasons set out by the Commission in recital 1036 of the decision at issue, the General Court identified, in paragraph 816 of the judgment under appeal, the fact that the anti-fragmentation obligations hinder the development of non-compatible Android forks; the fact that Android-compatible forks do not constitute a credible competitive threat to Google; and the fact that the capability of the anti-fragmentation obligations to restrict competition is reinforced by the unavailability of Google's proprietary APIs to non-compatible Android fork developers, which reduces the incentive for developers to design apps intended to function on such OSs.

333 As the Advocate General noted, in essence, in points 175 and 176 of her Opinion, it follows from paragraph 816 of the judgment under appeal, which has not been contested by Google and Alphabet in their appeal, that the Commission actually criticised Google for having adopted a practice aimed at excluding non-compatible Android forks because they constituted a threat to Google, the reality of that threat having been explained by the Commission in section 12.6.1 of the decision at issue. Thus, according to the Commission, if the development of those forks was restricted, this was because OEMs no longer marketed them for fear of no longer being able to obtain licences for Google's apps.

334 By analysing whether the Commission had established this state of affairs to the requisite legal standard, the General Court did not, therefore, substitute its own reasoning for that set out in the decision at issue.

335 It follows that while the terminology used in the last sentence of paragraph 828 of the judgment under appeal does indeed differ from that used in Article 1(1)(c) of the decision at issue, it cannot be concluded that the General Court thereby identified abusive conduct that differs from that established by the Commission in that decision.

336 In addition, although the terms of Article 1(1)(c) of that decision refer only to Google's conduct in making the licensing of the Play Store and the Google Search app conditional on the anti-fragmentation obligations, it is apparent from that decision and from the judgment under appeal that the compatibility requirements relating to the devices on which Google's apps were installed, the legitimacy of which is not called into question by the General Court, are a relevant element of the context in which that conduct took place.

337 The importance of that contextual element in the analysis of the second abuse identified in the decision at issue can, in the first place, be inferred from

paragraphs 855 and 856 of the judgment under appeal. Paragraph 855 confirms that access to Google's proprietary APIs was of strategic interest to developers and OEMs. Moreover, the General Court stated, in paragraph 856, that 'examination of the second plea [for annulment] has shown [that] OEMs wishing to avail of Google's proprietary APIs were required to enter into a MADA, which presupposed prior acceptance of the terms of the AFAs'. It is on the basis of those findings that the General Court concluded, in paragraph 856 of the judgment under appeal, that it had to 'be held that Google's policy in relation to the development and distribution of its [proprietary] APIs constituted an incentive to enter into an AFA, which … limited the markets for non-compatible Android forks'.

338 In the second place, the General Court's 'preliminary observations on the scope of the second abuse identified in the [decision at issue]', in paragraphs 803 to 814 of the judgment under appeal, confirm the importance of that contextual element and, consequently, the absence of any error of law in the General Court's paraphrasing of the conclusion in paragraph 828 of that judgment.

339 It is, first of all, expressly confirmed in paragraph 809 of that judgment that, 'according to the [decision at issue], Google has … abused its dominant position … by making the licence for the Play Store and Google Search conditional on acceptance of the anti-fragmentation obligations'. The General Court went on to state, in paragraph 810 of that judgment, that, 'as [Google and Alphabet] confirmed at the hearing, the AFAs are considered abusive in the [decision at issue] only in so far as they require OEMs to ensure that all the devices which they market and whose OS is Android or an Android fork, including those on which Google's apps are not pre-installed, are compatible with the CDD. In other words, the AFAs are considered to be abusive only in so far as they prohibit the marketing of smart mobile devices that have an OS which is a non-compatible Android fork even if no Google apps are pre-installed on those devices.' Lastly, the General Court found, in paragraph 812 of the judgment under appeal, that the Commission was, in essence, complaining that Google had 'implemented an anticompetitive practice aimed at depriving non-compatible Android forks of commercial markets'.

340 Those contextual elements also show that what the Commission refers to as the second abuse identified in the decision at issue consists in the very fact of having required that all the technical standards defined in this instance in the CDD be applied, including to devices on which proprietary apps and services, including Google's proprietary APIs, are not pre-installed. Accordingly, the General Court did not err in law when it ruled, in paragraph 864 of the judgment under appeal, that the Commission was not required to identify precisely the CDD standards which gave rise to those effects.

341 It follows from all of the foregoing considerations that the first part of the third ground of appeal must be rejected as unfounded.

(b) Second part

342 Google and Alphabet submit that the General Court erred in law when it held, in paragraph 893 of the judgment under appeal, that the Commission was not required to carry out a counterfactual analysis to evaluate the hypothetical consequences that might have been observed, in the absence of the second abuse, in so far as the existence of the restrictions at issue and of their effects on competition had been sufficiently demonstrated.

343 In that regard, as has been noted in paragraph 225 of the present judgment, while the Commission is required to establish a causal link between the contested abusive behaviour and its anticompetitive effects, it may nevertheless, in that context, rely on a range of evidence, without being required systematically to use any single methodology, in particular a counterfactual analysis.

344 In the present case the General Court found, first, in paragraph 834 of the judgment under appeal, that the material existence of the practice considered by the Commission, in the decision at issue, to constitute the second abuse was not only admitted by Google and Alphabet but was also established. Second, the General Court found, in paragraph 841 of that judgment, on the basis of their statements, supported by the documents in the file, that that practice had been knowingly implemented with the aim of limiting market access of non-compatible Android forks. Third, the General Court came to the conclusion, in paragraph 847 of that judgment, that Google and Alphabet had not demonstrated that those forks could not in any event have constituted a competitive threat to them. Fourth, the General Court ruled, in paragraph 863 of that judgment, that the Commission had sufficiently established that the AFAs prohibited their signatories from providing markets for non-compatible Android forks and that that impediment had helped to strengthen Google's dominant position on the markets for general search services, while also proving detrimental to end users.

345 In order to justify the need for a counterfactual analysis, Google and Alphabet submit that Google's policy in relation to the development and distribution of its proprietary APIs would in any event have provided OEMs with an incentive to distribute only compatible Google Android devices. They take issue with the General Court, moreover, for having failed to analyse whether Fire OS's failure was attributable to the anti-fragmentation obligations and for merely stating, in paragraph 850 of the judgment under appeal, that even if there could be other reasons for the commercial failure of Fire OS, the Commission had established that the AFAs had deprived that OS of the markets which the OEMs that had entered into an AFA with Google could have constituted for it.

346 In that regard, it must be noted that Google and Alphabet do not criticise the other findings of the General Court, such as those relating to the failure of the Aliyun OS developed by Alibaba, which culminated in the findings recalled in paragraph 344 of the present judgment and, ultimately, in confirmation that the

actual foreclosure of non-compatible Android forks and the anticompetitive effects of that foreclosure had been demonstrated.

347 Furthermore, by their arguments relating to the General Court's assessment of Google's policy in relation to the development and distribution of proprietary APIs and the failure of Fire OS, Google and Alphabet seek, in reality, to obtain a new assessment of the facts and the evidence, which has already been conducted by the General Court.

348 However, as noted in paragraph 216 of the present judgment, an appeal lies on points of law only. In the absence of a claim of any kind of distortion, the arguments put forward by Google and Alphabet in support of the alleged need for a counterfactual analysis are therefore inadmissible.

349 Having regard to all of the above reasons, the second part of the third ground of appeal must be rejected as, in part, unfounded and, in part, inadmissible. Accordingly, the third ground of appeal must be rejected in its entirety.

D. Fourth ground of appeal

1. Arguments of the parties

350 By their fourth ground of appeal, Google and Alphabet complain that the General Court failed to take account of and to conduct a concrete examination of the arguments which they put forward and the evidence which they adduced in order to show that the anti-fragmentation obligations were objectively justified.

351 In particular, they claim that the General Court made four errors.

352 In their submission, first, the General Court failed to examine the need for the anti-fragmentation obligations. In paragraph 880 of the judgment under appeal, the General Court merely relied on the evidence of the Android OS's actual growth to support its conclusion that that platform did not face a survival risk from fragmentation throughout the infringement period when it should have queried whether that platform would have enjoyed the same rapid growth had Google not imposed the contested obligations. To that end, it should have referred, for example, to the experience of open-source operating systems that had done less to protect against fragmentation.

353 Second, it failed to consider Google's legitimate interest in protecting the entire Android ecosystem, including devices not incorporating Google's proprietary apps. The General Court considered, in paragraph 878 of that judgment, that the justification put forward by Google and Alphabet was unrelated to the alleged abuse, which concerned only the application of the anti-fragmentation obligations to devices not equipped with the GMS suite. It thereby failed to address their argument that Google's legitimate interest, as Android OS developer and steward

of the Android ecosystem, necessitated measures to safeguard that entire ecosystem.

354 Third, the General Court erred in upholding the decision at issue although the Commission had failed properly to assess the conditions under which Google adopted an open-source licence for the Android OS. The General Court held, in paragraph 886 of that judgment, that Google had made a 'choice' to accept the risks associated with releasing that OS on an open-source basis when Google had done the opposite, having consciously taken steps to avoid the risks that an unmanaged open-source model presented, which the General Court had not taken into account.

355 Fourth, the General Court failed properly to assess the evidence regarding the AFAs' necessity, given the inadequacy of a solution involving the registration of trade marks that would reserve the name 'Android' for them. The General Court merely stated, in that regard, in paragraph 883 of that judgment, that Google and Alphabet had not adduced any detailed evidence in support of that claim. The General Court thereby distorted the evidence establishing the inadequacy of a solution involving the registration of trade marks.

356 Gigaset acknowledges that the obligation to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by Google and Alphabet. Nevertheless, it contends that their arguments concerning the Commission's assessment of the AFAs addressed facts that were relevant for a correct legal analysis and, moreover, that if evaluated objectively, those facts would demonstrate that the AFAs' minimum compatibility requirements were a legitimate and necessary measure aimed at protecting the integrity of the entire Android ecosystem.

357 It submits, furthermore, that the General Court also erred in law when it refused to examine Google and Alphabet's argument that a solution consisting in the registration of trade marks that would reserve the name 'Android' for them would not be sufficient to avoid confusion between CDD-compatible and non-CDD-compatible devices.

358 HMD reproduces, in essence, the arguments put forward by Google and Alphabet.

359 The Commission and FairSearch contend that the fourth ground of appeal is inadmissible because, under the guise of relying on an error of law, Google and Alphabet challenge the General Court's factual findings regarding the lack of necessity of the anti-fragmentation obligations. In addition, they submit that Google and Alphabet have merely reargued parts of their case before the General Court, without identifying any error of law. In the alternative, the Commission maintains that this ground of appeal is unfounded.

2. Findings of the Court

360 By their fourth ground of appeal, Google and Alphabet claim that the General Court erred in its assessment of the objective justifications for the AFAs.

361 In that regard, it should be recalled, as a preliminary point, that it is for the undertaking that is in a dominant position to provide justification for behaviour that is liable to be caught by the prohibition under Article 102 TFEU (see, to that effect, judgments of 15 March 2007, *British Airways* v *Commission*, C-95/04 P, EU:C:2007:166, paragraph 69, and of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 40 and the case-law cited).

362 In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary, or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers. In that last regard, it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition (judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 41 and 42 and the case-law cited).

363 On that basis, Google and Alphabet raised a number of arguments before the General Court to show that the Commission had failed to take account of the procompetitive nature of the anti-fragmentation obligations, which were necessary to protect the integrity and quality of the Android OS against the risks inherent in any incompatibilities. Those arguments were summarised in paragraphs 868 to 873 of the judgment under appeal and were successively rejected by the General Court in its examination of those arguments as set out in paragraphs 877 to 891 of that judgment.

364 By the fourth ground of appeal, Google and Alphabet put forward four complaints in respect of that examination.

365 First, they argue that the General Court failed to examine the necessity of the anti-fragmentation obligations to facilitate compatibility among Google Android devices and to help to protect the quality and integrity of the Android OS against the risks of fragmentation. Second, in their view, the General Court inappropriately limited its assessment to a need to help to protect only Google Android devices carrying Google's proprietary apps. Third, it wrongly attributed to Google a choice to accept any and all consequences of releasing Android under an open-source licence. Fourth, it failed properly to consider the evidence adduced by Google and Alphabet to demonstrate that the Commission had made an error of

assessment in finding that a change of strategy in terms of branding was an appropriate alternative to the anti-fragmentation obligations.

366 Google and Alphabet nevertheless end the summary of each of those four complaints by accusing the General Court of the same error of law. They claim that the General Court failed, in the judgment under appeal, to take account of or to conduct a concrete examination of all the factors relevant to establishing whether the anti-fragmentation obligations were objectively justified.

367 However, as noted in paragraph 348 of the present judgment, an appeal lies on points of law only, the General Court alone having jurisdiction to establish and assess the relevant facts and to evaluate the evidence. The assessment of those facts and that evidence does not therefore constitute, save in the case of their distortion, a question of law subject, as such, to review by the Court of Justice in the context of an appeal.

368 In the present case, it must be noted, in the first place, that Google and Alphabet do not claim any distortion of the facts or evidence examined by the General Court, save for a single reference, in their written submissions, to a distortion of the evidence relating to the ineffectiveness of the defence of their intellectual property rights as a consequence of the non-examination of that evidence. As this has not been demonstrated, that assertion cannot be taken into consideration.

369 Where an appellant alleges distortion of the evidence by the General Court, that party must, pursuant to Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice, indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that party's view, led to such distortion. In addition, that distortion must be obvious from the documents in the Court's file without there being any need to carry out a new appraisal of the facts and the evidence (see judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 50, and of 21 December 2023, *United Parcel Service* v *Commission*, C-297/22 P, EU:C:2023:1027, paragraph 30).

370 In the second place, it should be noted that the arguments put forward by Google and Alphabet in support of the four complaints raised under the fourth ground of appeal refer to paragraphs 880, 878, 886 and 883, respectively, of the judgment under appeal and are based on a partial reading of the General Court's reasoning. By complaining that the General Court failed to take account of or to conduct a concrete examination of all the factors relevant to establishing whether the anti-fragmentation obligations were objectively justified, Google and Alphabet seek, ultimately, to challenge the findings of the General Court preceding each of those paragraphs in the context of its assessment of the objective justifications for the AFAs which they put forward.

371 It follows from the foregoing that the fourth ground of appeal must be rejected as inadmissible.

E. Fifth ground of appeal

1. Arguments of the parties

372 By their fifth ground of appeal, Google and Alphabet criticise the General Court for erroneously upholding the findings in the decision at issue relating to the single and continuous infringement despite the annulment of that decision in relation to portfolio-based RSAs.

373 They submit that it is apparent from the case-law that partial annulment of a Commission decision is possible only if the annulled elements can be severed from the remainder of the decision. That is not the case where partial annulment would alter the substance of the measure. As it is, the decision at issue penalised Google and Alphabet for a single and continuous infringement consisting of four separate abuses. In paragraph 1029 of the judgment under appeal, the General Court annulled that decision in so far as it concerned one of the four abuses, namely that relating to the portfolio-based RSAs, but upheld that decision with regard to the single and continuous infringement. The General Court thereby erred in law.

374 They argue that the General Court should in fact have assessed whether the annulment of one of the findings of infringement would alter the substance of the finding of a single and continuous infringement. Hence, there are essentially four defects in that respect in the judgment under appeal. First, it is not possible to substitute, without any basis for doing so, a single and continuous infringement consisting of three separate abuses for a single and continuous infringement consisting of four separate abuses that are complementary and interdependent, according to the decision at issue. Second, while annulling the finding relating to the portfolio-based RSAs, the General Court took those agreements into account, in paragraph 1018 of the judgment under appeal, as elements of context to confirm the decision at issue with regard to the existence of a single and continuous infringement. Third, the General Court took account, in paragraph 1027 of that judgment, of the agreement between Google and Apple on default setting of the Google Search app on the Safari browser to confirm the existence of a single and continuous infringement. However, that factual aspect is not relevant since it was never identified during the administrative procedure. Fourth, the General Court stated, without foundation, in paragraph 1028 of that judgment, that Google's practices were detrimental to the interest of consumers in having more than one source for obtaining information on the internet. However, no such finding was made. The General Court therefore impermissibly deviated from the findings in the decision at issue.

375 CCIA supports the arguments put forward by Google and Alphabet, in particular as regards the claim that the General Court substituted its own reasoning for that of the Commission as set out in the decision at issue.

376 The Commission contends that the General Court was fully entitled not to annul the decision at issue in its entirety. It submits that the fifth ground of appeal is both inadmissible, in that it is a new plea, and ineffective, in that the remaining infringements, beyond that which was annulled, subsist. This ground of appeal is in any event unfounded, according to the Commission.

2. Findings of the Court

377 By their fifth ground of appeal, Google and Alphabet claim, in essence, that the General Court did not draw the appropriate conclusions from the annulment of the decision at issue as regards the portfolio-based RSAs. They argue that that decision was based on the finding of a single and continuous infringement, consisting of four separate infringements, so that the annulment of one of its constituent elements should have led the General Court either to annul the finding of a single and continuous infringement or to assess whether the substance of that infringement was altered by the absence of that constituent element.

378 As a preliminary point, as regards, first, the allegedly novel nature of that plea, in that Google and Alphabet did not challenge at first instance the conclusion in the decision at issue that the MADA pre-installation conditions, the anti-fragmentation obligations and the portfolio-based RSAs constituted a single and continuous infringement, nor did they argue that that decision should have been annulled in its entirety since one of the elements of that infringement was annulled by the General Court, it is sufficient to note that, by that ground of appeal, Google and Alphabet seek to advance, before the Court of Justice, a plea arising from the judgment under appeal itself and one that is intended to criticise the merits of it, in law. That ground of appeal cannot, therefore, be rejected as being inadmissible.

379 Second, as regards the allegedly ineffective nature of this ground of appeal, the Commission contends that even if it were deemed to be well founded, it could only lead to the remaining separate abuses, taken together, failing to constitute a single and continuous infringement. Accordingly, such a finding would not be sufficient to justify setting aside the judgment under appeal in its entirety, since those abuses are not affected by the same ground of appeal.

380 However, it must be held that in so far as the General Court based the calculation of the fine on the premiss of a single and continuous infringement, merely disputing the existence of such an infringement is sufficient for part of the operative part of the judgment under appeal to be called into question. The Commission's arguments on that point must therefore be rejected.

381 As to the substance, it must be observed, on the one hand, that an infringement of Article 102 TFEU can result not only from an isolated act, but also from a series

of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Thus, when the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to treat everything together as a whole, including for the purposes of calculating the fine (see, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 258, and of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41).

382 On the other hand, according to settled case-law, partial annulment of an act of EU law is possible only if the elements which it is sought to have annulled can be severed from the remainder of the measure. That requirement is not satisfied where the partial annulment of a measure would cause the substance of that measure to be altered, a point which must be determined on the basis of an objective criterion and not of a subjective criterion linked to the intention of the authority which adopted the measure at issue (see, to that effect, judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 38 and the case-law cited).

383 In the present case, the General Court annulled Articles 1, 3 and 4 of the decision at issue in so far as they concern the fourth abuse of the single and continuous infringement relating to the portfolio-based RSAs. It also took account of that partial annulment by varying Article 2 of the decision so as to reduce the fine imposed.

384 While the Commission was unable, according to the General Court, to show that the portfolio-based RSAs were abusive, the General Court nevertheless considered that the finding of a single and continuous infringement should stand.

385 It must be held, as did the General Court, first, that in so far as each of the forms of conduct at issue was characterised as a separate, autonomous infringement in the decision at issue and, taken together, those forms of conduct were characterised as a single and continuous infringement, the fact that the abusive nature of one of them may have been called into question cannot call into question the abusive nature of the rest. Moreover, as regards continuing to characterise the remaining forms of abusive conduct as a single and continuous infringement, the General Court duly explained that the partial annulment of the decision at issue in relation to the portfolio-based RSAs did not affect the finding that there was an overall strategy that covered the three remaining infringements.

386 As the Advocate General noted in point 212 of her Opinion, the General Court found, in particular, in paragraphs 1021 to 1023 and 1025 of the judgment under appeal, that the factual circumstances of the established infringements show that the first, second and third restrictions at issue, that is, the Google Search app tie, the Chrome browser tie and the AFAs, which were classified as three distinct

infringements, were part of an overall strategy. That strategy consisted in attaching special conditions to the use of the Android OS, on the one hand, and to the use of certain apps and services, on the other. It was aimed at anticipating the development of the mobile internet, while preserving Google's own business model, which is based on the revenues which it derives essentially from the use of its general search service. In the context of that overall strategy pursued by Google, the preservation of the dominant position which it held, throughout the entire period of the infringement, on the national markets for general search services, to which the first and second restrictions at issue contributed, was therefore of decisive importance.

387 Notwithstanding the partial annulment of the decision at issue as to the abusive nature of the portfolio-based RSAs, the General Court found, in view of the available evidence, that that overall strategy remained in effect and that it constituted an overall plan, within the meaning of the case-law cited in paragraph 381 of the present judgment.

388 The severability of the finding in relation to portfolio-based RSAs cannot therefore be called into question; the General Court was therefore fully entitled partially to annul the decision at issue while retaining the classification of a single and continuous infringement used in that decision.

389 As regards, second, the more specific arguments put forward by Google and Alphabet in the fifth ground of appeal, it is necessary first to clarify, as has already been established in paragraph 197 of the present judgment, that the General Court was entitled to take account of the RSAs, irrespective of whether they were abusive, as relevant contextual elements for the purpose of confirming the existence of a single and continuous infringement. It is apparent from paragraph 1018 of the judgment under appeal that the General Court found that the RSAs were correctly taken into consideration in the decision at issue as elements of the factual context for the purpose of assessing the exclusionary effects caused by the first, second and third separate abuses. Since the General Court added, in paragraph 1019 of the judgment under appeal, that those contextual elements are also relevant for the purpose of assessing the combined effects of the practices, Google and Alphabet cannot criticise it for taking those elements into account.

390 Second, Google and Alphabet cannot criticise the General Court for having set out, in paragraphs 1027 and 1028 of the judgment under appeal, contextual elements mentioned by the decision at issue such as Google's agreement with Apple or the limited choice available to search engine users. Those contextual elements are invoked not as proof of the existence of a single and continuous infringement but as elements illustrating the broader context of Google's conduct. Accordingly, those elements simply support the conclusions drawn by the Commission and the General Court.

391 In the light of the foregoing considerations, the fifth ground of appeal must be rejected as unfounded.

F. Sixth ground of appeal

1. Arguments of the parties

392 By their sixth ground of appeal, Google and Alphabet complain that the General Court made four errors of law in exercising its unlimited jurisdiction. They submit that the General Court increased the amount of the fine despite the fact that the finding, in the decision at issue, as to the existence of one of the four abuses constituting the single and continuous infringement recognised in that decision was invalidated following the General Court's partial annulment of Articles 1, 3 and 4 of the decision.

393 In their submission, in the first place, the General Court's decision to increase the amount of the fine infringed Google and Alphabet's rights of defence and distorted the evidence adduced before the General Court. In the second place, the General Court infringed the presumption of innocence laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union by relying in its assessment of the gravity and duration of the single and continuous infringement on Google's legitimate practices, such as the portfolio-based RSAs, device-based RSAs and the refusal to make its proprietary APIs available to developers of non-compatible Android forks. In the third place, Google and Alphabet complain that the General Court breached the principle *ne ultra petita* by adopting an approach to assessing the criterion of gravity that no party had pleaded, while relying on factual elements extrapolated from the decision at issue. In the fourth place and alternatively, the fine thus set by the General Court was disproportionate and lacked reasoning.

394 Google and Alphabet conclude from this that paragraph 2 of the operative part of the judgment under appeal should be set aside. Should the Court reject the first five grounds of appeal, the Court should then, in the exercise of its unlimited jurisdiction, reduce the original fine imposed by at least one third.

395 The Commission contends that this ground of appeal is unfounded.

2. Findings of the Court

396 By their sixth ground of appeal, Google and Alphabet claim that the General Court made four errors of law in exercising its unlimited jurisdiction.

397 The General Court allegedly infringed, first, the rights of defence of Google and Alphabet; second, the presumption of innocence, laid down in Article 48(1) of the Charter of Fundamental Rights; and, third, the principle *ne ultra petita*. Fourth, the fine imposed by the General Court was disproportionate and unreasoned.

398 It should be borne in mind as a preliminary point that, in accordance with Article 261 TFEU and Article 31 of Regulation No 1/2003, the General Court has unlimited jurisdiction with regard to the fines imposed by the Commission. It is thus empowered, in addition to carrying out a mere review of the lawfulness of those fines, to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine imposed, where the question of the amount of the fine is before it (see, to that effect, judgments of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraphs 61 and 62; of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraphs 123 and 124; and of 12 January 2023, *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2023:12, paragraphs 151 and 152).

399 In that regard, it is settled case-law that the General Court is bound, when exercising its unlimited jurisdiction, by certain requirements, which include the duty to state reasons, by which it is bound in accordance with Article 36 of the Statute of the Court, applicable to the General Court under the first paragraph of Article 53 of the statute, and the principle of equal treatment (judgments of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 77, and of 12 January 2023, *Lietuvos geležinkeliai* v *Commission*, C-42/21 P, EU:C:2023:12, paragraph 154). Those requirements are similarly binding on the General Court where it departs from the indicative rules laid down by the Commission in its Guidelines on the method of setting fines, which are not binding on the Courts of the European Union but are capable of guiding them when they exercise their unlimited jurisdiction (judgment of 18 March 2021, *Pometon* v *Commission*, C-440/19 P, EU:C:2021:214, paragraph 146).

400 As regards respect for the rights of the defence, it is also apparent from the case-law of the Court of Justice that proceedings before the Courts of the European Union are *inter partes*, the exercise of unlimited jurisdiction in such proceedings being no exception (see, to that effect, judgments of 17 December 2009, *Review M* v *EMEA*, C-197/09 RX-II, EU:C:2009:804, paragraph 58; of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 64; and of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 213).

401 While it is common ground that, in exercising that jurisdiction, the Courts of the European Union may take all the factual circumstances into account (see, to that effect, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 692, and of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 78), the *inter partes* principle nevertheless means that the parties are to have the opportunity to express their views as regards the setting of the fine and that the General Court is not to apply any factor, circumstance or criterion which those parties could not have foreseen would be taken into account

(see, to that effect, judgment of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraphs 70 and 82).

402 With regard, moreover, to the principle *ne ultra petita*, the Court has repeatedly ruled that the exercise of powers of unlimited jurisdiction provided for in Article 261 TFEU and in Article 31 of Regulation No 1/2003 does not amount to a review of the Court's own motion. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, it is therefore for the applicant to raise pleas in law against the measure of EU law being challenged and to adduce evidence in support of those pleas (judgments of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 64; of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 213; and of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission*, C-617/13 P, EU:C:2016:416, paragraph 85). By contrast, as noted in paragraph 398 of the present judgment, where the question of the amount of the fine imposed by the Commission on the basis of Regulation No 1/2003 is before them, the Courts of the European Union are empowered to substitute their own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine imposed.

403 In the present case, none of the arguments put forward by Google and Alphabet in relation to the alleged breach of the principle *ne ultra petita*, which it is appropriate to examine in the first place, demonstrates that the General Court erred in law in its application of the rules set out in the preceding paragraph of the present judgment. It is not disputed that, in their action, Google and Alphabet claimed that the decision at issue should be annulled and, in the alternative, that the fine should be cancelled or reduced in the exercise of the General Court's unlimited jurisdiction. The amount determined by the General Court, which is less than the amount imposed by the Commission in the decision at issue, was set by the General Court in response to that claim.

404 In the second place, the *inter partes* principle means, as noted in paragraph 401 of the present judgment, that Google and Alphabet are to have had the opportunity to express their views as regards the setting of the amount of the fine and that the General Court is not to apply any factor, circumstance or criterion which those parties could not have foreseen would be taken into account.

405 In the present case, the General Court, first of all, considered in paragraph 1085 of the judgment under appeal that, unlike the Commission which had used a single, overall multiplier to take account of the duration of Google and Alphabet's participation in the infringement, it was more appropriate to take account of other parameters in order better to reflect certain particularities of the progress of the single and continuous infringement over time in the light, in particular, of its variable intensity.

406 On that premiss, it went on, in paragraph 1088 of that judgment, to identify three separate periods between 1 January 2011 and the date of adoption of the decision

at issue. The second of those periods was described, in paragraph 1093 of that judgment, as 'crucial for the development of online search services from smart mobile devices'.

407 Lastly, the General Court confirmed, in paragraph 1094 of that judgment, that it would take account, in determining the amount of the fine, both of the respective duration of the various aspects of the single and continuous infringement and of the differences between the periods it had identified, in order to assess the variable intensity of the effects of that infringement.

408 Thus, by reference to the variability of the intensity of the effects during the infringement period, the General Court set the amount of the fine at EUR 4 125 000 000 in paragraph 1099 of the judgment under appeal.

409 That subdivision of the infringement period, due to a potential variability in the gravity of the relevant undertaking's conduct, is, as is apparent from paragraphs 1086 and 1088 of the judgment under appeal, one of the parameters adopted in the General Court's method, as compared to the arithmetical and linear method defined by the Commission in the decision at issue.

410 In the circumstances of the present case, it cannot be argued that, by ruling, in paragraph 1088 of the judgment under appeal, that it was necessary to take particular account in assessing the amount of the fine of the intensity of the anticompetitive conduct over time, which resulted in three distinct periods being identified, the second of which was described as crucial, in paragraph 1093 of the judgment under appeal, the General Court infringed the rights of defence of Google and Alphabet.

411 While the General Court is bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all complaints based on issues of law or of fact which seek to show that the amount of the fine is not commensurate with the gravity or duration of the infringement, it cannot be required to invite the parties to comment on the variation of the fine that is specifically envisaged or on the precise parameters which it intends, from that aspect, to apply.

412 In any event, it must be held, in the first place, that it is apparent from the judgment under appeal, in particular from paragraphs 1043, 1047 and 1099 thereof, that Google and Alphabet implemented the abusive practices at issue intentionally, that is to say, in full knowledge of the effects which those practices would produce on the relevant markets, and that that was an overall strategy the classification of which as a single and continuous infringement, as is apparent from paragraph 385 of the present judgment, is not vitiated by the Commission's errors in relation to the characterisation of the portfolio-based RSAs.

413 In the second place, as the General Court found in paragraph 1087 of the judgment under appeal, Google and Alphabet's abusive practices under their overall strategy were reinforced once both the Google Search app and the Chrome browser were covered by the MADA pre-installation conditions. Google thereby

ensured that it had a significant competitive advantage over the two main entry points for internet searches, a competitive advantage which it was very difficult for Google and Alphabet's competitors to offset.

414 In the third place, it is apparent from paragraph 1028 of the judgment under appeal that the abusive practices of Google and Alphabet were detrimental to the interest of consumers in having more than one source for obtaining information on the internet, by restricting, in particular, the development of search services directed at those segments of consumers that attached particular value to, inter alia, the protection of privacy or specific linguistic features within the EEA.

415 It follows from the grounds of the judgment under appeal referred to in the preceding paragraphs of the present judgment that the amount of the fine set by the General Court is based on factors which were subject to an exchange of arguments and, moreover, may be justified, irrespective of any possible variation in the gravity of the conduct of Google and of Alphabet during the infringement period, by the need to impose a fine that is sufficiently dissuasive given the gravity of the abuses penalised and the context in which they took place.

416 As to whether that amount is proportionate, Google and Alphabet submit that it is, in reality, an increase in the amount set in the decision at issue, and that that amount should have been reduced by at least one third.

417 In that regard, it is sufficient to note that Google and Alphabet do not offer any justification or explanation at all for seeking a reduction of at least one third of that amount. As indicated in paragraph 402 of the present judgment, it is for the applicant to adduce evidence in support of the pleas raised.

418 In addition, the General Court has fully explained the reasons for the finding of a single and continuous infringement notwithstanding the annulment of the abuse relating to the portfolio-based RSAs, which constitutes, in itself, justification for the limited reduction of the amount of the fine.

419 In the light of the foregoing considerations, the sixth ground of appeal must be rejected as unfounded.

420 Since none of the grounds put forward in support of the present appeal has been successful, the appeal must be dismissed in its entirety.

VI. Costs

421 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

422 Under Article 140(3) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) of those rules, the Court may order an intervener to bear its own costs.

423 In accordance with Article 184(4) of those rules, where the appeal has not been brought by an intervener at first instance, that intervener may not be ordered to pay costs in the appeal proceedings unless it participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court of Justice may decide that that intervener is to bear its own costs.

424 In the present case, since the Commission has applied for costs and Google and Alphabet have been unsuccessful, Google and Alphabet must be ordered to bear their own costs and to pay those incurred by the Commission.

425 ADA, CCIA, Gigaset, HMD, Opera, BDZV – Bundesverband Digitalpublisher und Zeitungsverleger, BEUC, FairSearch, Seznam and Verband Deutscher Zeitschriftenverleger shall each bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders Google LLC and Alphabet Inc. to bear their own costs and to pay those incurred by the European Commission;

3. Orders Application Developers Alliance, Computer & Communications Industry Association, Gigaset Communications GmbH, HMD global Oy, Opera Norway AS, BDZV – Bundesverband Digitalpublisher und Zeitungsverleger eV, Bureau européen des unions de consommateurs (BEUC), FairSearch AISBL, Seznam.cz, a.s. and Verband Deutscher Zeitschriftenverleger eV to bear their own costs.

Jürimäe Lenaerts Schalin

Gavalec Csehi

Delivered in open court in Luxembourg on 2 July 2026.

A. Calot Escobar K. Jürimäe

Registrar President of the Chamber