Van Bael & Bellis

Android Auto – Does Article 102 make open digital platforms into public utilities?

Under the EU's long-standing refusal to deal case law, a dominant firm would be required to grant third parties access to its assets only under strict conditions, including evidence that access was indispensable for the third party's ability to compete. But, following the Court of Justice's ("**ECJ**") *Android Auto/Enel* judgment, these strict conditions no longer apply when a third party seeks access to an "open" digital platform – a platform designed in part for third party use. Denying a third party access to an open (dominant) platform can infringe Article 102 if the third party can credibly claim that the platform provides an attractive channel to reach consumers.

Android Auto/Enel significantly limits the right of developers of open digital platforms to control content on their platforms, even if access to the platform is not considered indispensable. Platform developers may even be required to spend time and money so that third party apps, at least those considered actual or potential competitors, are available to consumers on the platform.

Android Auto/Enel's lowering of liability standard has the most immediate impact of strengthening the Commission's hand vis-à-vis the very large digital platforms that regularly are in the Commission's crosshairs. But this comes with trade-offs – distorted investment incentives, reduced legal certainty, and increased compliance costs. And this could affect not only the very large digital platforms. Other platforms that are successful in their space, but may be less in the spotlight, might get caught as well.

Background

The case relates to Google's Android Auto platform, which allows drivers to access certain smartphone apps directly on a vehicle's infotainment screen. Enel X Italia sought to have its JuicePass app - an app launched in Italy that enables drivers to find and reserve charging stations for their electric vehicles (among other features) – available on Android Auto. The app was already available in Google Play (and used on mobile phones), but Enel viewed Android Auto as an attractive additional channel to reach consumers.

Google refused Enel's request, citing safety reasons and lack of a specific template that would be required to ensure JuicePass's interoperability with Android Auto. The Italian Competition Authority sided with Enel, finding that Google's refusal constituted an abuse of Google's dominant position and fining Google over EUR 102 million. On appeal, the Italian Council of State issued a preliminary ruling request to the ECJ.

The ECJ case

Google's main argument was that access to Android Auto was not indispensable for the JuicePass app to compete (as demonstrated by drivers' increased use of the JuicePass app as well as competing apps not available on Android Auto). It could therefore not be found liable under the ECJ's refusal to deal case law. In particular, the landmark Bronner judgment held that there was a duty to deal only if, among other criteria, access to the dominant firm's assets was indispensable for a rival to compete, a condition clearly not met in this case.

The ECJ held, however, that the indispensability requirement was not relevant where a dominant firm has developed a digital platform not only for its own business needs but with a view to enabling third-party undertakings to use it. Since Android Auto was developed also for use by third parties, Google's refusal to grant the JuicePass app access to the Android Auto platform could be abusive, despite evidence that Android Auto was not indispensable for the JuicePass app to reach consumers and compete. It was sufficient that the refusal excluded a third party from a platform it considered an attractive channel to reach consumers. The Court further found that Article 102 could require Google to invest its own time and resources to develop a solution enabling the JuicePass app to appear on Android Auto.

The ECJ's analysis is remarkable for several reasons:

- The ECJ relied on questionable dominance findings in the Italian proceedings. It accepted that "Android Auto is a piece of infrastructure in the digital sector" and belongs to a "market" on which Google was dominant. But the Android label cannot be equated with dominance. Dominance can be assessed only in relation to products which incorporate versions of the Android platform, such as mobile phones, TVs, or a platform allowing drivers to project apps to an infotainment screen. It is unfortunate that the ECJ, although it took great liberties in reformulating questions referred to it, did not opine on the insufficient dominance analysis, a cornerstone in an Article 102 case.

- The Court confirmed that there should be an effects analysis, but that it can be cursory – capability of having harmful effects was sufficient to establish an Article 102 infringement, and even evidence showing

that the third-party app and its competitors continued to be active/grow on the relevant market without access to Android Auto was not considered determinative. The Court did concede that this type of evidence could be used to show that the refusal of access was not capable of having the alleged exclusionary effects. But this is a very soft framework for an effects analysis – a competition authority can always come up with a narrative about "capability to foreclose" to determine that there are harmful effects, even in the face of evidence to the contrary. *Android Auto/ Enel* highlights the benefits of a robust, evidence-based effects analysis, as it would have helped to uncover the shortcomings in the dominance analysis.

- The Court engaged in a selective discussion of incentives: it carefully recited the incentive rationale supporting the indispensability requirement in traditional refusal to deal scenarios. Yet, the Court did not consider that interference with the freedom to contract and the right to property, which the Court readily accepted, also distorts incentives – potential complications from third party access requests, and the need to invest in making the platform accessible for third party apps make developing an open platform a less attractive commercial option. Closed platforms create fewer competition law risks. And limiting the developer's own apps on the platform may reduce the need to accommodate access requests by actually or potentially competing apps. Less innovation and less choice cannot be in the interests of consumers.

- The grounds to justify a refusal to deal are very narrow. The ECJ held that a refusal could be justified if granting interoperability would compromise the security or the integrity of the platform, or where it would be impossible for other technical reasons to ensure interoperability. The dominant firm's business decision that it would not be in its own commercial interests to commit the necessary resources to ensure interoperability for third party apps does not represent an acceptable justification. Thus, in the absence of security/integrity/technical impossibility reasons, Article 102 obliges the dominant undertaking to invest time and resources to develop the necessary templates. The ECJ concedes that the dominant firm would be entitled to appropriate compensation. But negotiations about what compensation would be appropriate would be inherently fraught with uncertainty, and if the dominant firm takes a robust position on being compensated for all direct and indirect costs, it might run into further antitrust risks.

The impact of *Android Auto/Enel*

Android Auto/Enel continues to lower the threshold for intervention under Article 102 in the digital space, and demonstrates the Court's reluctance to impose on the Commission and other competition authorities rigorous analytical discipline in cases against large digital platforms. By imposing not only a wide-ranging duty to deal, but also a duty to invest solely for the benefit of a third party, open digital platforms are treated almost like public utilities, with less control over how their assets are used and less freedom to decide on what projects they prefer to deploy time and resources.

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