COURT OF JUSTICE
OF THE EUROPEAN UNION

PRESS RELEASE No 132/24
Luxembourg, 5 September 2024

Advocate General's Opinion in Case C-233/23 | Alphabet e.a.

AG Medina: Google's refusal to provide third-party access to Android Auto platform may be in breach of competition rules

Google [1] is the author and developer of Android OS, an open-source operating system for Android mobile devices. In 2015, Google launched Android Auto, an app for mobile devises with an Android operating system that enables users to access certain apps on their smartphone through a car's integrated display. Third-party developers can create their versions of their own apps that are compatible with Android Auto by using templates provided by Google.

Enel X, forms part of the Enel Group, and provides electric car charging services. In May 2018, it launched JuicePass, an app which offers a set of features for charging electric vehicles. In September 2018, Enel X asked Google to make JuicePass compatible with Android Auto. Google refused, stating that, in the absence of a specific template, media and messaging apps were the only third party apps compatible with Android Auto. Google justified its refusal on the basis of security concerns and the need to allocate the resources necessary for the creation of a new template.

The Italian Competition Authority found Google's conduct to be in breach of EU competition rules. It held that in obstructing and delaying the publication of JuicePass on Android Auto, Google had abused its dominant position. Google challenged this decision before the Italian Council of State that referred the issue to the Court of Justice.

In today's Opinion, Advocate General Laila Medina examines whether this case falls under the traditional case-law applicable to refusals to grant access by a dominant undertaking – namely the *Bronner* conditions [2]. The Advocate General then considers whether access obligations, in terms of interoperability, require dominant undertakings to engage in an active behaviour such as the development of the necessary software.

Advocate General Medina concludes that the *Bronner* conditions do not apply where the platform whose access is requested has not been developed by the dominant undertaking for its exclusive use, but has been conceived and designed with the aim of being nourished by apps of third party developers. In such a situation, it is not necessary to demonstrate the indispensability of that platform for the neighbouring market. By contrast, **an undertaking abuses its dominant position if it engages in conduct consisting of excluding, obstructing or delaying access by the app developed by a third-party operator to the platform, provided that that conduct is capable of producing anticompetitive effects to the detriment of consumers and is not objectively justified**.

A refusal by a dominant undertaking **to provide access** to a third-party operator to a platform such as that concerned in the present case **may be objectively justified** where the access requested is technically impossible or where it could affect, from a technical perspective, the performance of the platform or run counter to its economic model or purpose. However, the mere fact that, in order to grant access to that platform, the dominant undertaking must, in addition to giving its consent, develop a software template taking into account the specific needs of the operator requesting access cannot in itself justify a refusal of access, provided that an appropriate time frame is allowed for that development and that that development is subject to appropriate consideration in favour of the dominant undertaking. Both elements must be communicated by the dominant undertaking to the operator

requesting access upon that request.

EU competition rules do not impose an obligation to predefine objective criteria for examining request applications of access to a platform. Only in the context of several requests made simultaneously, the absence of any such criteria might constitute an element to take into consideration in order to assess the abusiveness of the conduct reproached to the dominant undertaking when it leads to a situation of excessive delay in terms of granting access or to discriminatory treatment among concurrent applicants.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the Opinion is published on the CURIA website on the day of delivery.

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[1] Google Italy Srl, the Italian subsidiary of Google LLC, in turn owned by Alphabet Inc. The three undertakings are referred to as "Google".

[2] They take their name from the judgment of the Court of Justice of 26 November 1998 in Case C-7/97 Bronner (see Press Release No. 72/98). According to those criteria, practices consisting in a refusal to grant access to infrastructure developed by a dominant undertaking for the needs of its own activities and owned by it are liable to constitute an abuse of a dominant position provided not only that the refusal is such as to eliminate all competition on the relevant market on the part of the applicant for access and cannot be objectively justified, but also that the infrastructure in itself is indispensable to the exercise of the applicant's activity, in the sense that there is no actual or potential substitute for that infrastructure.