Android Auto (C-233/23)

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All views are personal

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Setting the scene

- AGCM Decision of 27/4/2021. Interoperability of JuicePass (Enel's app) with Android Auto (projection in car infotainment system). TAR Lazio dismisses action in first instance. Consiglio di Stato (CoS) raises questions for preliminary ruling.
- AGCM: G has a central role in the development of the market; saw elements of leveraging in G's conduct, as it has developed or was capable of developing an app with similar features to JP. But the analysis tried to "fit" the Bronner criteria (formally): indispensability deemed to met as there are no convenient/safe alternatives (while driving), protecting competition in digital markets requires considerations of its unique features; almost regulatory position, G can "decide which apps may be present on Android Auto"; likely effects: network effects associated to G maps being the only one available, at a key period of market development.
- By contrast, Alphabet/Google submitted that the interoperability had to "indispensable" (Bronner), that conduct was justified, and that the downstream market had to be identified (AGCM mainly identified a "competitive space").
- CoS agreed that digital markets had some specificities. Access was "indispensable" for easy and safe use; risk of losing appeal by customers and G developing its own product; CoS is suggesting that indispensability should be interpreted in a flexible manner.

First question: is indispensability indispensable?

The ECJ reformulates the question: in essence the CoS asks is there can be an abuse even if platform is not indispensable, "*but is such as to make that app more attractive to consumers*" (36).

First, Bronner applies only to "*infrastructure developed by a dominant undertaking for the purposes of its own business and owned by it*" (39), and implies a more demanding test, which "*was justified by the specific circumstances of that case*" (40). The ECJ explains such circumstances (41-43): maintaining long-term incentives to develop facilities.

Second, "*by contrast*", where a dominant undertaking has developed infrastructure not solely for the needs of its own business "*but with a view to enabling third-party undertakings to use that infrastructure*", the condition relating to whether that infrastructure is indispensable for carrying on the business of the entity applying for access, in that there is no actual or potential substitute for that infrastructure, "*does not apply"* (44). The cost of developing the infrastructure in such case has been assumed "*with a view to that infrastructure being able to be used by third-party undertakings*" (46), and such access has already been granted (47).

Third, in the instant case (48-51), "*a digital platform intended to enable the use, on the motor vehicle infotainment system, of apps developed in particular by third parties and downloaded on users' mobile devices cannot be regarded as having been created solely for the needs of that undertaking in a dominant position". The general test applies: "actual or potential effect of excluding, obstructing or delaying the development on the market of a product or service which is at least potentially in competition with a product or service supplied or capable of being supplied by the undertaking in a dominant position and constitutes conduct which restricts competition on the merits, and is thereby capable of causing harm to consumers*" (51).

Second question: relevance of lack of exclusion even growth of competing app

No need to prove actual exclusionary effect or that practice is successful (55); but tangible evidence is “actual capability” to produce restrictive effects is needed and doubt benefits the accused (57).

Mere maintenance of the same degree of competition or even the growth of that competition is not enough to negate such capability, as absence of effects may be due to different causes (58): “*In particular, first, whether the conduct at issue is abusive cannot depend on the ability of competitors on the market concerned to mitigate such effects and, second, it cannot be ruled out that, in the absence of that conduct, competition on that market could have grown even further*”.

Third and fourth questions: justifications

The ECJ accepts that security or integrity concerns could objectively justify conduct, as well as technical reasons which make such interoperability "*impossible*" (73).

Outside such scenarios, absence of template is no justification, but "*the need to devote a reasonable period of time to that development and therefore not to be able immediately to implement the requested interoperability may be regarded as objectively necessary and proportionate*" (74).

The ECJ provides some elements which are relevant in this assessment (75).

Art 102 TFEU does not preclude requiring a "*fair and proportionate*" financial contribution (76).

Failure to respond can constitute evidence of lack of justification (77).

Fifth question: no need for market definition downstream

This was one of A/G's main criticisms: the AGCM described "competitive spaces". The ECJ shows understanding for this approach in dynamic environments, i.e. restriction may be shown even if market is not "defined" (85):

"*a precise definition of the product market and the geographic market is not necessarily required to identify the downstream market*";

"*where the downstream market concerned is still developing or is evolving rapidly and, therefore, its scope is not fully defined on the date on which the undertaking in a dominant position implements the allegedly abusive conduct, it is sufficient for the competition authority to identify that market, even if it is only a potential market*";

"*that authority must then, taking account of the characteristics and the potential scope of that market, demonstrate that that conduct is capable of having anticompetitive effects on that same market, even if only potential competition exists on that market between the products or services of the undertaking in a dominant position and … the products or services of the undertaking requesting that interoperability*".

Some (random) personal reflections

- There is no “narrowing” of Bronner, only for those who thought Bronner stood for a very wide principle (deference to freedom of contract, to how undertakings develop their businesses); Bronner is the exception, not the other way round. Bronner not applied in many past cases (ice cream freezers, margin squeeze, Google Shopping, Lithuanian railways). Attachment to “formalism” by those who criticised “formalism”.
- The dramatic consequences some authors draw are overblown: “in view of” (when development decision is adopted); consider facts of the case: delay/disrupt development of a promising rival while the dominant undertaking develops its own product and amplifies its reach through its own platform; interpretation of “solely for the needs of its own business”.
- Ceasing to deal with third parties: changes of conduct seen as suspicious in the past; may undermine the idea that the economic model is affected.
- The fact that some “active behaviour” was needed was not unique in this case (Clearstream, Microsoft).
- Positive position towards interoperability (Microsoft and interoperability); dominant undertaking acting as quasi-regulator of entire sector of the economy (ecosystem).
- Justifications: does not go further, competing requests, objective criteria, etc.
- Ability to mitigate effects (*versus* standard in Bronner).
- Dynamic competition: difficulties to apply traditional market by market analysis; entry/growth of the only rival affected, why do you need more?

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