Case C-233/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

13 April 2023

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

7 April 2023

Appellants:

Alphabet Inc.

Google LLC

Google Italy Srl

Respondent:

Autorità Garante della Concorrenza e del Mercato

Other parties to the proceedings:

Enel X Italia Srl and Enel X Way Srl

Subject matter of the main proceedings

Appeal lodged by Alphabet Inc., Google LLC, and Google Italy Srl (collectively, 'Google') against the judgment of the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio, Italy) in which that court dismissed the action brought by Google against an order of the Autorità Garante della Concorrenza e del Mercato (Italian competition authority) ('the Authority'). The Authority had considered that Google had committed an abuse of a dominant position within the meaning of Article 102 TFEU by not having made its Android Auto app compatible with an app developed by Enel X Italia Srl ('Enel X') for services related to the charging of electric cars, and had therefore ordered Google

to put an end to the abuse in question, imposed certain obligations on it concerning the apps in question, and ordered it to pay a fine.

Subject matter and legal basis of the request

The request for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), as the court of last instance, seeks an interpretation from the Court of Justice of the concept of abuse of a dominant position within the meaning of Article 102 TFEU, in particular as regards the identification of (i) the relevant markets and (ii) any obligations of an undertaking that is dominant in one or more digital markets.

Questions referred for a preliminary ruling

(1) Must the requirement that the product that is the subject of a refusal to supply be indispensable be interpreted, for the purposes of Article 102 TFEU, as meaning that access must be indispensable to the exercise of a particular activity in a neighbouring market, or is it sufficient that access be indispensable for a more convenient use of the product or service offered by the undertaking requesting access, especially where the essential function of the product that is the subject of the refusal to supply is to make it easier and more convenient to use existing products or services?

(2) Is it possible, in the context of conduct constituting a refusal to supply, to consider behaviour to be abusive, within the meaning of Article 102 TFEU, in a situation where, notwithstanding the lack of access to the requested product, (i) the undertaking requesting access was already active in the market and had continued to grow within that market throughout the period of the alleged abuse and (ii) other operators competing with the undertaking requesting access to the product had continued to operate in the market?

(3) Must Article 102 TFEU, in the context of abuse consisting in a refusal to grant access to an allegedly indispensable product or service, be interpreted as meaning that the fact that the product or service did not exist at the time of the request to supply must be taken into consideration as an objective justification for that refusal, or, at least, is a competition authority required to conduct an analysis, based on objective elements, of the time needed for a dominant undertaking to develop the product or service in respect of which access has been requested, or must the dominant undertaking, given the responsibility it has within the market, be required to inform the undertaking requesting access of the time required to develop the product?

(4) Must Article 102 TFEU be interpreted as meaning that a dominant undertaking that has control over a digital platform may be required to modify its own products, or to develop new ones, so that those who so request may access such products? In that case, is a dominant undertaking required to consider the

general requirements of the market or the requirements of a single undertaking requesting access to the allegedly indispensable input, or, at least, given the special responsibility it has within the market, to lay down in advance objective criteria for reviewing the requests that it receives and for ranking them in order of priority?

(5) Must Article 102 TFEU, in the context of abuse consisting in a refusal to grant access to an allegedly indispensable product or service, be interpreted as meaning that a competition authority is required to define and identify in advance the relevant downstream market to which the abuse applies, and can this market also be only potential?

Provisions of European Union law and case-law relied on

Article 102 TFEU

Judgment of the General Court (then the Court of First Instance) of 17 September 2007, *Microsoft* v *Commission*, T-201/04

Judgment of the Court of Justice of 26 November 1998, *Bronner*, C-7/97

Succinct presentation of the facts and procedure in the main proceedings

1 Google Italy Srl, the Italian subsidiary of Google LLC, which in turn is owned by Alphabet Inc., operates primarily in the supply of services to other undertakings in the Google group.

2 Google has developed an open-source operating system for Android mobile devices, which can be obtained free of charge and modified by anybody without the need for authorisation. Google has also developed Android Automotive OS, an integrated operating system for motor vehicle infotainment systems, which has also been made available free of charge through an open-source licence.

3 In 2015, Google launched Android Auto, an app for mobile devices with an Android operating system which enables users to access certain apps on their smartphone through a car's integrated display.

4 Given the time and cost involved in ensuring that each app is compatible with Android Auto, Google offers solutions for entire categories of app in the form of templates, which allow third-party developers to create versions of their own apps that are compatible with Android Auto. In some cases, Google has allowed developers to create personalised apps that have been developed to be compatible with Android Auto without there being a pre-defined template.

5 In late 2018, the templates referred to above were available only for media and messaging apps; Google also developed versions of its own map and navigation apps (namely Google Maps and Waze) that were compatible with Android Auto.

6 Enel X provides electric car charging services and the Enel group manages more than 60% of the charging stations available in Italy.

7 In May 2018, Enel X launched the JuicePass app, which offers a set of features for charging electric vehicles, in particular: searching for and booking charging stations on a map; transferring to Google Maps or Apple Maps, in order to navigate to the selected charging station; and starting, stopping and monitoring the charging session and the payment relating thereto. JuicePass is available to users with an Android smartphone and can be downloaded from Google Play.

8 In September 2018 and the months thereafter, Enel X asked Google to make JuicePass compatible with Android Auto. Google refused to do so, stating that media and messaging apps were the only third-party apps compatible with Android Auto and that it was not possible to publish JuicePass on Android Auto, on the grounds of security and the need to rationally allocate the resources necessary for the requested development.

9 On 12 February 2019, Enel X submitted a report to the Authority, claiming that Google's conduct, consisting in an unjustified refusal to allow JuicePass to function with Android Auto, constituted an infringement of Article 102 TFEU.

10 After the Authority initiated proceedings, Google, on 15 October 2020, released a version of the template for designing beta versions of electric car charging apps that are compatible with Android Auto.

11 By order of 27 April 2021, the Authority stated that Google's conduct, consisting in obstructing and delaying the publication, on the Android Auto platform, of the JuicePass app developed by Enel X, constituted abuse of a dominant position within the meaning of Article 102 TFEU, and ordered Google, inter alia, to: (i) put an end to the anti-competitive behaviour in question and not behave in this manner in future; (ii) release the definitive version of the template for developing electric charging apps; and (iii) develop any features missing from the final template that had been indicated by Enel X as being essential. The Authority also ordered Alphabet Inc., Google LLC and Google Italy Srl jointly and severally to pay a total administrative fine of EUR 102 084 433.91.

12 The appellant companies contested that order before the Regional Administrative Court, Lazio, which dismissed the action in its entirety.

13 An appeal has been brought against that judicial decision.

The essential arguments of the parties in the main proceedings

14 The Authority maintains that Google's conduct is relevant for the purpose of protecting competition and market dynamics owing to the dominant position held by Google, which plays a central role in allowing professional users (in this case, developers) to access end users of apps. The types of app which may be published

on Android Auto and the specific characteristics of those apps, as well as the time required to define and make available the necessary development tools, are exclusively within Google's control.

15 According to the Authority, there is a competitive space that includes both Google Maps (and other navigation apps) and Enel X's app (and other electric charging service apps), given that both apps offer search and navigation services relating to charging stations (effective competition) and, in addition, Enel X's app offers features that are new, but that could in future be integrated into Google Maps (potential competition); furthermore, Enel X's app and Google Maps would be competing for users and for the data generated by those users.

16 For those reasons, in the Authority's view, the conduct of Google, which – allegedly – unjustifiably obstructed and delayed the availability of Enel X's app on Android [Auto], amounts to a refusal to allow interoperability (refusal to deal), which led to a breach of the level playing field principle, consisting in the app owned by Google having an unfair advantage over the app owned by its competitor, Enel X.

17 Google has disputed, in the first place, that it is under an obligation to supply, as was maintained in the judgment under appeal and the order of the Authority. In particular, it argues that the cumulative conditions indicated in the judgment of the General Court (then the Court of First Instance) of 17 September 2007, *Microsoft* v *Commission*, T-201/04 (that is to say: (i) the obligation to supply concerns a product or service indispensable to the exercise of an activity on a neighbouring market; (ii) the refusal to supply is of such a kind as to exclude any effective competition on that neighbouring market; and (iii) the refusal prevents the appearance of a new product), are absent.

18 In particular, no indispensability analysis was carried out by the Authority. Furthermore, the lack of access to Android Auto did not prevent the JuicePass app from working (as it could still be used on a smartphone attached to the vehicle, for example, with a sucker); nor did it prevent effective competition in the electric vehicle charging apps sector, as evidenced by the significant growth of JuicePass and the presence of other similar apps in Italy.

19 In the second place, Google submits that its own conduct was correct and justified in view of: (i) the need to develop a new template for accessing Android Auto that met the applicable security requirements (a template which did not exist at the time of the request) and the practical impossibility of developing a personalised app for this purpose; (ii) the reasonable timeframe in which Google then developed the template, in spite of the complexity thereof and the difficulties caused by the COVID-19 pandemic; and (iii) the fact that the Authority did not criticise the time taken by Google to develop the template as unreasonable.

20 In the third place, Google has disputed the identification by the Authority of two upstream markets in which Google was deemed to have a dominant position, that

is to say, the smartphone operating system licensing market, in which Google is active through the Android operating system, and the Android app store market, in which Google is active through Google Play. According to Google, the Authority should have identified the different relevant market in which Android Auto operates and proved the dominant position of that app on that market.

21 In the fourth place, Google has noted that the contested order did not even identify a specific relevant downstream market, but merely identified a 'competitive space' in which navigation apps might compete with electric car charging apps, without analysing the alleged demand-side and supply-side substitutability of those two different types of app.

22 In the fifth place, Google has denied the existence of a competitive relationship between Google Maps and JuicePass: (i) from a current point of view, calling into question the substitutability of the two apps as regards the charging station search function, which would mean that they are not competing but rather complementary services; (ii) from a potential point of view, submitting that, according to the criteria laid down in EU case-law, the possible future integration into Google Maps (on Android Auto) of functions relating to booking and paying for charging sessions has not been sufficiently demonstrated; and (iii) in terms of the gathering, by Google Maps and JuicePass, of data generated by users of electric car charging services, since the two apps are of different types.

23 In the sixth place, Google has challenged the amount of the fine imposed by the Authority pursuant to the applicable Italian legislation.

24 The Authority has responded that the objectives of protecting competition in digital markets require account to be taken of the specific features and the dynamics of those markets, and in particular of the fact that: (i) on vertically integrated digital platforms, the dominant position of an operator in upstream markets may be used by that operator to assert its own dominance in downstream markets, and in related or emerging markets; (ii) the conduct at a given time may influence the evolution and competitive dynamics of the market in which it takes place; and (iii) the expansion of the supply promoted by digital market operators means that services and products that were previously considered to belong to different markets begin to experience mutual competitive pressure or that new functions are incorporated into pre-existing products, which were previously considered not to be comparable, as is happening with ever-increasing frequency in relation to products and services intended for multiple groups of users of a digital platform.

25 In order to ensure effective protection of competition and greater choice for consumers, the logico-legal criteria that are traditionally applied to such matters should therefore be applied with greater flexibility to the competitive spaces that are created in evolving markets or in relation to future markets.

26 Enel X has emphasised that Google's conduct, which was classified by the Authority as constituting a refusal to deal, has factual characteristics which differ from those of the cases of a refusal to deal analysed in the case-law cited by Google, which refers to a non-digital economic context.

27 In this particular case, it is not a question of entering into an agreement, but of guaranteeing complete interoperability between Enel X's product and the open-source system developed by Google, the success of which is predominantly related to the possibility for consumers to access the apps developed by undertakings.

28 By configuring its Android Auto product in such a way as to hinder the full interoperability of that product with charging service apps, Google breached the level playing field principle, preventing Enel X from developing JuicePass for Android Auto with similar functions to those of Google's proprietary Google Maps app and from introducing new functions which are different from those offered by Google Maps, and seeking to impose conditions of use on JuicePass (on smartphones with the engine switched off, and so on) that would have harmed the success of that app with consumers.

29 Although Google has the power to determine release times, conditions and methods, this power may not go so far as to obstruct, persistently and without providing valid objective justifications, innovation and technical development to the detriment of consumers, given the high risk that a successful product in digital markets will very rapidly attract a dominant share, or even the entire market.

Succinct presentation of the reasoning in the request for a preliminary ruling

30 The referring court observes that Article 102 TFEU does not contain a definition of abuse, which is presented as a general legal concept, and that the cases listed in the law are merely examples and are not an exhaustive list of the ways of abusing a dominant position which are prohibited by EU law; for this reason, it is the responsibility of the interpreter to take into account the specific characteristics of the economic context in question, which in the present case is that of digital markets.

31 Having regard to the effects that Google's conduct is likely to have in the particular economic sector in which it operates, according to the referring court, that conduct appears in the abstract to be likely to constitute an abusive refusal to supply which is in breach of Article 102 TFEU, for the following reasons.

32 In the first place, Google is in a situation of market dominance as regards Android and Google Play, given that Android Auto is no more than a projection of the Android system onto the car's infotainment system.

33 In the second place, access to Android Auto appears to be 'indispensable' in order for an operator such as Enel X to offer end users apps that can be easily and safely

used when those users are driving, since the app (for electric vehicle charging) is intimately linked to the use of a car – be it stationary or moving – to which Android Auto appears to constitute a specific accessory, given the presence on Android Auto of apps developed by car manufacturers. In light of the characteristics and the specific function of Android Auto, as well as the process of rapid digital evolution, the concept of indispensability should be interpreted more broadly, defining as 'necessary' products or services originally designed purely to make the use of existing products more convenient.

34 In the third place, the referring court considers that Google's conduct is potentially likely to eliminate competition on the digital markets in question and that, if JuicePass had been definitively barred from accessing Android Auto, consumers would no longer have been interested in it; in this regard, the disputed conduct is likely to pose an obstacle to consumers' ability to use a 'better' product for which there is potential demand; moreover, having regard to the specific nature of the context concerned, the referring court, on the basis of the documents before it, does not exclude the possibility that an existing 'generic' application, such as Google Maps, could incorporate the 'specific' functions of JuicePass.

35 In the fourth place, for the referring court, Google's refusal is not supported by effective, objective justifications, since, even considering the time required to implement the technical solution, that refusal depends substantially on business decisions made by Google, against which the undertaking requesting access to the essential resource – which only Google can provide – has no means of protection and of interacting with the dominant undertaking. Having regard to the characteristics of the sector and the market power of Google, the referring court considers that an interpretation is possible according to which, given the special responsibility of the dominant undertaking, that undertaking should be required to establish, in advance, objective criteria for reviewing requests and the average timeframes required to satisfy those requests.

36 In the fifth place, the identification of the downstream market should not disregard the specific features of (i) the context concerned and (ii) the characteristics of Android Auto, which only serves to make an existing product more usable, and may include, from a dynamic perspective, apps such as Google Maps. Indeed, according to the case-law, it is sufficient that 'a potential market or even a hypothetical market could be identified' downstream (judgment of the General Court (then the Court of First Instance) of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289). From another point of view, the identification of a downstream market defined according to traditional rules – as a space in which there is demand and supply, which determines the price of the product – does not entirely correlate with the specific features of the economic models in question, where the user of the product or service does not pay consideration in terms of price, including in the light of the possible existence, as posited by the Authority, of a competitive space regarding users and the data generated by those users.

37 For those reasons, the referring court considers that the case-law cited by the appellant (including the judgment of the Court of Justice of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569), which expresses established principles in reference to the specific case of a refusal to deal, is not immediately applicable to the case before it, which is situated in an economic context that is affected by the specific features of the functioning of digital markets. This may justify a flexible interpretation of the traditional principles, for the purpose of allowing a practical application of Article 102 TFEU that is in line with the spirit of that provision.