



The Refusal to Allow Interoperability Between Android Auto and Third-Party Apps – A Deep Dive into *Enel X Italia v. Google*

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Abstract With vehicles gradually becoming more equipped with advanced features and telemetry, the demand for applications suitable for in-vehicle use is also increasing. To cater to these demands, Google created Android Auto. As an extension of the well-known Android operating system, Android Auto enables consumers to use certain apps while driving. In *Enel X Italia v. Google*, Google’s conduct of refusing to allow interoperability between Android Auto and a third-party app is under scrutiny. Given Google’s unique position on the market as a gatekeeper between application developers and end users, the exclusion of a third-party app from the automotive application platform was eventually qualified as a refusal to deal in contravention of Art. 102 TFEU.

Keywords Interoperability · Refusal to deal · Art. 102 TFEU · Self-preferencing · Gatekeeping · Essential facilities

1 Introduction

The doctrine of applying Art. 102 TFEU to conduct involving intellectual property has been widely accepted.¹ Hence, the ownership of intellectual property rights (IPRs) can produce a de facto monopoly and confer a position of dominance on undertakings.² A refusal to deal, to license or to supply information may qualify as an abuse of dominance in these circumstances. Accordingly, the notion of an

¹ Wish and Bailey (2021), p. 837; Turner (2015), p. 125; Anderman and Schmidt (2011), p. 35.

² Anderman and Schmidt, *supra* note 1, p. 59.

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“essential facility” is not exclusively limited to physical infrastructure – such as harbours³ or telecommunication networks⁴ – but also covers the ownership of IPRs.⁵

Over the course of multiple decades, an extensive line of cases⁶ has shaped the relevant four-pronged test for assessing whether conduct relating to IPRs is considered abusive under EU competition law. Since the Court of Justice of the European Union’s (CJEU) landmark judgments in *Magill*,⁷ *IMS Health*⁸ and *Microsoft*,⁹ several references to this test have been made by Europe’s highest court and its Advocates General.¹⁰ However, while the substantive assessment criteria have crystallised in scholarly literature,¹¹ their mode of application often triggers questions given the factually complex nature of the cases that fall within its ambit.

A recent decision handed down by the Italian Competition Authority (ICA) in *Enel X Italia v. Google*¹² provides a clear illustration of these intricacies and applies the relevant refusal-to-deal test to digital ecosystems. In this instance, the ICA held that access to the market can hinge on having access to a proprietary platform. By applying established CJEU case law it is found that Google’s refusal to allow interoperability between Android Auto and a third-party application is abusive in the sense of Art. 102 TFEU.

This contribution sheds light on the decision’s key points and highlights some of the overarching implications. The structure is as follows. Sections 2 and 3 first address the legal and factual background relevant to the dispute. Section 4 subsequently analyses the rationale that underpins the refusal to deal in the present case. Section 5 then adds several comments and remarks.

³ Commission Decision 94/19/EC, *Sea Containers v. Stena Sealink* [1994] OJ L 15/18, para. 70; Commission Decision 94/119/EC, *Port of Rødby* [1994] OJ L 55/52, para. 51.

⁴ Case T-486/11, *Orange Polska v. Commission* [2015] ECLI:EU:T:2015:1002.

⁵ Sebastien Evrard, “Essential Facilities in the European Union: Bronner and Beyond”, 10 *Columbia Journal of European Law* 491, 497 (2003).

⁶ For a concise overview of these cases, see Lamping (2015), p. 129 *et seq.*

⁷ Case C-241/91 P, *RTE and ITP v. Commission* [1995] ECLI:EU:C:1995:98.

⁸ Case C-418/01, *IMS Health* [2004] ECLI:EU:C:2004:257.

⁹ Case T-201/04, *Microsoft* [2007] ECLI:EU:T:2007:289.

¹⁰ E.g. Cases C-152/19 P and C-165/19 P, *Deutsche Telekom AG and Slovak Telekom a.s. v. European Commission* [2020] ECLI:EU:C:2020:678, Opinion of Advocate General Saugmandsgaard Øe, paras. 58–60, where eventually the three-pronged test from *Bronner* (physical infrastructure) rather than the four-pronged test from *Microsoft* (IPRs) is applied; Case C-170/13, *Huawei v. ZTE* [2015] ECLI:EU:C:2015:477, paras. 46–48, where the difference between *de facto* monopolies and *de jure* monopolies is observed; Case C-138/11, *Compass-Datenbank GmbH v. Republik Österreich* [2012] ECLI:EU:C:2012:251, Opinion of Advocate General Jääskinen, paras. 63–72, where the absence of an upstream market is considered.

¹¹ Turner, *supra* note 1, pp. 137–138.

¹² Case A529, *Enel X Italia v. Google* [2021] Bollettino 20/2021, No. 29645; for the press release in English, see AGCM, “A529 – ICA: Google Fined over 100 Million for Abuse of Dominant Position” (L’Autorità Garante della Concorrenza e del Mercato, 2021), <https://en.agcm.it/en/media/press-releases/2021/5/A529> (accessed 3 December 2021).

2 Legal Context

The notion of interoperability provides that two or more systems have the ability to operate in conjunction with one another.¹³ Typically, once a communication interface¹⁴ has been established, it becomes possible to exchange information across these systems and to enable each system to make use of that newly acquired information.¹⁵

In principle, undertakings have full entrepreneurial freedom to decide on their desired level of interoperability.¹⁶ Offering products on the market with a high level of interoperability may, for instance, increase the overall value of those products to consumers and thus provide an opportunity to charge higher prices. However, valid arguments can also be found in support of strategies that involve offering limited interoperability. A good example in this regard is when a firm wants to retain full control over the value chain within its (proprietary) digital ecosystem.

In high-tech industries, interoperability decisions are considerably influenced by the occurrence of network effects,¹⁷ which in turn shape the competitive dynamics in those markets.¹⁸ In this respect, it is useful to briefly consider the “hardware/software” paradigm¹⁹ in a contemporary setting. For IT markets in particular, a high level of complementarity exists between operating systems (OS) and (interoperable) application software.²⁰ Consumers looking to reap the benefits of their computer systems must purchase both components.²¹ Under those

¹³ ISO, “Information Technology – Cloud Computing – Interoperability and Portability”, International Standard ISO/IEC 19941:2017, 1 (2017).

¹⁴ Interface is defined as “a shared electrical boundary between parts of a computer system, through which information is conveyed”, in: IEEE (2000), p. 574.

¹⁵ Palfrey and Gasser (2012), p. 5; IEEE, *supra* note 14, p. 582; Mehmet Bilal Ünver, “What Cloud Interoperability Connotes for EU Policy Making: Recurrence of Old Problems or New Ones Looming on the Horizon?”, 43 Telecommunications Policy 154, 156 (2019).

¹⁶ Wolfgang Kerber and Heike Schweitzer, “Interoperability in the Digital Economy”, 8 Journal of Intellectual Property, Information Technology and E-Commerce Law 39, 43 (2017).

¹⁷ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) OJ C 45/7, para. 17; Whish and Bailey, *supra* note 1.

¹⁸ Michael L. Katz and Carl Shapiro, “Systems Competition and Network Effects”, 8 Journal of Economic Perspectives 93, 94 (1994); Michael L. Katz and Carl Shapiro, “Product Compatibility Choice in a Market with Technological Progress”, 38 Oxford Economic Papers 146, 148 (1986); Michael L. Katz and Carl Shapiro, “Network Externalities, Competition, and Compatibility”, 75 The American Economic Review 424, 424 (1985).

¹⁹ Katz and Shapiro, “Systems Competition and Network Effects”, *supra* note 18, pp. 97–98: “[...] consider a system in which each consumer must buy two components to generate benefits, like computer hardware and software [...]. Network effects in hardware/software systems competition arise in the common case in which users make their purchases over time [...]. In these markets, adoption externalities come about indirectly, through the impact of one consumer’s adoption decision on the future variety or prices of components”.

²⁰ Daniele Condorelli and Jorge Padilla, “Harnessing Platform Envelopment in the Digital World”, 16 Journal of Competition Law & Economics 143, 147 (2020): “an operating system platform (such as iOS or Android) links users with app developers. Users value the platform more, the greater the number of app developers and vice versa. Such a two-sided platform thus exhibits cross-group network effects”.

²¹ Katz and Shapiro, “Systems Competition and Network Effects”, *supra* note 18, p. 97.

circumstances, network externalities occur in that the initial decision to purchase a particular OS influences any subsequent purchase of compatible applications (i.e. path dependency).²² The first transaction typically leads to a lock-in,²³ which suggests that consumers must also take the availability of application software into account when acquiring an OS.

In a software market where a single firm sells its own OS as well as proprietary applications, consumers expose themselves to monopolistic conduct in the downstream market for application software once in possession of a particular OS. Therefore, from an entrepreneurial point of view, each firm faces incentives to attract users to their respective ecosystem. This ties into strategies where undertakings make their OS available to consumers against a relatively low price (or zero price), with the intention to recoup lower revenue in the OS market via increased sales and higher prices in the application software market. To overcome consumers' reluctance to buy into a certain ecosystem, firms may consider seeking recourse to price, quality and variety commitments vis-à-vis the application software market (and having the credibility to back up such claims).²⁴ Another common practice involves committing to an "open" operating system, where independent software developers are enabled to enter the downstream application software market, thereby offering some assurances to consumers that exploitation risks by means of an OS lock-in are curtailed.²⁵

On balance, when markets meet the conditions for effective competition, firms will determine their best course of action – i.e. choosing their ideal level of interoperability – based on their cost model and the overall market structure. In those cases, the market-optimal level of interoperability is set accordingly. In reality, instances of market failure can occur.²⁶ Especially when key information pertaining to interoperability specifications is concentrated in the hands of a select few undertakings, there is an ability to exploit that market power for the purpose of locking in consumers and locking out vendors. When interoperability limitations are caused by a dominant player's efforts to deny competitors access to the market, such conduct directly contravenes the provisions of EU competition law.²⁷

Such was the case in *Microsoft*,²⁸ a judgment concerning interoperability in the market for operating systems. With Microsoft unwilling to provide interoperability

²² Kerber and Schweitzer, *supra* note 16, p. 44.

²³ Mehmet Bilal Ünver, "Turning the Crossroad for a Connected World: Reshaping the European Prospect for the Internet of Things", 26 International Journal of Law and Information Technology 93, 96–98 (2018).

²⁴ Katz and Shapiro, "Systems Competition and Network Effects", *supra* note 18, p. 103.

²⁵ *Ibid.*

²⁶ Competition & Markets Authority, "Online Platforms and Digital Advertising Market Study", p. 17 (2019), https://assets.publishingservice.gov.uk/media/5d1b297e40f0b609dba90d7a/Statement_of_Scope.pdf (accessed 7 December 2021); Ofcom, "Online Market Failures and Harms: An Economic Perspective on the Challenges and Opportunities in Regulating Online Services", pp. 4–5 (2019), https://www.ofcom.org.uk/__data/assets/pdf_file/0025/174634/online-market-failures-and-harms.pdf (accessed 7 December 2021).

²⁷ Mehmet Bilal Ünver, "Threading the Needle from 'Interoperability' to 'Gatekeeping': Quest for a Layered Model", 34 International Review of Law, Computers & Technology 1, 5 (2021).

²⁸ *Microsoft*, *supra* note 9.

information to a competitor – information which was needed to facilitate the interworking between the competitor’s work group server OS and the Windows OS – , a complaint was lodged with the European Commission, accusing Microsoft of anticompetitive conduct by refusing to share the information needed to allow interoperability.²⁹ The case provided the CJEU with an occasion to reinforce and streamline some of the findings from *Magill*,³⁰ *Bronner*³¹ and *IMS Health*.³² In these earlier cases, the Court held that certain conduct by IPR holders may, *in exceptional circumstances*, give rise to an abuse of dominance.³³ As a result, when a firm maintains a dominant position and engages in exclusionary behaviour in secondary markets, intellectual property law considerations need to give way to the rationale of competition law.

Microsoft added significantly to the refusal-to-deal doctrine and confirmed that a refusal to supply information is governed by EU competition law when it impedes effective competition on the market.³⁴ In 2022, 15 years later, *Microsoft* remains the leading authority on matters involving an abuse of dominance that hinders interoperability. Scholarly writings have covered this topic extensively and contributed to an appropriate theory of harm which involves a two-tiered market approach.³⁵ In this respect, competitive harm can occur when downstream competitors are at risk of being vertically foreclosed, for instance, by having no access to core application programming interfaces (APIs) or software development kits (SDKs).³⁶

When combining the relevant insights from settled case law, a four-pronged test reveals itself. To be caught under Art. 102 TFEU, there needs to be an expression of a refusal that demonstrates:

- (i) the *indispensability* of the information to the exercise of an activity on a neighbouring market;
- (ii) an ability to *eliminate effective competition* on the neighbouring market;
- (iii) a *barrier to the emergence of a new product* for which there is potential consumer demand or an *abuse which limits technical development* to the prejudice of consumers;
- (iv) the absence of an *objective justification*.

²⁹ *Ibid.*, paras. 2–7.

³⁰ *Magill*, *supra* note 7.

³¹ Case C-7/97, *Bronner* [1998] EU:C:1998:569.

³² *IMS Health*, *supra* note 8.

³³ *Ibid.*, para. 12.

³⁴ *Microsoft*, *supra* note 9, paras. 708–712.

³⁵ William Page, “Microsoft and the Limits of Antitrust”, 6 *Journal of Competition Law & Economics* 33 (2010); Anderman (2010), p. 258; Pierre Larouche, “The European Microsoft Case at the Crossroads of Competition Policy and Innovation: Comment on Ahlborn and Evans”, 75 *Antitrust Law Journal* 933 (2009); Page and Lopatka (2009), p. 368; Anneleen Straetmans, “The EU Microsoft Case. Not as Soft a Case”, 44 *Jura Falconis* 563 (2008).

³⁶ Chinmayi Sharma, “Concentrated Digital Markets, Restrictive APIs, and the Fight for Internet Interoperability”, 50 *University of Memphis Law Review* 441, 505 (2019).

Jurisprudence hints at a narrow interpretation for accepting justification grounds.³⁷ Neither the fact that the interoperability information is protected by IPRs,³⁸ nor the fact that the interoperability information proves of great value to competitors constitute valid reasons for a refusal.³⁹ Instead, a dominant firm must demonstrate serious negative repercussions on its incentives to innovate that directly follow from forcing the disclosure of the interoperability information.⁴⁰

With enforcement taking over a decade, the *Microsoft* case is testament to the lengthy and arduous process of obtaining appropriate relief. At present, these concerns remain a topical problem for competition law in increasingly digitised markets. As argued elsewhere in literature: “EU competition law tools are not capable enough to cope with the digital era problems, particularly in view of the semi-structural, enduring gateway problems”.⁴¹ The desire to address these concerns and to push for a more straightforward regime has recently led to the proposal for a Digital Markets Act (DMA).⁴² The draft regulation confirms the Commission’s intentions to address structural market hurdles related to the phenomenon of gatekeeping, with various provisions pertaining specifically to access.⁴³ In light of these ongoing developments, it is particularly interesting to see how the decision in *Enel X Italia v. Google*⁴⁴ fits within the larger European debate on the functioning of digital markets.

3 Background to the Dispute

3.1 Relevant Players

Complainant Enel X Italia is an Italian undertaking that specialises in offering services in the energy sector. Among others, it manages electric vehicle (EV) charging points throughout Italy. As part of its business model, Enel X Italia created JuicePass, an app that offers extensive functionality relating to the charging of electric and hybrid cars. JuicePass enables drivers to search for and navigate to charging points, arrange bookings for charging sessions and perform payments for the use of a charging point. The reservation and payment functionality for charging points offered through JuicePass lies at the centre of the current decision.

To reach its intended audience, Enel X Italia considered publishing its app on Android Auto. In essence, Android Auto is a dedicated application platform for cars developed by Google as an extension of its Android operating system.⁴⁵ The

³⁷ *Microsoft*, *supra* note 9, para. 666 *et seq.*

³⁸ *Ibid.*, para. 693.

³⁹ *Ibid.*, para. 694.

⁴⁰ Turner, *supra* note 1, p. 143.

⁴¹ Ünver, *supra* note 27, p. 6.

⁴² Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (2020) COM/2020/842 final.

⁴³ *Ibid.*, Art. 3.

⁴⁴ *Enel X Italia v. Google*, *supra* note 12.

⁴⁵ More details on Android Auto can be found at: https://www.android.com/intl/en_be/auto/.

platform is specifically tailored to vehicles and enables users to utilise certain applications via the car's built-in infotainment system. A core feature of the Android Auto platform is that apps are simplified to prevent drivers from becoming overly distracted while behind the wheel. The process of slimming down applications – thereby making them suitable for Android Auto – occurs by designing the software on the basis of a template that is exclusively made available by Google.

The case at hand concerns a refusal by Google to make the JuicePass app available on Android Auto.⁴⁶ With negotiations between both parties coming to a standstill, Enel X Italia decided to bring a complaint to the ICA, accusing Google of committing an abuse of dominance under Art. 102 TFEU. The *Enel X Italia v. Google* decision is the direct result of the investigation that subsequently took place.

3.2 Market Structure

3.2.1 Relevant Upstream Market: Android Auto

The investigative section of the decision commences with a detailed portrayal of the relevant upstream market.⁴⁷ In line with the findings from *Google Android*,⁴⁸ the ICA emphasises Google's unique position within the market for mobile communication.⁴⁹ The company has built an extensive ecosystem around its Android operating system for smartphones. Seamless integration between Android and other Google products – such as the Google Play Store and Google Assistant – have made Google into a dominant player in this domain.

Apropos of the relevant upstream market, the ICA specifically considers application platforms geared towards drivers.⁵⁰ With cars gradually becoming more equipped with complex telemetry and infotainment systems, the demand for car-specific applications has also increased. Apple was first to launch a dedicated platform for in-vehicle applications with the launch of CarPlay in 2014. Google followed suit in 2015 with the development of Android Auto, thereby also creating an application platform to cater to the specific needs and wants of car owners.

Substitutability between these two platforms is non-existent: iOS smartphone users are restricted to using CarPlay, whereas Android smartphone users can only make use of Android Auto.⁵¹ From that perspective, app developers will generally develop two versions of their software in order to reach end users in both ecosystems.

⁴⁶ *Enel X Italia v. Google*, *supra* note 12, para. 24.

⁴⁷ *Ibid.*, paras. 29 and 278 *et seq.*

⁴⁸ Commission Decision AT.40099, Google Android [2018] C(2018) 4761 final.

⁴⁹ *Enel X Italia v. Google*, *supra* note 12, para. 278.

⁵⁰ *Ibid.*, para. 295 *et seq.*

⁵¹ *Ibid.*, para. 299.

3.2.2 Downstream Competitive Space: Applications Designed for In-Vehicle Use

The downstream competitive space comprises applications that are suitable for usage while driving.⁵² This implies that the user experience of these apps is significantly simplified for safety purposes, for instance by only allowing voice commands or a select few touch gestures. By way of illustration, software that belongs within this category includes apps that enable the driver to make phone calls, listen to audio books or facilitate navigation.

When considering specific applications, the ICA elaborates that the downstream competitive space includes apps such as JuicePass which offer services related to electric charging as well as more generalist apps for navigation purposes.⁵³ In this respect, Italy's competition authority frames Google's conduct within a competitive relationship that exists between, on the one hand, Google's proprietary apps Google Maps and Waze and, on the other hand, Enel X Italia's app JuicePass. The ICA subsequently makes note of the following tensions:⁵⁴

- *Actual competition*: an overlap exists between generalist navigation apps and specialist apps that facilitate the search for and navigation to EV charging points.
- *Potential competition*: navigation apps could potentially extend their functionality to include services relating to EV charging points.
- *Competition for users and data*: both types of apps compete for the relationship with end users and the subsequent flow of data originating from end users using those apps.

3.2.3 Google as a Gatekeeper Between App Developers and End Users

Two factors need to be considered when pushing an application to Android Auto. Firstly, developers are fully dependent on Google for making the necessary programming tools available to create applications that work with the Android Auto platform.⁵⁵ Secondly, the distribution of applications must also take place via the Google Play Store.⁵⁶ Combining these insights leads the ICA to find that compatibility between an app and Android Auto is determined at the sole discretion of Google. Therefore, Google is said to be in a position of considerable strength where it can act as a gatekeeper between app developers and end users.⁵⁷ The ICA also touches on the fact that Google explicitly reserves the right to verify the actual compatibility of apps with Android Auto through its interoperability policy.⁵⁸ In

⁵² *Ibid.*, para. 283.

⁵³ *Ibid.*, para. 283.

⁵⁴ *Ibid.*, paras. 27, 265 and 300.

⁵⁵ *Ibid.*, para. 66 *et seq.*

⁵⁶ *Ibid.*, para. 74.

⁵⁷ *Ibid.*, para. 314.

⁵⁸ *Ibid.*, para. 322.

that sense, Google is de facto able to decide which applications can reach end users and which apps cannot.

The positioning of Google on the market is further complicated by the fact that the tech giant not only fulfils the role of gatekeeper, but also that of competitor, given the presence of several proprietary apps within the downstream market segment.⁵⁹ This calls for Google to refrain from exercising any of its prerogatives in a discriminatory or self-preferential manner to ensure a level playing field for all actors within the downstream competitive space. In this respect, it should be noted that, although JuicePass was created via Google's application template, Google denied the publication of the app on Android Auto. The tech company cited that only two categories of apps – media apps and messaging apps – should be made available on Android Auto and argued that JuicePass falls within neither category.⁶⁰ Enel X Italia replied by stating that Android Auto already contains several apps that cannot be ascribed to either of the two categories, notably:

- *Google Maps* and *Waze*, two proprietary apps created and maintained by Google and which are widely used for navigation purposes.
- *Kakao*, a custom app developed for Android Auto within the framework of a collaboration between third-party developers and Google. The navigation app specifically caters to South-Korean users due to the unavailability of Google Maps in that country.

It is worth emphasising that neither Google Maps, Waze nor Kakao were developed via the application templates Google had provided to the public.

4 Refusal to Deal

4.1 Dominant Position

The concept of a dominant position coincides with the ability to hinder market dynamics and to act independently, to an appreciable extent, of competitive market pressure.⁶¹ Undertakings finding themselves in such a position have the power to prevent effective competition by virtue of their conduct on the market. Accordingly, such undertakings are faced with a special responsibility not to impede the process of competition. It is established that Google holds a dominant position in the market for smartphone operating systems through its Android OS.⁶² By virtue of the Google Play Store, the firm also maintains a dominant position in the market for distributing applications within the Android ecosystem.⁶³

⁵⁹ *Ibid.*, para. 276.

⁶⁰ *Ibid.*, para. 232.

⁶¹ Case C-27/76, *United Brands v. Commission* [1978] ECLI:EU:C:1978:22, para. 65; Whish and Bailey, *supra* note 1, pp. 183–184.

⁶² *Google Android*, *supra* note 48, para. 440 *et seq.*

⁶³ *Ibid.*, para. 590 *et seq.*

Recently, this strong foothold in the digital market has been extended through the roll-out of Android Auto. With Android Auto, Google was effectively able to extend its dominant position to segments within the automotive industry. The ability to act independently of any competitive pressure within this market segment is obvious in several ways: not only is Google the only source of development tools, the firm also reserves the right to deny the publication of certain apps.⁶⁴ In the same vein, the firm has full discretion to decide on who to partner with and which ideas warrant the creation of a custom app.⁶⁵ Several EV manufacturers have also indicated that interoperability between a vehicle's infotainment system and Android Auto or CarPlay is crucial, given that these systems are perceived as the market standard.⁶⁶ Interoperability is thus needed to meet the demand of potential car buyers.

As to the finding of a dominant position, it becomes clear that application developers can only abide by the choices made by Google regarding interoperability between applications and Android Auto. In that sense, Google not only occupies a dominant position, it also serves as a gatekeeper between developers and end users.⁶⁷ This creates a situation wherein Google is obliged to refrain from any conduct that distorts effective competition on the market.

4.2 Finding of an Abusive Refusal

The second element under consideration in the ICA's investigation is Google's abusive refusal to deal. The refusal took two forms: firstly, the express refusal to publish JuicePass on Android Auto and, secondly, the non-implementation of appropriate interoperability solutions such as the release of a suitable application development template. On balance, the ICA held the view that this cannot be interpreted in any other way than being obstructive conduct having exclusionary effects. Given Google's special responsibility to ensure effective competition, the refusal to allow interoperability violates the principle of maintaining a level playing field: not only does Google's conduct provide an unfair advantage vis-à-vis its proprietary apps, it also includes an element of discrimination due to developing a custom app for Kakao whilst refusing to do the same for Enel X Italia.

4.2.1 Exclusionary Purpose and Effect of the Refusal

By refusing to publish JuicePass and by failing to implement appropriate technical solutions to make JuicePass available on Android Auto, Google has effectively kept the app outside of the Android Auto ecosystem. This stands in stark contrast with other applications – notably Google Maps, Waze and Kakao – which were designed without regard to the restrictions contained in Google's application templates. Therefore, it is accurate to speak of a refusal that is the direct result of a commercial

⁶⁴ *Enel X Italia v. Google*, *supra* note 12, para. 323.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, paras. 56–57.

⁶⁷ *Ibid.*, para. 326.

⁶⁸ *Ibid.*, para. 370.

decision taken by Google.⁶⁸ Moreover, documents show that Google's conduct went on for more than two years; a period during which Google excluded JuicePass from its automotive platform, while also strengthening its own positioning on the market by starting to offer services related to EV charging via Google Maps.⁶⁹ Considered together, having prevented the presence of JuicePass on Android Auto, Google's conduct demonstrates an exclusionary purpose.⁷⁰

4.2.2 Indispensability of Google's Developer Tools

The indispensability criterion was next to come under scrutiny. The ICA emphasised that Google is the sole source for app development tools.⁷¹ Without these tools being available, it is simply not possible to gain access to the Android Auto platform and reach the app's intended audience. This point is reinforced by the finding that Android is being used as the operating system for three-quarters of the smartphone market. By extension, and due to the close ties with the Android OS as well as the feature-richness of the Android ecosystem, Android Auto encompasses a platform that cannot be substituted.⁷²

Google focussed particularly on the indispensability prong, holding that interoperability with Android Auto does not fulfil this high threshold.⁷³ Two specific arguments are worth addressing. Firstly, JuicePass still saw numerous downloads via the Google Play Store, even though it was not available on Android Auto. Secondly, users can also use JuicePass on their smartphone, without being connected to the car's infotainment system. According to Google, it would take drivers roughly thirty to sixty seconds to bring their car to a halt and make the necessary reservations via JuicePass. None of these counterarguments were upheld, however. The ICA refuted Google's defence by asserting that the actual usefulness of an app depends on the utility users can derive from it, which includes both safety and functionality aspects.⁷⁴ Moreover, it is unrealistic to expect drivers to stop mid-journey to search for a charging point.

4.2.3 Ability to Eliminate Effective Competition on the Market

The EV sector is expected to grow significantly in the upcoming years. It is likely that network effects and a so-called "winner takes all" phenomenon⁷⁵ will occur within the downstream competitive space. From that perspective, keeping JuicePass

⁶⁸ *Ibid.*, para. 370.

⁶⁹ *Ibid.*, para. 372.

⁷⁰ *Ibid.*, para. 374.

⁷¹ *Ibid.*, para. 376.

⁷² *Ibid.*

⁷³ *Ibid.*, para. 377.

⁷⁴ *Ibid.*, paras. 378–381.

⁷⁵ In essence, a "winner takes all" market encompasses a market where the best competitors quickly attain large market shares, at the expense of other market players. In high-technology markets, these phenomena are especially prevalent, for instance by being first-to-market with a novel product or by benefiting from economies of scale in data-driven business models.

outside of Android Auto for a 2-year period has the likely effect of frustrating Enel X Italia's efforts to gain a foothold in the market for providing services pertaining to EV charging points.⁷⁶ This situation is unlikely to change without Google making the necessary development templates available. Hence, in the present case, the omissive conduct of refusing to develop templates in a timely manner is capable of eliminating effective competition in the market.

4.2.4 *Barrier to the Emergence of a New Product for Which There is Potential Consumer Demand*

A disparity in terms of treatment reveals itself between third-party apps and apps owned by Google. In this instance, the disparity results in consumers being precluded from using comprehensive services relating to the booking of and payment for EV charging points. While Google has opted to include information in Google Maps relating to charging infrastructure, end users cannot benefit from the specific features offered through JuicePass, notably the reservation and payment functionality for charging points (see above at Section 3.1). As a result, the decision to refuse interoperability effectively frustrates end users from enjoying select services offered through JuicePass, thereby causing a reduction in terms of consumer welfare and consumer choice.⁷⁷ Furthermore, Google's conduct puts strain on Enel X Italia's business model due to being deprived from user-generated data. As a result, the refusal to interoperate not only leads to an impoverishment in terms of applications and services offered on the market, it also puts strain on data-driven business models.⁷⁸ Therefore, given the increasing popularity of electric vehicles, it is accurate to speak of a barrier to the emergence of a new product for which there is potential demand.

4.3 Absence of an Objective Justification

Google put forward several arguments to justify the refusal, two of which are worth addressing. Firstly, Google argued that its decision to refrain from publishing JuicePass is not the result of company policy, but rather linked to limitations of a technical nature inherent to the application templates.⁷⁹ Hence, according to Google, catering to Enel X Italia's request would require the investment of significant additional resources. The ICA was unconvinced, citing that Google is a market leader in the digital industry and one of the five prominent American technology companies.⁸⁰ This suggests that Google is endowed with considerable financial means, thereby making it difficult to believe that it would not be able to gather the necessary resources to develop a suitable template. Moreover, Google's track record and established functionality available through Google Maps and Waze made it difficult to accept technical challenges as an objective justification.

⁷⁶ *Enel X Italia v. Google*, *supra* note 12, para. 385.

⁷⁷ *Ibid.*, para. 387.

⁷⁸ *Ibid.*, para. 391.

⁷⁹ *Ibid.*, para. 399.

⁸⁰ *Ibid.*, para. 398.

Secondly, Google asserted that safety considerations justify a differential treatment for Google Maps and Waze.⁸¹ Since these apps were developed in-house, Google was able to keep distractions while driving to a minimum. Expanding the Android Auto ecosystem to all sorts of applications, however, would limit oversight by Google and would likely run counter to the idea of safeguarding users while driving. The ICA was quick to dismiss this second justification ground. While the ICA admitted that it made sense to limit particular modes of use for applications (e.g. limiting touch gestures), it did not make sense to impose restrictions on the purpose of applications (e.g. reserving EV charging points).⁸² According to the ICA, outright refusing some purposes did not fit well with Google's responsibility of maintaining a level playing field within the downstream competitive space.⁸³

In conclusion, the refusal was not justified by any objective justification.⁸⁴ The evidence in the file showed that the choice to limit the usage of Google's application template to two specific categories of applications was prompted by corporate policy rather than technical constraints.⁸⁵ Moreover, on the grounds that Google did not provide appropriate solutions nor maintain a collaborative attitude, it was found that the undertaking was abusing its dominant position under Art. 102 TFEU by refusing to allow interoperability between Android Auto and JuicePass.

5 Implications and Discussion

The decision in *Enel X Italia v. Google* is welcomed as it provides an illustration of the complexity inherent to digital ecosystems and the intricacies of applying the refusal-to-deal test to the digital realm. While the 156-page decision explores the available strategies and legal tests at length, it is worth shedding light on some specific elements of the case.

5.1 Gatekeeping as a Legal Concept

A first important discussion revolves around the soundness of using gatekeeping as a legal concept within competition law. Platforms such as Android Auto are characterised by their intermediary role; their value specifically lies in bringing together supply and demand.⁸⁶ Platforms can form part of an overarching, vertically integrated ecosystem that is governed as a closed environment, otherwise known as a "walled garden". As a result, by positioning itself between developers and end users, a platform occupies a position of a gatekeeper where it can exert significant

⁸¹ *Ibid.*, para. 403.

⁸² *Ibid.*, para. 400.

⁸³ *Ibid.*, para. 443.

⁸⁴ *Ibid.*, para. 414.

⁸⁵ *Ibid.*, para. 393.

⁸⁶ Rupprecht Podszun, Philipp Bongartz and Sarah Langenstein, "The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers", 10 Journal of European Consumer and Market Law 60 (2021).

influence on companies' ability to reach end users.⁸⁷ Consumers experience the negative effects of gatekeeping through a limited offering of products or services.⁸⁸

As of 2020, following the introduction of the proposal for a Digital Markets Act (DMA),⁸⁹ the notion of gatekeeping has attracted considerable attention from competition scholars. The DMA provides extensive clarifications as to the designation of platform services as a gatekeeper.⁹⁰ Operating systems are explicitly listed under Art. 2(2) as a core platform service. Providers of such core platform services can be designated as a gatekeeper if the platform (i) has a significant impact on the internal market, (ii) serves as an important gateway for business users to reach end users, and (iii) enjoys an entrenched and durable position.⁹¹ Once qualified as a gatekeeper, the platform provider must adhere to an extensive list of obligations.⁹² Keeping downstream markets contestable is crucial, which is ensured by provisions regarding non-discriminatory access to gatekeeper-platforms, including a vertical interoperability obligation.⁹³

While the proposal for the DMA will not come into force before 2023, it can be argued that the ICA's findings regarding gatekeeping follow from an interpretation in conformity with the text and spirit of future EU law, in addition to relying on scholarly writings addressing the concept of gatekeeping. With a view to future law, it would be difficult to deny that Google has behaved in an anticompetitive manner by not allowing JuicePass to appear on Android Auto, while simultaneously also encroaching on Enel X Italia's application by introducing EV charging information in Google Maps.

However, it must also be borne in mind that the adoption of the DMA is still subject to approval by the European Council and the European Parliament. Hence, as the law currently stands, the ICA's line of reasoning apropos of gatekeeping may arguably go against current EU law. Uncertainty surrounding the entry into force of the DMA offers a plausible explanation as to why Google vehemently argued against the application of the gatekeeper rationale, citing that "the concept of gatekeeping is completely extraneous to competition law".⁹⁴ Apart from being grounded in factual circumstances,⁹⁵ the ICA did away with these concerns in its

⁸⁷ Ünver, *supra* note 27, p. 14.

⁸⁸ Agustin Reyna and David Martin, "Online Gatekeeping and the Google Shopping Antitrust Decision: The Beginning of the End or the End of the Beginning", 1 European Competition and Regulatory Law Review 204, 205 (2017).

⁸⁹ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), *supra* note 42.

⁹⁰ *Ibid.*, Art. 3.

⁹¹ *Ibid.*, Art. 3(1); Art. 3(2) subsequently mentions the relevant quantitative thresholds for the designation as a gatekeeper: (1) an annual EEA turnover of €6.5 billion in the last three financial years or a market capitalisation exceeding €65 billion, while providing the platform service in at least three Member States; (2) 45 million monthly active users located in the EU and 10,000 yearly business users established in the EU; and (3) these thresholds are met in the last three financial years.

⁹² *Ibid.*, Arts. 5–6.

⁹³ *Ibid.*, Art. 6(1)(c)–(f).

⁹⁴ *Enel X Italia v. Google*, *supra* note 12, para. 254.

⁹⁵ *Ibid.*, para. 316.

rebuttal by countering that the role of gatekeepers has been covered in an extensive body of literature.⁹⁶ While scholarly articles certainly exert an authoritative influence over the present case, it is difficult to attribute legally binding force to these texts, especially pending ongoing legislative developments. From that perspective, it is particularly striking how little attention is paid to refuting Google's argumentation regarding gatekeeping.

5.2 Self-preferential Conduct Under EU Competition Law

A second element that warrants further scrutiny is the argumentation on self-preferential conduct. In essence, self-preferencing encompasses market behaviour through which an undertaking favours its own goods and services, to the detriment of its competitors.⁹⁷ Although not explicitly mentioned or prohibited under Art. 102 TFEU, the European Commission has addressed the topic of self-preferencing on several occasions, stating the need to end such practices in view of future-proofing Europe's digital single market.⁹⁸ It is not particularly surprising that self-preferencing has caught the attention of Europe's policymakers, especially due to the strong links between self-preferencing and theories on leveraging. Since self-preferential behaviour by a dominant undertaking has significant potential to generate foreclosure effects, it is a worthwhile effort to subject such conduct to an effects-based analysis in order to map out its impact on effective competition. Decisions on this matter should not be taken lightly, however, as anticompetitive effects are not necessarily present. In some instances, a compelling justification can be found in the need to maintain full control over the platform environment, for instance in view of upholding a certain quality standard.⁹⁹ Only when abusive conduct is apparent, an intervention is warranted.

The argumentation put forward by Google's legal department on the topic of self-preferencing was not well received by the ICA. Internal documents included in the decision reveal Google's rather dismissive attitude towards allegations of market

⁹⁶ *Ibid.*, para. 315; the ICA specifically refers to the following reports in fn. 379: Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, "Competition Policy for the Digital Era" (2019), <https://data.europa.eu/doi/10.2763/407537> (accessed 20 March 2022); Jason Furman et al., "Unlocking Digital Competition" (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (accessed 20 March 2022); Competition & Markets Authority, "Online Platforms and Digital Advertising" (2020), https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf (accessed 20 March 2022).

⁹⁷ Niamh Dunne, "Dispensing with Indispensability", 16 *Journal of Competition Law & Economics* 74, 99 (2020); Condorelli and Padilla, *supra* note 20, p. 152; Friso Bostoën and Daniel Mândrescu, "Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores", 16 *European Competition Journal* 1, 17 (2020).

⁹⁸ See, for instance, European Commission, "Statement by Executive Vice-President Vestager on the Commission Proposal on New Rules for Digital Platforms" (2020), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_2450 (accessed 17 December 2021).

⁹⁹ Friso Bostoën, "Leveraging Conduct in Digital Markets under EU Competition Law and Beyond", p. 74 (KU Leuven, 2021), <https://lirias.kuleuven.be/3439114> (accessed 2 December 2021).

foreclosure through self-preferential treatment, citing that, in its view, favouring its own services is not prohibited under antitrust law.¹⁰⁰ Google's legal department went as far as explicitly mentioning *Google Shopping*¹⁰¹ and expressing their disagreement with the decision. With the General Court proceedings in *Google Shopping* now being concluded – and pending the appeal case¹⁰² before the CJEU – it is clear that self-preferential conduct can be subjected to scrutiny under EU competition law.¹⁰³

What makes Google's position especially precarious are several factual elements, notably the existence of the third-party application Kakao. In this respect, a close reading of the decision suggests that the ICA is creating a slight overlap between allegations on self-preferential treatment and discriminatory conduct, thereby creating leeway to pivot away from the not-so-well established rationale on self-preferencing in view of relying on the tried and tested reasoning that underpins abusive discriminatory conduct. Furthermore, as argued by the ICA, it indeed appears illogical to refuse the publication of certain applications altogether based on their purpose rather than their mode of use. The combination of these two arguments indeed puts question marks over the compatibility of Google's conduct with EU competition law.

5.3 Essential Facilities Versus Convenient Facilities

A third aspect under consideration is the reasoning on the indispensability criterion. The rationale on Android Auto being an essential facility is perhaps the most controversial facet of the decision. The facts indicate that JuicePass performs as it is supposed to when used via a smartphone.¹⁰⁴ From that angle, one could indeed argue that Android Auto is not indispensable for the usage of JuicePass. The ICA decided differently, holding that the usage of JuicePass via a smartphone is not the same as using the app via Android Auto. According to the ICA, safety and ease-of-use considerations also come into play when making this assessment.¹⁰⁵

The current decision stretches the notion of an essential facility well beyond the boundaries as foreseen in earlier CJEU case law such as *Magill*.¹⁰⁶ As recalled, the litmus test for accepting indispensability has been whether alternative facilities – actual or potential – are available on the market.¹⁰⁷ If true, the facility is not regarded as indispensable. Under these circumstances, the level of convenience

¹⁰⁰ *Enel X Italia v. Google*, *supra* note 12, para. 206; regrettably, the current decision does not shed more light on this aspect.

¹⁰¹ Commission Decision AT.39740, *Google Search (Shopping)* [2017] C(2017) 4444 final.

¹⁰² While little information is known regarding the appellate proceedings before the CJEU at this point, the case has recently been assigned case number C-48/22 P.

¹⁰³ Case T-612/17, *Google and Alphabet v. Commission (Google Shopping)* [2021] ECLI:EU:T:2021:763.

¹⁰⁴ *Enel X Italia v. Google*, *supra* note 12, para. 377.

¹⁰⁵ *Ibid.*, para. 380.

¹⁰⁶ *Magill*, *supra* note 7, para. 52.

¹⁰⁷ *Ibid.*

offered by those alternative facilities is not a deciding factor. In the current case, however, it seems that the convenience factor of using JuicePass via a smartphone versus using JuicePass via Android Auto did play an important role in the outcome of the indispensability assessment. Elsewhere, it is argued that the reading of the indispensability criterion in *Enel X Italia v. Google* shifts the threshold from an “essential facility” to a “convenient facility”, thereby substantially lowering the threshold for finding a refusal to deal.¹⁰⁸

In this respect, it is also useful to consider the rationale behind the indispensability criterion. The approach taken towards indispensability is often quite restrictive, given the need to balance the short-term positive effects on competition by imposing a duty to deal against the negative effects on long-term competition by taking away incentives to develop competing essential facilities.¹⁰⁹ In literature, this trade-off is described as a balancing exercise between competition *in* the market and competition *for* the market.¹¹⁰ On the one hand, a duty to interoperate does not incite firms to engage in competition *for* the market and to develop a competing platform.¹¹¹ Hence, incumbent monopolists will not face any challenges in the upstream market and are therefore likely to retain their dominance. On the other hand, a duty to interoperate strengthens competition *in* the market by enabling new market entrants to engage in downstream competition and by subsequently permitting follow-on innovation.

While both approaches – a refusal to deal and a duty to deal – have their respective merits and shortcomings, it is especially appealing from a policy perspective to pursue competition *in* the market for the simple reason that the effects thereof manifest themselves in a more immediate manner.¹¹² A duty to interoperate between Android Auto and JuicePass would immediately enrich the competitive dynamics in the market for navigation apps, whereas a refusal to deal would equate to the status quo for the foreseeable future. Yet, considerations concerning competition *for* the market should not be overlooked, since the imposition of a duty to interoperate does not provide any incentives to push for disruptive innovation, capable of toppling existing dominant firms.

Ultimately, a balancing exercise, where both points of view are considered, indeed seems the most sensible course of action. The digital nature of the situation undoubtedly complicates such assessment. In this respect, Google’s positioning benefits from a policy argument and a factual argument. From a policy point of view, imposing a duty to interoperate takes away any incentives for Enel X Italia to

¹⁰⁸ Pablo Ibanez Colomo, “The Italian Competition Authority in *Enel v Google*: Will Bronner and Magill Survive Common Carrier Antitrust?” (Chillin’Competition, 27 May 2021), <https://chillingcompetition.com/2021/05/27/the-italian-competition-authority-in-enel-v-google-will-bronner-and-magill-survive-common-carrier-antitrust/> (accessed 17 December 2021).

¹⁰⁹ Inge Graef, “Rethinking the Essential Facilities Doctrine for the EU Digital Economy”, 53 *Revue juridique Thémis de l’Université de Montréal* 33, 43 and 47 (2019).

¹¹⁰ *Ibid.*, p. 47.

¹¹¹ Dunne, *supra* note 97, p. 76.

¹¹² Damien Geradin, “Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court’s Judgment in *Trinko* in the Wake of *Microsoft*, *IMS*, and *Deutsche Telekom*”, 41 *Common Market Law Review* 1519, 1540 (2004).

bring the battle to Google and to attempt to design its own ecosystem for connected cars. From a factual standpoint, it remains questionable whether there is a true impediment to enter the downstream market for navigation apps. Nothing prevents car users from putting their smartphone in a car phone mount and using the JuicePass app accordingly, i.e. without being connected to Android Auto. When combined, these arguments suggest that it would perhaps be logical to deny interoperability.

However, several arguments also reinforce Enel X Italia's positioning. Firstly, it is reasonable to assume that Enel X Italia is unable to create a proper alternative to Android Auto in a short time window due to either technical or economic obstacles.¹¹³ Firms such as Google are typified by a high level of vertical integration and extensively benefit from economies of scale and scope, as well as an ability to leverage the insights obtained via large-scale data aggregation. Conversely, Enel X Italia does not seem to possess the necessary means to achieve a level of efficiency that would enable upstream competition¹¹⁴. Secondly, the safety argument merits revisiting. For all intents and purposes, directly using a smartphone does not appear to be a viable substitute in the sense of *Bronner*.¹¹⁵ It seems somewhat cynical to deny the finding of indispensability by solely considering that "less advantageous" alternatives are available, thereby wholly disregarding users' safety while driving.¹¹⁶

The unexpected approach taken by the ICA vis-à-vis indispensability is further reinforced by the finding that access to the essential facility follows from an omission and that it is perhaps far-fetched to demand the creation of new development tools in order to facilitate access to the Android Auto platform. Moreover, the case suggests that indispensability is assessed from the perspective of a specific downstream undertaking rather than from the perspective of the market itself. In other words, the decision hints at a subjective interpretation of indispensability rather than an objective one.¹¹⁷ The current case therefore challenges some of the established principles from *Magill* and *Microsoft*, perhaps in an effort to circumvent some of the difficulties that are associated with assessing indispensability. In that regard, it remains to be seen how the tension between a subjective or objective understanding of indispensability would be settled by the European courts.

¹¹³ *Bronner*, *supra* note 31, para. 44.

¹¹⁴ Christof Koolen, "Des appareils intelligents au centre de plusieurs problèmes de concurrence - Le rapport de l'enquête sectorielle de la Commission européenne sur l'Internet des Objets destiné aux consommateurs", 132 *Consumentenrecht/Droit de la Consommation* 73, 75 (2021).

¹¹⁵ *Bronner*, *supra* note 31, paras. 45–46.

¹¹⁶ In this respect, consider Barry Doherty, "Just What Are Essential Facilities?", 38 *Common Market Law Review* 397, 423 (2001): "Alternatives are not to be discounted merely because they are 'less advantageous'".

¹¹⁷ Colomo, *supra* note 108; consider also Evrard, *supra* note 5, p. 507, who writes in the context of *Bronner*: "Hence, it is an objective test and not a subjective one that the Court put forward, based on the needs of the undertaking requesting access".

6 Conclusion

Since the initial release of Android in 2008, Google has been able to steadily strengthen its positioning in the market for smartphone operating systems. With electric cars slowly catching on, Google opted to extend the features and functionality of Android to automotive environments as of 2015. The resulting platform – Android Auto – ensures that drivers can make use of certain applications while keeping distractions to a minimum. At present, interoperability with Android, Android Auto and the Google Play Store is deemed crucial for application developers looking to serve their user base.

In *Enel X Italia v. Google*, the question arose whether a refusal to allow interoperability between Android Auto and the app JuicePass could be considered as an abuse of dominance under Art. 102 TFEU. The refusal to allow interoperability was eventually brought before Italy's competition authority. Here it was decided that Google occupies a dominant position on the market for automotive application platforms. Moreover, it was also found that the tech firm operates as a gatekeeper between application developers and end users. Under those circumstances, Google's conduct is of relevance to the dynamics within the market and thus gives rise to a special responsibility for the company to maintain a level playing field.

The ICA held that Google failed to create this level playing field, among others by giving preferential treatment to its proprietary apps Google Maps and Waze, and by impeding the release of JuicePass on Android Auto. As such, Google hindered Enel X Italia's ability to establish itself on the market in addition to influencing the downstream competitive space for automotive applications. Since no objective justifications were accepted, Google was found to be in contravention of Art. 102 TFEU. Under those circumstances, Google was fined €102,084,433.91 and ordered to restore the level playing field by creating a suitable application template for the development of electric charging apps.

The decision is welcomed for addressing some contentious elements that are inherent to digital ecosystems such as self-preferential conduct and gatekeeping behaviour. While the ICA heavily relied on established CJEU case law, it is interesting to see how the current decision also deviates from established legal doctrine, notably on the topic of gatekeeping. These findings are further reinforced by reading the decision in *Enel X Italia v. Google* in conjunction with the proposal for a Digital Markets Act. Considering these developments, and with EU policymakers eager to address contemporary challenges in online marketplaces via legislation, it remains to be seen whether some of these deviations will reappear in future case law.

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