February 26, 2025

ECJ Hands Down Landmark Decision on Access Restriction Abuses

Introduction

On February 25, 2025, the European Court of Justice ("ECJ") delivered its judgment[1] in Case C-233/23 the ("Judgment") developing a growing line of support for abuses of dominance based on access restrictions. In further developing a new access-restriction abuse category under Art. 102 TFEU, the ruling will likely shape the Commission's enforcement practice for the years to come in digital as well as other regulated markets such as telecoms and utilities.

Refusal to supply vs. access restrictions

Prior to the ECJ's more recent decisions in Slovak Telekom (Case C-165/19 P), Lithuanian Railways (Case C-42/21 P) and Google Shopping (C-48/22 P), the Commission primarily enforced Art. 102 TFEU in refusal to supply cases where the so-called Bronner conditions were met. Tracing back to a precedent in 1998 concerning access to a newspaper home-delivery network, the Bronner conditions set out that for a refusal of supply to constitute an abuse of a dominant position under Art. 102 TFEU, it must: (i) concern an indispensable product or service, (ii) likely lead to the elimination of all competition in a downstream market and (iii) not be objectively justified.

With more recent precedent in Slovak Telekom and Google Shopping, the ECJ started to introduce nuance to the Bronner doctrine, holding that "*where a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down [in Bronner] do not apply*".[2] While the Bronner doctrine previously paid considerable deference to dominant companies' freedom to contract and made an *obligation* to grant access to a product or infrastructure subject to the strict indispensability criterion, the ECJ more recently held that a distinction must be made for cases where competition authorities "*do not have to force the dominant undertaking to give access to its infrastructure, as that access has already been granted*".[3] These cases would no longer constitute classical "*refusals to supply*" but rather "*access restrictions*" imposed by a dominant company.

Advocate General Medina held in her opinion on the case—which was largely followed by the ECJ—that it is the "*delicate balance* [...] *between the right to choose one's trading partners and freely to dispose of one's property"* that would need to be weighed against the "*interest of competitors and consumers in the proper development of the neighbouring market and fertile competition therein*".[4]

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1 Judgment of the Court of Justice of February 25, 2025, Case C-233/23, Alphabet Inc v AGCM, available here.

2 Judgment of the Court of Justice of March 25, 2021, Case C-165/19 P, Slovak Telekom, paragraph 50, available here.

3 Judgment of the Court of Justice of September 10, 2024, Case C-48/22 P, Google Shopping, paragraph 112, available here.

4 Opinion of AG Medina of September 5, 2024, Case C-233/23, Alphabet Inc v AGCM, paragraph 30, available here.

This approach is consistent with the European Commission's ("EC") draft guidelines on abusive exclusionary conduct by dominant undertakings.[5]

The Judgment

In its Judgment, the ECJ discussed this "*delicate balance*" and clearly distinguished between access restrictions and refusal to supply cases.

Bronner is not applicable for digital ecosystems dependent on uptake from third parties

In its ruling, the ECJ followed AG Medina's opinion and held that the Bronner conditions do not apply 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*".[6] The ECJ drew a clear line in holding that the Bronner conditions are only applicable if the infrastructure is (i) developed by the undertaking in a dominant position solely for the needs of its own business and (ii) owned by that undertaking.

Indispensability

With specific reference to the indispensability criterion, which has previously been a significant hurdle for traditional refusal to supply cases, the ECJ held that a refusal to grant access to a platform by a third-party undertaking which has developed an app is "*capable of constituting an abuse of a dominant position even though that digital platform is not indispensable for the commercial operation of the app concerned on a downstream market*".[7]

Anti-competitive effects

The ECJ confirmed—in line with standing precedent—that "*whether the conduct at issue is abusive cannot depend on the ability of competitors on the market concerned to mitigate such effects*".[8] However, the fact that the undertaking requesting access to a product or digital platform continued to be present on the market or that their presence increased, may constitute evidence that the conduct at issue "*was incapable of having the alleged exclusionary effects*". The ECJ makes clear that dominant companies have the ability to adduce, and enforcers or national courts are obliged to take into account evidence that shows a given access restriction was incapable of having exclusionary effects—in which case the conduct at issue is not abusive.

Objective justification

Departing from the opinion of the Advocate General, the ECJ did not endorse the view that objective justifications for access restrictions under Art. 102 must be viewed or interpreted restrictively. Rather, and in line with existing precedent, the ECJ held that it is for the dominant undertaking to adduce the evidence underpinning an objective justification. For access restrictions to digital platforms, this can include that the grant of access may compromise the integrity or security of the platform concerned, or that it would be impossible for other technical reasons to ensure interoperability with the platform.

Implications of the Judgment

The allocation of this case to the Grand Chamber and the issuance of the opinion of the Advocate General on a legal question on which the ECJ had previously ruled shows that the case was of significant importance to the ECJ.

The Judgment clearly separates a new abuse category of access restrictions from the traditional refusal to supply cases that followed the Bronner criteria—and which required complainants and enforcers to prove that the product or infrastructure that

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5 European Commission, Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, available here.

6 Judgment of the Court of Justice of February 25, 2025, Case C-233/23, Alphabet Inc v AGCM, paragraph 44.

7 *Ibid*., paragraph 50.

8 *Ibid*., paragraph 58.

market participants sought access to was indispensable. This new string of case law shows that findings of abuse concerning access are possible without proving indispensability.

The Judgment also confirms, however, that dominant companies must be able to effectively adduce evidence to show that an alleged access restriction either (i) was not capable to produce exclusionary effects or (ii) was objectively justified for technical or other reasons, such as the integrity of the platform as a whole.

Ensuring interoperability is likely to incur a cost: the ECJ holds that Article 102 TFEU does not preclude a dominant company from requiring an appropriate financial contribution for access. The ECJ's position on interoperability under Article 102 TFEU—and also the Digital Markets Act—is likely to lead to increased litigation involving dominant firms.

We expect the Commission to take note of the Judgment and reflect these findings in a updated version of its Guidelines on unilateral exclusionary conduct that it intends to adopt by the end of this year.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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