

# How *Android Auto* reshapes the law of refusal to deal

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Autoridade da Concorrência Webinar, 26 May 2026

<http://chillingcompetition.com>

# Summary

- The traditional refusal to deal doctrines (*Magill* and *Bronner*)
- How *Android Auto* reshapes the traditional doctrines
- Implications of *Android Auto*

# Summary

- **The traditional refusal to deal doctrines (*Magill* and *Bronner*)**
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# The traditional refusal to deal doctrines

- Under the traditional doctrines, a refusal to deal only amounts to an abuse of a dominant position in exceptional circumstances:
  - **Indispensability** of the input or infrastructure to compete in the relevant adjacent market
  - The refusal would lead to the **elimination of all competition** in the relevant adjacent market
  - When the input or infrastructure is protected by intellectual property rights (*Magill*), the refusal must prevent the emergence of a **new product**
  - The refusal lacks an **objective justification**
- These conditions are notoriously demanding for authorities and claimants

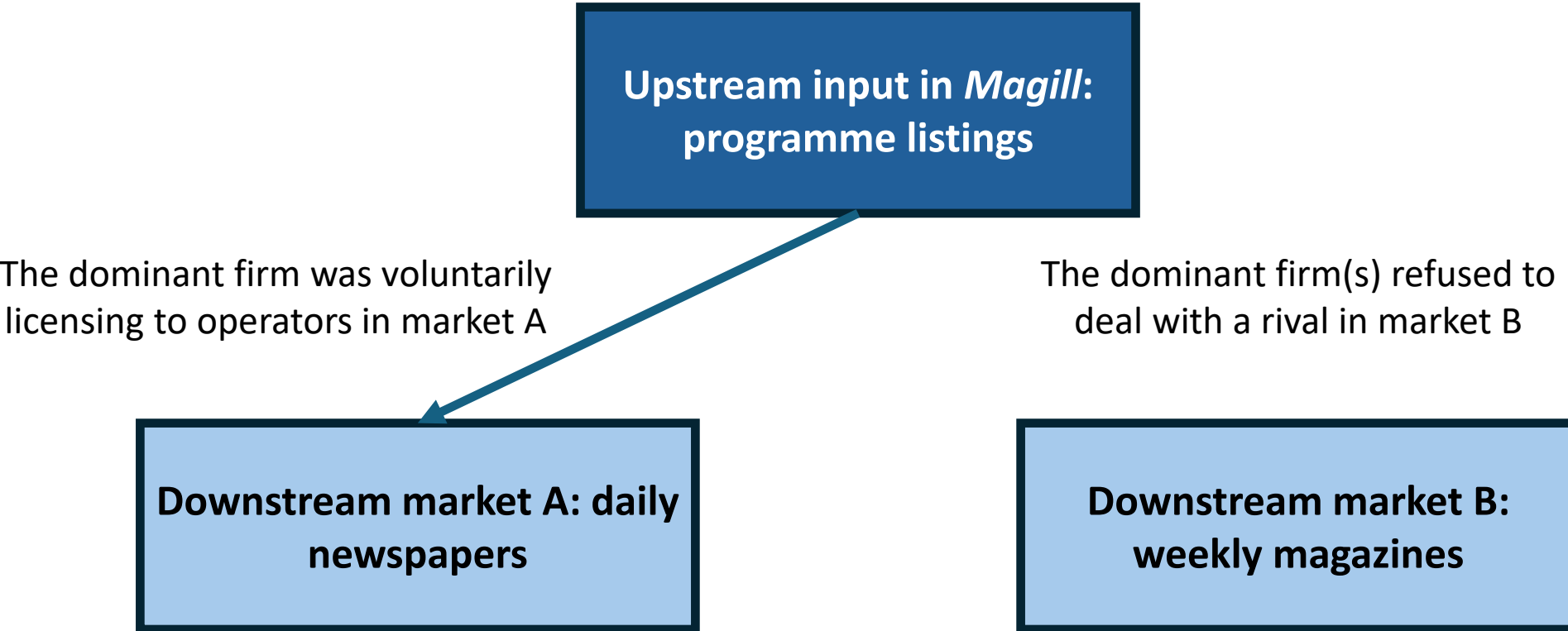
# The traditional refusal to deal doctrines

- The traditional refusal to deal doctrines only apply to a subset of cases:
  - To begin with, they concern exclusionary (not exploitative) conduct
  - They make it necessary to identify **two related markets** (one where dominance is enjoyed and another where the effects are displayed)
  - They do not apply in the following scenarios:
    - Where the dominant firm is voluntarily dealing with third parties
    - Where there is regulation in place compelling the firm to deal with third parties

# The traditional refusal to deal doctrines

Under the traditional understanding of the doctrines, it was immaterial that the dominant firm was dealing with third parties in markets unconcerned by the refusal at issue in the case

# The traditional refusal to deal doctrines



# The traditional refusal to deal doctrines

- The rationale of the traditional refusal to deal doctrines has been made explicit by the Court of Justice:
  - Requiring a firm to deal with third parties with which it has chosen not to deal interferes with its **fundamental rights**
  - In addition, can be expected to negatively affect the firm's incentives to invest and innovate, and thus **dynamic competition**
  - The traditional doctrines saw product design and business models as something best left, in principle, firms themselves

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# The *Android Auto* case

- On its face, the *Android Auto* case looks like a canonical refusal to deal scenario:
  - Enel requested access to the Android Auto platform, operated by Google, for its application
  - Google had never given access to an application falling within the relevant category (use of charging points for electric vehicles)
  - At the time of the facts, Google had given access to its platform to two other categories of applications: media and messaging
- These facts would suggest that the abusive nature of the refusal would be assessed against *Magill* and/or *Bronner*

# The *Android Auto* case

- If one were to apply *Magill* and/or *Bronner*, as traditionally understood, the behaviour would be unlikely to amount to an abuse
  - **Indispensability**: access to the relevant platform (Android Auto) was clearly not indispensable for Enel to compete on the relevant adjacent market
  - **New product**: to the extent that Enel's application was a new product, its emergence had clearly not been prevented by the refusal
  - More generally, it was not even clear that the behaviour was exclusionary, as the definition of the relevant adjacent market had been left open

# The *Android Auto* case

- However, the Italian Competition Authority established an abuse on the basis of an expansive interpretation of *Magill-IMS Health*
  - Android Auto was found to be indispensable in a narrow sense (use of the application while driving)
  - As far as the ‘new product’ condition is concerned, the authority argued that the refusal could tilt the market in favour of Google’s product
  - In addition, the authority failed to define the relevant adjacent market affected by the refusal, referring instead to a ‘competitive space’

# The *Android Auto* case

- The decision is interesting given the nature of the remedy imposed to bring the infringement to an effective end
  - In traditional refusal to deal cases, the infringement would be brought to an end by requiring the firm to give access to the relevant input or infrastructure
  - In *Android Auto*, the platform operator was required not just to share its infrastructure, but to modify it to accommodate Enel's request
  - In a sense, what was an objective justification for the refusal is no longer a relevant factor

# The *Android Auto* case

- The Italian Competition Authority's decision was confirmed by the TAR Lazio, and then appealed before the *Consiglio di Stato*
- The latter referred a number of questions to the Court of Justice, revolving around:
  - The interpretation of the traditional doctrines
  - Whether a dominant firm can be compelled to modify its own product
  - The need to define the relevant adjacent market affected by the refusal

# The *Android Auto* case

- The Court of Justice changed the focus of the case: from the *interpretation* of *Magill*, to the *applicability* of *Bronner*
  - It had never been in doubt at the national level that the behaviour was a refusal to deal, to be assessed against *Magill-IMS Health*
  - The ECJ, instead, concluded that the behaviour had to be assessed under a standard effects analysis (without the need to establish indispensability)
  - The rationale provided for this position represents a move away from the traditional understanding of the refusal to deal doctrines

# The *Android Auto* case

'44. By contrast, as the Advocate General observed in point 35 of her Opinion, **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 laid down** by the Court of Justice in paragraph 41 of the judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569), 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**'

Case C-233/23, *Android Auto*

# The *Android Auto* case

‘46. [...] **[W]here the cost of developing such infrastructure has been assumed by the undertaking** in a dominant position not solely for the needs of its own business but **with a view to that infrastructure being able to be used by third-party undertakings**, the fact of requiring the undertaking in a dominant position to provide **access** to that infrastructure to a third-party undertaking **does not fundamentally alter the economic model** which applied to the development of that infrastructure’

Case C-233/23, *Android Auto*

# The *Android Auto* case

Following *Android Auto*, the fact that the dominant firm was dealing with third parties in a market unconcerned by the refusal rules out the applicability of *Magill* and *Bronner*, thereby moving away from the traditional doctrines

# The *Android Auto* case

- The two crucial paragraphs of the ruling show that the rationale underpinning the refusal to deal doctrine has changed:
  - **Design:** if the relevant input or infrastructure has been designed with a view to opening it up to third parties, *Magill* and *Bronner* are not relevant
  - **Economic model:** the question is no longer whether the firm would be compelled to deal, but whether a duty would ‘fundamentally alter’ its model

# The *Android Auto* case

‘74. [...] **the fact that there is no template for the category of apps concerned or the difficulties involved in its development** which the undertaking in a dominant position may face **cannot in themselves constitute an objective justification for that undertaking’s refusal to grant access**. Nonetheless, taking into consideration all the relevant circumstances in that regard, 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, taking into account both the needs of the undertaking requesting access to the platform of the undertaking in a dominant position and the difficulties encountered by that undertaking in developing that template’

Case C-233/23, *Android Auto*

# The *Android Auto* case

## ***Magill/IMS Health and Bronner***

Absent '***exceptional circumstances***', dominant firms are free to choose the design of their products and their business models

Intervention under competition law is confined to a duty to deal with a third party



## ***Android Auto***

Product design and business models will be typically subject to scrutiny whenever the ***requisite threshold of effects*** is met

Intervention under competition law goes beyond a mere duty to deal; ***third parties become actively involved*** in the design of products and/or business models (***from design to co-design***)

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# Implications of *Android Auto*

- Is *Android Auto* relevant beyond digital platforms? The Court of Justice's reasoning suggests that it is:
  - Intellectual property licensing
  - Utilities and infrastructure
  - Financial services

# The *Android Auto* case

- Following *Android Auto*, the scope of the ‘*exceptional circumstances*’ doctrines has been significantly narrowed
  - Where the dominant firm **has chosen to deal with third parties in an unrelated market, indispensability is no longer required** to prove an abuse
  - For instance, indispensability would not be required to gain access to one level of the value chain if access has already been given at another level
  - For instance, indispensability would no longer be required for any application of a patent if a licence has been given for another application of the patent
- What is more, intervention under competition law can now go beyond a mere access duty

# Implications of *Android Auto*

- Following *Android Auto*, intervention is more likely to force the alteration of firms' **business models**:
  - More frequent interference with product design means that some business models may not be viable following intervention
  - If a digital platform is required to license its operating system, for instance, it may not be able to monetise its assets via the sale of devices
  - Similarly, the holder of an intellectual property right may no longer be able to choose the level of the value chain at which its technology is licensed

# Implications of *Android Auto*

- The institutional implications are no less significant:
  - The administration of Article 102 TFEU is likely to become more complex
  - Rise of private enforcement to test the boundaries of *Android Auto*