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New chapter in the Google Shopping saga

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Resume: *It's the end of the second round in the Google Shopping case, and the company has lost this battle again. The Commission had already imposed a serious penalty during its record decision in 2017. But this time it is the court that does not hesitate to confirm and even accentuate this sanction by bringing new legal elements. Back, analysis and in-depth criticism on a case that will be a marker in competition law.*

I/ Elements prior to the decision

A . Historical factual background of the case

1. The power of Google. "Google is an elephant in a china[1] store" is how economist Joëlle Toledano defines the American company. The company's position of strength in the global economy is no longer in question. Google has been growing steadily during the first decade of the 2000s, to the point of obtaining more than 90% of the market[2] share in the European search engine market.

2. How Google is suffocating its competitors in the price[3] comparison market. At the beginning, the price comparison market was in full expansion, and seen as "bubbling[4]" in the sense of one of the leaders of a company competing with Google on this market. A price comparison service can be defined as: "*a service that allows consumers to compare the prices of multiple products on the Internet. Price comparison sites list the products submitted by merchants in order to bring up the best prices for each product the consumer is looking for*[5]". The fact is that in the early 2000s, it is difficult

[1] J. Toledano, "Abuse of dominance Google is an elephant in a china store," September 19, 2018, Int, "The Tribune.

[2] EU Comm. June 27, 2017, *Google Search shopping*, DG COMP/39.740 - EU Comm. IP/17/1784, June 27, 2017

[3] R. Balenieri, F. Dèbes, "*How Google asphyxiated European price comparators*," Les Echos, October 8, 2018.

[4] N. Jornet, "*How Google asphyxiated European price comparison sites,*" Les Echos, October 8, 2018.

[5] Mickael Froger, "Les comparateurs de prix : comment ça marche", Legow blog, marketing and marketplaces, March 29, 2011.

to be a price comparison company, although this market is growing rapidly, it struggles to be legitimized. The entry of Google in this sector was therefore initially seen as a positive element, an arrival that would allow to legitimize this young market.

From the beginning Google shopping and proposed as a free service that aimed to highlight the e-commerce sites that were little publicized at the time. In 2012 the comparator will know a notable change which is that it goes from free to paid. A reversal of business strategy that will not benefit the competition. Indeed this strategy was finely thought out, because the service in the first instance, there is a predation phase with the free service. This is what some would define as the principle of hard drugs or "the first dose is always free[6]". Thanks to this free service, there is an intensive loyalty of e-merchants who have finally been diverted from Google's competitors. An effect that could be called "gatekeepers[7]" is created with this strategy. The fact that the comparator becomes paying in 2012 will not help. Users are now accustomed to this comparator. But this is not the most predatory maneuver that Google has used via its Google-shopping.

B. <u>The context of the case</u>

3. The premises of the case. The Google Shopping case started with a series of complaints filed with the European Commission in November 2009. On November 30, 2010, the Commission initiated a procedure against Google. Officially announced in a press release: "*The Commission is investigating allegations of antitrust violations by Google*[8]". This statement establishes the presumption of abuse of a dominant position by Google in the field of online search. The two main grievances raised in the statement include: first, that Google would penalize online search providers in paid and free search results. Secondly, and in conjunction with this deceitful maneuver against its competitors, Google would allow itself to favor its own services in the online comparison market.

When opening the formal investigation, the Commission focused on several efforts, which aimed to demonstrate:

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6 N. Jornet, "How Google asphyxiated European price comparison sites", Op Cit.

7 This status is reserved for certain operators defined by the proposed regulation in a particularly precise manner. The operator must thus meet several conditions set out in Article 3.1: "*(a) it has a significant impact on the internal market; (b) it offers a basic platform service that serves as an important gateway for professional users to reach end users; and (c) it enjoys a well-established and durable position in its activities or it is foreseeable that it will enjoy such a position in the near future. If these conditions are met, the Commission decides to "designate" the operator as a gatekeeper.* D. Bosco, "Digital Economy - The Commission unveils its proposals to shape Europe's digital future", Lexis Nexis, Contrats Concurrence Consommation n° 2, February 2021, comm. 27.

8 EU Commission, "Antitrust: Commission investigates allegations of antitrust violations by Google", Press Release IP/10/1624, Nov 30, 2010

first, that Google artificially favored its own vertical services to the detriment of its competitors by giving them preferential placement in its organic results pages. Secondly, by disadvantaging competing vertical search engines by lowering their ranking in the natural search results. Thirdly, they would have increased the price per click of the sponsored links of the vertical search services by degrading their "Quality Score".

4. The first solutions considered. The list of complainants against Google is growing, Commissioner Almunia proposes the preliminary conclusions of the investigation. The first and main allegation is the heart of the case we are interested in, namely the preferential treatment that Google gave to its own thematic engines.

In the continuity of these conclusions, Commissioner Almunia does not wish to enter into a long and tedious case, de facto he prefers to opt for a commitment procedure on the basis of Article 7 of Regulation 1/2003[9]. Numerous proposals and exchanges were made with the American giant. A point of agreement seemed to have been found, Commissioner Almunia considered that it was time, that the investigation should come to an end[10]. However, it turned out that the complainants strongly disagreed with the proposed commitments established with Google and *de facto* increased the pressure on the Commission. Many new elements were sent to the Commission, including evidence of potential algorithmic[11] fraud. Under fire from critics, the Commissioner went back on his statement and finally recognized the insufficiency of Google's commitments in the face of these new elements[12].

5. The end of the first Google Shopping episode. The arrival of Magrethe Vestager, will mark a turning point in the management of this case. Upon her arrival the latter has set a strict course of action and immediately took control of the case. It was on April 15, 2015, that the Commission sent Google a statement of objections, the authority comes to expose to Google that according to it the company abuses its dominant position in favor of its price comparison "Google Shopping" in the results pages of its generalist engine.

Two years later, a record was set: "*The Commission fined Google 2.42 billion euros for abusing its dominant position in the search engine*

[9] Council Regulation (EC) No. 1/2003 of December 16, 2012 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[10] J. ALMUNIA, "*Public policies in digital markets: reflections from competition enforcement*," Chatham House Competition Policy Conference 2014, London, June 30, 2014, SPEECH/14/515.

[11] Samia Maouche, "*European Commission investigation: confirmation of suspicions of abuse of dominant position against Google*," LexisNexis, News File, May 15, 2015.

[12] J. ALMUNIA, "*Trends and milestones in competition policy since 2010*," AmCham EU's 31st annual Competition Policy Conference, Brussels, October 14, 2014, SPEECH/14/689.

market by promoting its own price comparison service"[13].

Google will find this decision extremely unfair and in the face of this will on September 11, 2017 decide to file an appeal against this decision.

C. The contested decision

6. The delimitation of the relevant market according to the Commission. As far as the relevant product market is concerned, the Commission has undertaken to establish a duality of markets. In a first step, the market for general Internet services was concerned, and in a second step the market for Internet price comparison services. This duality will be necessary for the characterization of the abuse. In addition, the Commission made a major clarification in the sense that it considered that from the point of view of Internet users' demand, there was little substitutability between general search services and other services offered on the Internet. De facto, this opens the door to a broad analysis of dominance and potential abuse.

As far as the geographical dimension of the relevant market is concerned, the Commission concludes that the general search market and the specialized price comparison search market are national in scope. A conclusion and a global analysis that Google does not contest.

7. The demonstration of the dominant position. The Commission thanks to the various elements of its investigation has managed to establish during its investigation, it has managed to establish that Google held since 2008 a dominant position on the market for general search in each country of the EEA. Market shares exceeding at the time of the decision in 2017 the 90% mark. In addition to that, there are certain barriers to entry in these markets that are quite high, especially due to network[14] effects.

8. Characterization of the abuse. The Commission determined that at various times from January 2008 onwards, Google had abused its dominant position. The Commission's demonstration began with an important clarification: the prohibition contained in Article 102 TFEU and Article 54 of the EEA Agreement concerns not only the conduct of an undertaking that intended to strengthen its dominant position in a market in which it was already dominant, but also the conduct of an undertaking in a dominant

[13] Comm.EU, press release "*Anticompetitive practice: Commission fines Google €2.42 billion for abusing its dominant position in the search engine market by favouring its own price comparison service*", Brussels, 27 June 2017, IP /17/1784.

[14] Comm.EU, Press Release, Margrethe Vestager, "Anticompetitive practice: Commission fines Google €2.42 billion for abusing its dominant position in the search engine market by favouring its own price comparison service", Brussels, June 27, 2017, IP /17/1784.

position in a given market that tended to extend its position in a neighboring market by distorting competition[15]. One of the Commission's main arguments was that the practices in question were abusive because they deviated from competition on the merits[16].

To establish this analysis, several criteria seemed to be important to the Commission. First of all, the positioning and the form of the price comparators competing with Google Shopping. The Commission analyzed the fact that the competing price comparison sites were always displayed in a generic form, with a blue link leading to the result page of the comparison site in question. This generic form, beyond the lack of graphic characteristics, was subject to potential demotion in the ranking of results of the "Panda" algorithm. Beyond this defect of classification of the competitors, Google came to put forward its own service. The latter was not initially subject to the same algorithmic adjustments as the competing comparators. The graphic form being already more advantageous, the display of Google Shopping is done in a "Box", directly integrated to the Google search service, which allows it to be at a highly visible place compared to its competitors[17].

In part 7.2 of its decision[18], the Commission clarified the identified abuse, which consisted in the more favorable positioning and presentation, in the general results pages of Google, of its own product comparator, compared to competing product comparators. That is why, in order to justify the abusive character of the practices in question, the commission came to examine the value of the volume of traffic for the capacities of the price comparators to compete. Following this examination, it was found that Google's practice had the effect of reducing the traffic generated for competing comparators from the general Google search results pages. The detour of this traffic had no possibility of being replaced by other traffic sources. Thus, an obstruction to access essential to ensure a competitive game.

In summary: The Commission intended to show that Google was willing to position and highlight its product comparison site on its general results pages in a more favorable way than competing price comparison sites. High traffic is essential for product comparison sites. This term "essential", must be highlighted, it can resonate with a famous theory, a theory that will be used by the court in its decision. As a result, the Commission declared: that Google

[15] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", Pt. 55-56

[16] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT. 58.

[17] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.69.

[18] EU Comm. June 27, 2017, *Google Search shopping*, DG COMP/39.740 - EU Comm. IP/17/1784, June 27, 2017.

had violated Article 102 TFEU and Article 54 EEA. Thus, the Commission to impose on Google Inc, a financial penalty of 2.4 billion euros[19].

9. Google's appeal proceedings. Application is filed at the Registry of the Court of First Instance on September 11, 2017 by Google to introduce the present appeal[20]. Following this appeal many are the supporters of the Commission, which will come to ask to intervene to support and support the conclusions of the Commission in the face of the appeal of Google. The conclusions of Google are filed on July 20, 2018. The hearing will be held on February 12 and 14, 2020.

II/ The heart of the decision

A. The debate on competition on the merits

10. A central notion in the debates. This idea of "competition on the merits" comes up again and again in the decision. However, what does this notion mean in practice? It is understood that in order to obtain effective competition, it is assumed that the merits of each other can be freely assessed by the consumer[21]. This is why the consistent European jurisprudence on this subject has defined that "a *dominant company must not resort to means other than those of competition on the merits*[22]".

11. Google defends itself from a lack of competition on the merits. Overall, Google believes that its practices do not violate the idea of competition on the merits. According to them in the contested decision, nothing comes to identify in the incriminated behavior which consists in setting up qualitative improvements of its service of research on Internet that it deviates from what one calls the competition by the merits[23].

To justify this defense, Google points out that the quality improvement practices are part of a competition on the merits that cannot be qualified as abusive[24]. In support of

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[19] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.68.

[20] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.79.

[21] C. Prieto, "Synthèse - Abus de position dominante", LexisNexis, Jurisclasseur Europe Traité, September 30, 2020, PT.27.

[22] CFI, Sept. 30, 2003, Case T-203/01, Michelin II, pts 54, 55 and 97: ECR 2003, p. II-4071.

[23] CJEU, October 23, 2003, aff. T-65/98, Van den Bergh Foods v/ Comm, pts 157 and 158 : Rec. ECJ 2003, p. II-4653 - CFI, September 17. 2007, aff. T-201/04, Microsoft v/ Comm, prec. n°1, pt 1038). These criteria are firmly supported by subsequent case law (ECJ, 2 Apr. 2009, case C-202/07 P, France Télécom , prec. n°26 - CJEU, Oct. 14. 2010, case C-280/08, Deutsche Telekom , prec. n°26, pt 176 - CJEU, Feb. 17. 2011, Case C-52/09, TeliaSonera Sverige AB, prec. n°13, pt 88.

[24] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.139.

this, the company recalls in its appeal most of the major antitrust[25] jurisprudence, which defines "normal" or "merit-based"[26] competition. The central element of the various cases cited by Google is that companies have the right to use all normal means to participate in competition and gain market share. In this context, Google points to a study by the Computer Communications Industry Association, which shows that the development and improvement of a website is an integral part of the so-called classical[27] competitive process. For Google, improving particular designs and developing so-called underlying technologies would be part of this idea of competition on the merits in the general search[28] market.

The company believes that the Commission simply considered that Google's behavior was aimed at extending its dominant position on a neighboring market through a "leverage effect" without necessarily taking into account that this behavior consisted in improving its services and that it did not therefore deviate from normal competition on the merits[29].

12. The Federal Republic of Germany's support for the Commission's conclusions. The Commission and the FRG argue that the improvement of a service does not preclude it from constituting an abuse of a dominant position, in particular if it leads the dominant undertaking to favour its own service by means other than competition on the merits[30].

Another clarification that the Commission makes is that it disputes the improvement of Google's general search service. According to the Commission, Google would not have improved its general search service by only displaying grouped results from its own product comparison in its general results[31] pages.

The Federal Republic of Germany has now clarified this position by stating that the Google price comparison service prevents competition on the quality of the algorithm for specialized product searches.

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[25] ECJ, February 13, 1979, Hoffman-La Roche v. Commission, Case C-85/76, EU:C:1979:36, paragraph 91; ECJ, July 3, 1991, AKZO v. Commission, C 62/86, EU:C:1991:286, paragraph 70; ECJ, October 14, 2010, Deutsche Telekom v. Commission, C 280/08 P, EU:C:2010:603, paragraph 177.

[26] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.140.

[27] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.141.

[28] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.142.

[29] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.143.

[30] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.146.

[31] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.147.

However, the ability of the specialized search algorithm would be the parameter on which the companies concerned would compete. *De facto,* through the behavior in question, Google would encourage users to click not on the most relevant results, but on the most visible results, regardless of their intrinsic[32] qualities.

13. The confirmation by the European Court of the non-respect of competition on the merits. The European Court of Justice, after a lengthy review of the various jurisprudence on which abuse[33] is based, also recalls that "leveraging effects" are not prohibited as such by Article 102 TFEU, which is nonetheless applicable to such practices. Moreover, in a number of previous[34] cases, several types of leveraging effects have been identified as being contrary to Article 102 TFEU[35]. The Commission found that through a leverage effect, Google was relying on its dominant position on the market of general search specialized in price comparison by enhancing the positioning and presentation of its own comparator and its results in the general results pages, at the top of the pages and in an enriched format compared to its competitors who are only in a generic format that is not very advantageous. The Commission in this context will categorize that this favoritism on the part of Google is likely to lead to a weakening of competition on the markets, on the meeting of three elements: the first is the importance of traffic generated by the general search engine of Google for price comparison. The second is the behavior of users when they search on the Internet, and the third is the fact that the traffic diverted from the general results pages counts as a large proportion of the traffic to the competing product comparison sites and cannot be replaced[36]. The court recognized the importance of the traffic generated by Google and its irreplaceable character by fully approving the Commission's demonstration and that these elements were retained, without committing an error of law, as relevant circumstances likely to characterize the existence of practices that would not fall under competition on the merits[37].

For the court, the fact that Google favors its own specialized results over third-party results seems to run counter to the basic business model of the initial success of its

[32] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.148.

[33] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT. 150-157.

[34] The best known case is Microsoft v. Commission, September 17, 2007, 201/04, EU: T:2007:289, paragraph 1344.

[35] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT. 164.

[36] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT. 167-173.

[37] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.174.

search engine has a certain abnormality[38]. This was also emphasized by one of the main supporters of the Commission in this decision, the deviation from competition on the merits appears to be all the more important when it occurs as a result of a change in the behavior of the dominant[39] operator. As seen above, Google initially provided general search services and acquired a "super-dominant[40]" position, which was characterized by very high barriers to entry. In the beginning, Google displayed all results of price comparison services in the same way and according to certain criteria. But in a second phase, as soon as Google entered the price comparison market, its display practices were modified in order to increase the visibility of the results of its own price comparison[41] service. Thus, the court established that the favoritism identified at the end of the above-mentioned analysis was validly established, as Google's behavior could not be considered as competition on the merits[42]. At the same time, the court confirms that this conclusion provided by the commission has not been overturned by Google[43]'s argued defense.

For the court, the Commission's analysis on this point of lack of competition on the merits and which finds an abuse is in no way inconsistent with [44]previous jurisprudence. De facto and on the basis of the various developments, the Court therefore rejects Google's defense on the issue of competition on the merits[45].

B. <u>The essential facilities new element of debate in the Google Shopping saga</u>

14. The concept of essential facilities theory. This concept makes it possible to guarantee economic actors fair access to the infrastructure, goods and services of another actor, potentially a competitor, when these are essential for the penetration of a market[46].

15. A notion introduced by Google's defense in the debates. In its appeal,

38 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.179.

39 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.181.

40 L.Vogel, "Droit de la Concurrence, Droit européen", Trauté de droit économique, Tome 1/1, 3 èmeedition, 2020, Lawlex Bruylant, P.30.

41 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.182-183.

42 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.185.

43 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.186.

44 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.197.

45 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.198.

46 S. Zinty, "Droit Commun des plateformes numériques. Le déroulement de la relation entre la plateforme et les usagers", LexisNexis, JurisClasseur Contrats - Distribution, Fasc 1210, November 1, 2019, PT.83.

Google claims that the so-called "favoritism" behavior incriminated by the decision is in fact a roundabout way of raising what is called a refusal to supply, implicitly reproaching Google for not having given competing comparators access to its innovative technologies and designs and in particular to the "Boxes" appearing at the top of the general search results. Apart from Google, it should be recalled that for such behavior to be contrary to Article 102 TFEU, the Commission would have had to establish that the conditions set out in the "Bronner[47]" judgment had been met, which it failed to do[48].

It is within this framework that part of Google's defense is built, and these are themselves brought into play by the notion of "essential facilities". This defense begins with the articulation of a potential manipulation of the law by the Commission, which, under the guise of this accusation of "favoritism", would have required an obligation to supply, without highlighting the conditions of indispensability of the service[49]. According to Google, since the alleged anti-competitive effects set out in the decision were the result of a lack of traffic, it was up to the Commission to show that access to traffic was essential for competition and that this lack of access eliminated competition[50]. Subsequently, Google's defense points out that the decision merely states that Google's search traffic is "important to the ability of a product comparison service to compete", but there is no demonstration of its indispensability, nor is there any demonstration that Google traffic is irreplaceable[51]. Google's challenge is based on the fact that the contested decision is based on the false premise that the search engine Google is the portal of the Internet. That according to Google there are many other entry points for competition on the Internet[52].

16. The Commission is sticking to its guns. In its defense, the Commission remains adamant that the criteria set forth in the Bronner judgment are not applicable to the facts of the case[53]. The Commission contests all of Google's arguments aimed at finding a potential abuse of dominant

47 CJEU, November 26, 1998, "Bronner", C 7/97, EU:C:1998:569.

48 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.137.

49 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.201.

50 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.202.

51 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.203.

52 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.207.

53 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.208.

position linked to a refusal to provide an essential facility.

One of the main supporters of the Commission, the Federal Republic of Germany, comes to argue that unlike the Bronner case, access to an essential facility is not at issue, for them Google was already providing to its competitors by providing access to its general[54] service.

17. The distinction between refusal to supply and differential treatment established by the Court. At the beginning of its argument, the Court of First Instance recalls the conditions set out in the Bronner judgment, and in particular that in that judgment the Court considered that in order for the refusal by a dominant undertaking to grant access to an essential service to constitute an abuse within the meaning of Article 102, it was necessary, in particular, that this refusal be such as to eliminate all competition on the market on the part of the person requesting the service, and it was necessary for this service to be essential[55].

Following all of its introductory remarks, the court examined the various arguments of the Google defense. The judges decided to recognize that, contrary to what the Commission maintains, the conditions under which Google provides its general search service through access to the results pages generated by competing[56] product comparators are at issue in this case. The court thus opens the debate on the issue of essential facilities. The contested decision therefore aims at equal access of Google's price comparison service and competing price comparison services to Google's general search results pages, regardless of the type of result in question[57]. Secondly, the Court found and granted that the Commission did not expressly refer to the conditions set out in the Bronner[58] judgment when dealing with this issue of access. This could be problematic in view of the following developments, as the court recognizes that Google's general result page has characteristics that make it an essential facility, in the sense of the 2007[59] Microsoft judgment, that there is no real or potential

[54] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.210.

[55] ECJ, November 26, 1998, "Bronner", C 7/97, EU:C:1998:569, PT.41; CJEU, September 9, 2009, Clearstream/Commission, T 301/04, EU:T:2009:317, PT.147.

[56] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.219.

[57] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.222.

[58] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.223.

[59] EU, September 2007, Microsoft C/ Commission, T 201/04, EU:T:2007:289, points 208, 388, 390, 421 and 436.

substitute available to replace the general[60] result pages in an economically viable way.

Even if this recognition is made by the Court, the rest of the judges' arguments do not seem to go in Google's favor. It is indeed stated in the decision that even if the practices in question do not appear to be unrelated to access issues, they are nevertheless distinct in their constituent elements from the refusal to supply identified in the Bronner judgment. This consideration justifies the desire to apprehend the practices under other criteria[61]. It is necessary to take into account that the practices are based, according to the Commission, on an internal discrimination between the Google price comparison service and competing product comparison services through leverage from a dominated[62] market. However, since this is a difference in treatment and it is not a simple unilateral refusal of access by Google to provide competitors with a service necessary to compete in a neighbouring market, the application of the so-called effects theory advocated by Google in its defence cannot be legitimized. The Court concluded that the Commission was not obliged to establish the conditions set out in the Bronner judgment in order to reach a finding of infringement on the basis of the practices found[63].

The judges have also made a major clarification in the articulation of this decision. The obligation for the company in a dominant position to dispose of assets, to conclude contracts or to provide access to its service under non-discriminatory conditions does not necessarily imply the application of the criteria set out in the Bronner judgment. Indeed, there can be no automaticity between the criteria of legal qualification of the abuse and the remedies that allow to remedy[64] it. In other words, the applicability of the criteria of the Bronner judgment cannot depend on the measures put in place by the Commission to put an end to the infringement[65]. In light of all of these elements, the Court rejected Google's argument on this point[66].

C. The discussion on the pro-competitive nature of Google's practice

[60] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.224.

[61] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping",PT. 229.

[62] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.237.

[63] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.240.

[64] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.244.

[65] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.245-246.

[66] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.249.

18. Google's desire to demonstrate the pro-competitive effects of its practice. In support of its defense, Google argues that the Commission has misunderstood the facts. The company maintains that the practice condemned by the Commission had as its main objective to improve the quality of its general search service and not to direct traffic to its own price[67] comparison service.

The argument goes on to state that the changes made to the service have not harmed users, and that they have even improved the quality and relevance of results. According to Google, the contested decision completely evades the evidence of the pro-competitive goal pursued by the company in the development of the product result groups. For Google, they have brought a real added value to the market by improving the quality of its product[68].

19. Strong views from the Commission's supporters. In its reply, the Commission argues that it does not dispute the pro-competitive purpose of Google's development in the market[69].

In contrast, the Commission's support is much less measured in its developments. It is first asserted by one of the parties that Google's real motivation was to protect and maximize its revenues by systematically reserving for itself the most profitable part of the screen. Subsequently, it is also argued that the allegedly pro-competitive motive behind Google's introduction of these changes is irrelevant in light of previous case law, and that in any case, since it could not benefit all competing product comparators, Google's alleged improvement could not improve the relevance of its results taken as a whole.

20. The notion of "intent" as the main factor in the court's response. In its argument, the court makes extensive use of the concept of intent. It expresses the view that even if there is a proven intention to compete on the merits, this is not sufficient to demonstrate the absence of an abuse[70], as the jurisprudence[71] also intends. For the court, in view of its previous developments and the finding that Google's practice deviates from competition on the merits, cannot be invalidated by the intention that Google would have had to compete in a [72]normal way. The court therefore affirms

[67]TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.250.

[68] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.251.

[69] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.252.

[70] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.257.

[71] CJEU, April 19, 2012, Tomra Systems and Others v. Commission, C-549/ 10 P, EU:C:2012:221, PT.22.

[72] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.263.

that mere intention cannot rule out abuse, as this is not reflected in practice. In view of these different elements, the Court rejects Google's argument that it intended to provide pro-competitive value to its practice[73].

D. Contesting the fine

21. Google's incomprehension about such a severe fine. For Google, even if the infringement finding were to be confirmed, the Commission should have refrained from imposing a fine, for three reasons: firstly, according to them, this is the first time that a behavior has been qualified as abusive, because it is a qualitative improvement. Secondly, the fact that the case was the subject of a commitment procedure under Commissioner Almunia. Finally, the fact that the quantum of the fine is excessive, while according to previous case law Google could not have identified that its practice violated the competition[74] rules. At the same time, Google takes as an argument a good part of what the doctrine fears, that this type of sanction could have negative consequences on the intention of companies to innovate.

The company highlights that, in principle, the European Commission can only fine a company if it has deliberately or negligently violated Articles 101 and 102. In fact, Google has been fined the largest fine ever imposed in competition law, without the Commission having to demonstrate that Google was not unaware of the anti-competitive purpose of its behavior[75].

Google continues its argument by stating that the Commission has found in numerous previous cases that there is no reason to apply a penalty when a new type of abuse is identified in the case.

To complete its argument, Google suggests that the fact that it initially undertook to deal with the case in the context of a commitment procedure, implies that the purpose is not suitable for a sanction as defined in Regulation 1/2003[76].

22. The Commission's diametrically opposed response. The latter argues that there is nothing new in the legal analysis on which the decision is based. In their view, most similar cases revealing this type of practice have arisen in complex environments such as the present decision. In any case, the Commission considers that the subjective knowledge of the abusive character of a behaviour by the person who has adopted it, is not in any way a condition that can be taken

[73] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.267.

[74] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.598.

[75] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.599.

[76] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.600.

into account in the possibility of imposing a pecuniary[77] sanction.

For its response to the argument of the prior commitment procedure, the Commission considers that it has enough new elements at its disposal at the end of the unsuccessful negotiations to return to a classic[78] procedure.

23. The court is adamant about the fine. The Court recognizes that the Commission's argument has some flaws and even leads to a form of insufficiency in terms of establishing the deliberate or negligent nature of Google[79]'s practice. However, the Court of First Instance wisely and necessarily recalls that it follows from European pre-trial law that, whatever the dominant position held on a market, the company holding that position bears a particular[80] responsibility. This particular responsibility means that the company has certain obligations that do not apply to all non-dominant[81] players.

In view of this, the court considers that Google could have been aware of its own dominant position, but also of the fact that its behavior as a dominant player was in some way abnormal[82]. In fact, the fact that the specific type of behavior alleged against Google has not been the subject of a previous antitrust enforcement decision does not mean that the finding of the infringement by Google, or even the potential sanction of the infringement, was unforeseeable[83].

The court also responds to Google's argument that in previous cases companies were not fined because of their lack of knowledge of antitrust violations. The judges point out that in all the cases cited by Google, the facts are not comparable to the case at hand. Furthermore, the Court recalls that the Commission has a strong discretionary power in matters of financial penalties and is not required to refer to its previous decisions. Consequently, there is no indication in Regulation 1/2003 that the Commission should refrain from imposing a penalty as a "first" for conduct contrary to antitrust[84] law, as Google maintains.

On the last point of the arguments putting forward the prior commitment procedure, the Court immediately supports

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77 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.602.

78 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.603.

79 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT. 610-611.

80 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.612.

81 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.613.

82 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.618.

83 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.618

84 TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.628.

the Commission, in that there is nothing to prevent it from reverting to a classic infringement procedure and a financial penalty even after having initiated a commitment[85] procedure.

III/ Critical analysis of the decision

A. <u>Europe's desire to regulate the GAFAs is reinforced by the courts</u>

24. The Commission's self-proclaimed mission. It is no longer a secret for anyone and it has been visible for several years now, the competition division of the European Commission has had an almost Christic revelation and has given itself the mission to come and regulate the GAFA. The latter never loses an opportunity to assert that competition policy is a response to the domination of digital[86] giants. The Commissioner for Competition, Margrethe Vestager, is the face of this new approach to competition law by the European authorities.

The Commission welcomed this decision: "Today's *judgment clearly indicates that Google's behavior was illegal and provides the necessary legal clarity*". A decision that appeared to be a first test of the policy of austerity and intransigence that Margrethe Vestager has established within the Commission. This mission also seems to be part of the European authorities' desire to show their strength in order to confront the American gigantism. A confrontation that finally resembles a form of protectionism bordering on demagoguery, so much the relentlessness on the ecosystems of GAFA intensifies and is increasingly virulent.

25. A major test for the Commission. This judgment was a major test for Mrs. Vestager and her line of conduct in antitrust policy in Europe. Indeed, it is the first major antitrust decision against a digital giant that is the subject of a judgment before the European court. We know the different and virulent doctrinal criticisms, which the Commission had to face at the time of this decision.

This criticism was based on the fact that the decision was eminently political. In short, this can hardly be questioned in the sense that it was difficult to abstract from the diplomatic and political context of this decision[87]. This is in line with the thinking of a certain part of the doctrine that considers that the current competition law is distorted, in the sense that it serves as a legal means to serve an eminently more political objective.

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[85] TUE, November 10, 2021. Case. T-612/17, Google and Alphabet C/ Commission "Google Shopping", PT.639.

[86] D.Bosco, *"The future of competition law"*, LexisNexis - Contrats-Concurrence-Consommation °12, December 2020, Dossier 15, pt 7.

[87] D. Bosco "*Abus de position dominante - Google heavily sanctioned for its price comparator*", LexisNexis - Contre Concurrence Consommation n°10, October 2017, comm.205.

This distortion has, in fact, been the subject of much debate.

It is in this respect that this decision was considered as a form of test for the current form that competition law has taken. If we follow the logic of the court's decision, it appears that there was no real break in the law, that the law was correctly applied, as shown by the fact that the judges rejected all of the American company's arguments, considering that the Commission had in whole or in part made a correct assessment of the law in its decision.

Beyond this test aspect for the political side of this saga, it is important to analyze and understand the construction of this ruling, which for many is a structuring and admirable decision as its legal depth is important.

B. <u>A landmark decision full of modernity</u>

26. The need to respond to a strong doctrinal criticism of the legal construction of the contested decision. If we put ourselves in the context of the time when the Commission's decision was rendered, it was a decisional innovation in competition law that the doctrine condemned. At first, it was considered unfounded in some respects, sometimes even in breach of the fundamental rights and freedoms guaranteed by European[88] law. Other authors, such as Pinar Arkman, considered that the facts reproached did not fall within the scope of Article 102 TFEU[89].

Some authors wanted to be more precise in their criticism, not understanding this type of abuse that the Commission had just identified, what is now called "self-preferencing" is now an integral part of the antitrust discussion, but still struggles to find a precise[90] definition. Indeed, the practice, although known in the past, is still present in the shelves of the retail[91] sector. What divides concretely about this practice is whether or not it should be sanctioned, with the questioning of whether through this practice there is a breach of the famous notion of "competition on the merits", and whether it would not have a deleterious effect on the

[88] Article 49 of the Charter of Fundamental Rights of the European Union: "Principles of legality and proportionality of penalties and offences"; Article 7 of the European Convention on Human Rights: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the offence was committed".

[89] P.Arkman, "*The theory of abuse in Google search: a positive and normative assessment under EU competition law*," SSRN, Journal of Law, Technology and policy 301, July 21, 2016.

[90] P.Ibáñez Colomo, "Self-Preferencing: Yet Another Epithet in Need of Limiting Principles", Word Competition 43, August 24, 2020.

[91] F.Marty, "Data access and self-preferencing: interview for atlantico.fr on the notification of grievances against Amazon by the European Commission", Frederic-marty.medium.com, November 13, 2020.

incentive to innovate and invest of large digital[92] companies.

Faced with so much criticism and concern, the court had two options: either it took the step of taking this doctrine into account and applying competition law strictly, thus completely disavowing the Commission. Or it could continue this approach, which could be described as "innovative" and in a line of intransigence against the GAFA. It is the second possibility that the court pursued in its decision of November 10.

27. The first of the European judges to deal with new forms of abusive behaviour. Some consider it to be "*one of the most structuring decisions of our time*"[93]. The judgment has a modern look coupled with an in-depth argumentation. Whether or not one agrees with the position of the judges in their interpretation of the law in this case, it is undeniable that there is a remarkable wealth of background work and argumentation.

The concrete contribution of the Court of First Instance in this decision is the identification of an abusive behaviour with two concomitant practices. It is indeed retained that the abusive character of Google's practice is not only due to the "self-preferencing", as the Commission could have raised, but also to the concomitant downgrading of its competitors' offers. The term "abuse of the algorithm[94]", established by a part of the doctrine, takes on its full meaning here, as the manipulation of the latter allowed the implementation of this double practice. The Court of First Instance also reaffirmed its constant jurisprudence according to which the list of abusive practices established in Article 102 is not exhaustive[95]. This is indeed the first time that a decision is taken in the digital economy by combining two sides of a behavior to qualify it as anti-competitive. The court finally offers a new assessment of the notion of abuse of dominance, an assessment that takes into account the realities of the digital economy.

This new assessment is accompanied by the establishment of new specific criteria for assessing abusive behavior in the operation of digital markets. First, by assessing the behavior of consumers of search engine services that may be influenced by the practices of the dominant company. Secondly, by taking into account the importance of the traffic generated online and in particular on the general search engine of Google, in that the latter is an important

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92 P.Ibáñez Colomo, "Self-Preferencing: Yet Another Epithet in Need of Limiting Principles", Loc.Cit.

93 F. Masmi-Dazi, "Google Shopping: the European Court of First Instance sounds the death knell for an era of digital excess", Dalloz Actualité, Concurrence-Distribution, November 22, 2021.

94 Catherine Prieto, "*Synthèse Abus de position dominante*", LexisNexis, JurisClasseur Europoe Traité, September 30, 2020, pt 55.

95 ECJ, February 21, 1973, case 6-72, *Continental Can.*

factor in the proper functioning of the competitive game. It is also recognized that this decisive element of the digital economy market cannot be effectively replaced by other sources.

Another fundamental element is the choice of the court to qualify Google's search engine as "infrastructure". This marks the indispensable nature of the service offered by the American firm. It is in fact by recognizing this character that the court had to establish one of its most advanced syllogisms, in the sense that the characterization of indispensable infrastructure does not necessarily entail the analysis of the theory of essential facilities. On this point, the court performed a real balancing act, explaining that there was no explicit refusal to supply as recognized in the Bronner decision, but rather a difference in treatment that is implemented by Google. A nuance that could at first sight be a legal set-up to counter Google's will to raise the theory of essential facilities, but finally seems to have some logic in that it joins the double characterization that was made to qualify the abuse by talking about a discriminatory treatment.

27. A decision that could satisfy doctrinal criticism. This decision answers an important part of the numerous criticisms and questions that we have previously established.

First, the depth of the decision vindicates, in a way, the doctrinal criticism that the Commission's legal arguments were far too weak. The latter did not in fact provide all the elements that the court noted, and the judges even established another aspect of the abuse. In a second step, it also brings an answer to this questioning about self-preferencing as a form of abuse. The court first expresses again that, not being limited by the list of article 102, it was right that this new typology of abuse could be put forward. But above all, they establish a second type of abuse concomitant to self-preferencing, which makes it difficult to question the anti-competitive nature of Google's practice in this case.

Overall, one could say that the court is in line with the modernist vision of competition law that the European authorities are trying to establish. Is this desire to regulate the GAFAs being reflected in the judges? In any case, we have the right to question what is currently being sanctioned.

C. <u>Sanction of the dominant position?</u>

28. A new form of dominance. For digital giants, the categorization of dominant position seems less and less sufficient. Many

authors speak of "ultra-dominant[96]" and "super-dominant[97]" positions. The French Competition Authority has itself qualified in one of its decisions, "extraordinary" the dominant position of Google[98]. We realize that the digital economy takes a form and a power so that it exceeds the simple framework of the right of the classic competition, we are obliged to use qualifying adjectives to determine the dominant character of the companies which governs this New Digital World.

This new qualification brings us back to the sad reality that we have been encountering for the last few years: our current competition law is not adapted to the new realities of the digital[99] economy, and in fact, does not know how to respond to the challenges of digital[100]. This inadequacy could sometimes lead to sanctioning the unthinkable.

29. The possible sanction of dominance. The fear that "*dominant positions will soon be sanctioned*[101]" is becoming more and more recurrent in the antitrust discussion. This fear has the impression that, in view of the direction that antitrust law may take, it tends to become a reality. As we know, since the beginning of the problems with the digital giants, competition law has taken on an eminently more political facet, which translates into an emphasis on economic analysis at the expense of legal analysis.

There is a form of populism in the air which has as its ideology that the GAFA are dangerous, particularly at the political level, and there is even talk of a possible "*clash of sovereignty between the nation states and the GAFA*[102]". This is now reflected across the Atlantic with Congress issuing an anti-trust report that concludes that GAFA[103] should be dismantled. Extreme proposals that do not seem to be destined to be realized either, but on the other hand the ideology "*Big is Bad*", is

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96 M. Malaurie-Vignal, D. Heintz and M. Lécole, "*Comment appréhender les abus et l'utilisation des données dans la relation d'une plateforme avec ses partenaires contractuels*", LexisNexis, Contrat concurrence Consommation N°12, December 2020, dossier 16, Pt 1; Louis Vogel, "Droit de la Concurrence, Droit européen",Loc.Cit.

97 C. Prieto, "Abuse of a dominant position. - Notion d'abus en droit communautaire", LexisNexis, JurisClasseur Concurrence-Consommation, February 1, 2018, PT.47.

98 Aut.Conc, December 19, 2019, 19-D-26, "relating to practices implemented in the sector of online advertising related to searches".

99 M. Malaurie-Vignal, "Concurrence et numérique : un foisonnement d'idées pour dominer les géants", LexisNexis - Communication Commerce électronique n°10, October 2020, study 17.

100 D. Bosco, "The future of competition law", LexisNexis - Contrats-Concurrence-Consommation n°12, December 2020, Dossier 15, pt 7.

101 T. Schrepel, "Les positions dominantes bientôt sanctionnées?", LexisNexis, La semaine juridique entreprise et affaires n°46, November 15, 2018, 1579.

102 A. Basdevant, "Censorship of social networks: 'we are heading straight for a clash of sovereignty between nation-states and the Gafa,'" Le Figaro, Figarovox/entertien, February 26, 2021.

103 U.S. Congress, "Investigation of Competition in Digital Markets: Majority Staff Report And Recommendation," Nimble Books, October 6, 2020.

strongly put forward by this populism to which the authorities and now the judges are adapting.

Indeed, this new approach to anti-competitive practices identified in the Tribunal's decision demonstrates a form of harshness that was not necessarily visible before and that reflects this timidity with respect to "ultra-dominant" players. The legal treatment and sanctions are not the same as those reserved for other players in competition law. One might even wonder whether we are not creating a parallel competition law, specifically reserved for the digital economy and more specifically for digital giants, which would be included and sanctioned more harshly because of their so-called "ultra-dominant" positions.

This idea of "Big is Bad" appears to be a political resonance that is applied to our competition policies. This ideology of bringing companies like Google to heel comes in a context that is both economically and sociologically troubled. The world and especially Europe seems to have difficulty accepting the digital transition and integrating that our future is digital. We have a competition policy which, in its vertical state, only punishes digital companies, rather than educating them and integrating them into a European legal framework. While on their side, the latter, despite the demands of the economic war, seem ready to build a horizontal relationship with the authorities. Many economists and observers recognize that the GAFA are no longer simple companies, but real ecosystems. Ecosystems comparable to states, digital states. Integrating them fully into the legal sphere by proposing that they fully adapt their practices and the law to their economic realities, seems to be a proof of progressivism. A progressivism that we could call "Good" progressivism, not the one that leads us to be afraid and ashamed of our failure in the digital construction during the 90s and early 2000s.

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