



## The Google comparative shopping case

### A critical take on the arguments

by **Dieter Paemen & Aleksander Tombiński**

On 27 June 2017, the European Commission (EC) adopted the Google Comparison Shopping (AKA 'Search') Decision. [1] It is not yet formally known whether Google will appeal, but that has not stopped its advisers, consultants and supporters from criticising the decision in public fora and the media, and one cannot escape the impression that Google is preparing the grounds for a major court battle.[2]

While we wait for publication of the Decision, with the handicap of asymmetric information, and with full recognition that the authors' views are undoubtedly coloured by our work on the side of complainants against Google, this article takes a critical look at what are appearing to emerge as Google's key arguments against the Decision.

#### The Decision

By way of background, it is worth briefly summarising what is publicly known about the Decision, which finds that Google is dominant on the market for general algorithmic online search in national markets throughout the EEA. Google is found to have leveraged this dominance into the market for comparison shopping services (defined as separate from online retailers) by favouring its own shopping comparison service, Google Shopping, in general search results vis-à-vis third-party comparison shopping services. In particular, Google has systematically given prominent placement to its comparison shopping service at or near the top of its general search results, while demoting rival comparison shopping services.

As a result, Google's comparison shopping service is much more visible to consumers in Google's search results, while rival comparison shopping services are less so, which in turn leads consumers to click far more often on Google Shopping. Given that Google's search engine is an important source of traffic, Google's practices result in a significant increase in traffic to Google's comparison shopping service and very substantial losses of traffic on a lasting basis for competing services.

The Decision finds that such conduct is not competition on the merits, infringes Google's special responsibility as a

dominant search provider, is not objectively justified, and is capable of foreclosing competition in the comparison shopping market. The Decision orders Google to stop its illegal conduct and to comply with the principle of giving equal treatment to rival comparison shopping services and its own offering.

Google and its supporters' criticism of the Decision appears to focus on the following themes:

1. Google's top search listings are ads and not comparison shopping services;
2. The Decision incorrectly excludes merchants from the affected comparison shopping services market;
3. The Decision fails to apply the criteria of a refusal to deal abuse;
4. The Decision's legal theory is novel and unprecedented and will outlaw all forms of favouring of own products;
5. The Decision fails to show foreclosure by allegedly focusing on loss of traffic by a limited number of comparison shopping sites; and
6. The remedy's lack of precision shows the EC cannot define the competitive problem and that it is incapable of being implemented.

If and when Google does appeal, it will undoubtedly present a whole raft of arguments, but those listed above and addressed below seem likely to feature prominently among them. As discussed below, these arguments do not withstand scrutiny.

#### Ads or not, Google's product listings are part of its comparison shopping service

A key Google claim is that its product listings are paid ads that support Google's organic search service and are subject to a separate algorithm, and hence not organic search results. Google argues that by placing and presenting its product listings separately from organic search results, it is not favouring its own service within its organic search service or discriminating against third-party comparison shopping

services: Google treats all ads with the same ad-relevant algorithm and all organic results with the same organic-relevant algorithm.[3]

Google has since 2004 maintained a service that allows the comparison of products and prices, which has been renamed over the years and is now called Google Shopping. In addition to showing results on its own dedicated Google Shopping pages, Google has started including comparison shopping results in its generic search result pages in response to a query for a product. When a user enters a search query that would trigger the display of comparison shopping results in Google's generic search engine (for example, a search for 'gas grills'), typically a box is displayed prominently at or near the top of Google's generic search engine results page (SERP). The box shows images of products, prices and merchant names taken from Google Shopping pages, linking directly to the site of the merchant. Above the pictures, the title reads "Shop for [product] on Google", and links to Google Shopping.

Google claims the product listings it includes in its generic search results in this way are ads. However, ads or not, Google's prominently placed product listings are part of its comparison shopping service, Google Shopping. The fact that the box with product listings also contains a link to Google Shopping in itself would seem to contradict Google's argument that it is not favouring its own services. In any event, the product images that appear with prices at the top of Google's generic search results page are functionally the same as comparison shopping results. A comparison shopping service is a specialised search service that: (i) allows users to search for products and compare their prices and characteristics across the offers of several different online retailers and merchant platforms; and (ii) provides links that lead (directly or via one or more successive intermediary pages) to the websites of such online retailers or merchant platforms.[4] The paid or unpaid nature of listings is not what defines a comparison shopping service. Comparison shopping services operate on a variety of business models including paid product ads.

Nothing suggests the Decision takes issue with Google using a paid listings business model for its comparison shopping service or providing direct links to merchant product pages. Rather, the Decision faults Google for reserving the preferential placement of comparison shopping results for itself on Google's generic search results page such that Google always appears on top, and only Google is able to provide direct links to merchants on the SERP.

### **Merchant services or comparison shopping services**

Advocates for Google (including Google's general counsel, Kent Walker) have also strongly emphasised the argument that the Decision is wrong because it excludes merchants from the market for comparison shopping services, whereas according to Google, users use online merchants to do

the same thing as when they use comparison shopping services.[5]

Curiously, Google appeared to argue the exact opposite when it discussed commitments to end the investigation in 2013-2014, insisting that merchants be excluded from its commitments because they were not comparison shopping services. In any event, the EC's investigation has shown that merchant services and comparison shopping services are used for different purposes, are not substitutable and do not form part of the same market. Moreover, the EC's press release indicates that Google's conduct would constitute an abuse, even if comparison shopping services and merchant platforms are considered part of the same market.

### **This is not a refusal to deal case**

Another theme that Google consultants have repeatedly advanced is that while the EC finds a favouring abuse, the case is really about refusal to supply, or even access to an essential facility.[6]

The purpose of advancing this argument is clear: particularly in the context of an essential facility case, it would subject the EC's analysis to criteria that do not apply to other infringements of Article 102.[7] However, the argument is a ruse, because competing comparison shopping services already have access to Google's SERP – there is no need to provide or restore access. Rather, they are subject to demotion, and thus appear far down in the search results, whereas Google Shopping enjoys preferential treatment and consistently appears prominently at the top.

It has been suggested that comparison shopping services are effectively seeking access to free traffic or privileged placement on the page.[8] However, that is also a misrepresentation of the multiple complaints and the Decision: competing shopping services are not seeking access to traffic or privileged placement. Instead, they are simply seeking the opportunity to compete on the merits. This implies restoring the non-discriminatory treatment to which Google Shopping and competing services were subject to before Google started favouring its own service, regardless of the result this ultimately produces for any particular third-party comparison shopping service in terms of placement or traffic. This means ranking and display of a search result should be determined by the relevance of the service rather than by whether it carries a Google brand.

### **Novelty of the facts does not equate to novelty of the law**

Related to the previous argument is the claim that the Decision is novel and unprecedented[9] and could even result in prohibiting any company from promoting its own products.[10] Analogies have been suggested with a situation in which a supermarket would be prohibited from favouring its own products.[11]

However, while the facts tackled may be new, the Decision's analysis appears (at least based on public information) to be entirely traditional. The Decision applies the established Article 102 criteria of dominance, abuse, foreclosure and objective justification in line with established precedent. Longstanding case law under Article 102 confirms conduct as part of which a dominant firm leverages its position to another market, or preferences its own products to the exclusion of others, can be abusive.[12] The Decision does not rely on particular criteria applicable to specifically identified abuses such as tying or refusal to supply, because Google's anticompetitive behaviour arises in different circumstances from such abuses. However, it is also well established that, as is moreover clear from the plain language of Article 102 TFEU, the abuses listed in the article are illustrative and not exhaustive.

The claim that the Decision prohibits any company from promoting its own products is equally wrong, and the supermarket example to which reference is made seems to be particularly misplaced.[13] First, the Decision concerns an abuse of dominance, and thus has little if any relevance to non-dominant firms. Second, as the press release makes clear, the Decision emphasises the existence of specific circumstances, including the diversion of web traffic and the capability this has to foreclose competition, to conclude that Google abused its dominance. Those circumstances are unlikely to be present in the context of other vertically integrated dominant firms' promotions of their own products. That said, the possibility that favouring by leveraging a dominant position leading to foreclosure could, depending on the specific circumstances, meet the criteria of Article 102 TFEU, existed before and continues to exist after the Decision's adoption.

### **There is compelling evidence of foreclosure and harm to consumers**

Google's supporters have argued the Decision fails to show foreclosure of competition or direct harm to consumers, and instead limits itself to showing diversion of traffic affecting a limited number of comparison shopping services, whose misfortunes are more likely caused by the success of online retailers.[14]

The actual language of the public version of the Decision may shed more light on the EC's approach to demonstrating effects of Google's conduct, but based on the EC's extensive market investigation during the course of the case, it would be surprising to see the EC limit its analysis to a few comparison shopping services. Evidence adduced by complainants certainly shows the introduction of Google's favouring conduct had an impact on the traffic of comparison shopping sites, and the press release appears to indicate the EC's own investigation confirmed that Google's favouring conduct coincided with a surge of Google traffic (by a factor of 10 to 45) and a coinciding drop in traffic of

competing websites. There is also extensive evidence that search result placement and presentation on a results page influences users' clicks. Surveys and eye-tracking studies show that consumers generally click far more on search results at or near the top of the first search results page than on results lower down the rankings, with the result up top on page 1 receiving the lion's share of all clicks, whether or not that result is the most relevant.[15] This evidence would support the EC's view that Google's favouring leads to diversion of traffic. The diversion of traffic results in a significant drop in visitors to competitor's sites, which ultimately starves these sites of revenues and leads to their foreclosure.

According to the EC, the increase in Google traffic and drop in competitors' cannot be explained by other factors than Google's conduct. As a result of Google's illegal practices and the distortions to competition, Google's comparison shopping service has made significant market share gains at the expense of rivals. While it may be the case that not all comparison shopping competition has been completely eradicated as a result of Google's conduct, this is not what the EC has to establish.[16]

The reduced competitive force or elimination of competing comparison shopping sites has deprived European consumers of the benefits of competition on the merits, namely genuine choice and innovation. Moreover, studies show that users who buy from Google's listings pay more than they need to about 85% of the time.[17]

### **There's nothing unprecedented or unworkable about the remedy**

Finally, critics of the Decision supporting Google's position have placed some emphasis on the fact that the remedy merely describes the result to be achieved, and does not prescribe the details of what Google is required to do to comply, which would allegedly show that (a) the EC was not capable of identifying a precise competitive problem and (b) Google cannot implement the remedy because it does not know what it needs to do.[18]

Far from suggesting that the EC is unable to identify the competitive problem, the Decision's approach to the remedy is a sensible one. The flexibility of the remedy leaves Google freedom to determine which implementation makes most sense from its perspective, and also ensures that it will remain relevant throughout technological innovations and changes to Google's services. Thus a principles-based remedy both preserves the freedom to innovate and avoids the risk of it becoming outdated and irrelevant soon after it is issued. It is also an approach that is based on established precedent: for example, the EC took a similar approach in its 2004 *Microsoft* decision – an approach that was upheld by the General Court notwithstanding Microsoft's arguments on appeal against it.[19] Google could comply simply by subjecting all comparison shopping sites (including Google's own) to Google's general search algorithm and ensure the same visual enhancements (if any) apply. Google already has in place

the tools to gather all the necessary information from competitors (for example, prices, product images, reviews, links to merchants) to present their results in the same manner as Google's own comparison shopping results, so compliance need not cause any degradation of the user experience.

## Conclusion

The commentary above provides brief answers to just some of the arguments Google is likely to raise in any appeal it decides to lodge against the Decision, and a few of the points that the Commission in the case might make in response. If nothing else, this article illustrates that if Google appeals, the General Court has a vigorous debate to look forward to.

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## Endnotes

1. EC Press Release IP/16/2532. For ease of reference we will hereafter refer to the decision issued on 27 June 2017 by the EC in relation to Google's practices related to comparison shopping as the "Decision".
2. Eg Walker, K., 'The European EC decision on online shopping: the other side of the story', *The Keyword* blog, 27 June 2017; Akman, P., 'Initial Reactions to the Infringement Decision in Google Search', *Antitrust & Competition Policy Blog*, 27 June 2017; Manne, G., 'The Washington Post editorial board understands online competition better than the European Commission does', *Truth on the Market* blog, 10 July 2017; Abbott, A., 'The European EC's Regrettable June 27 Google Antitrust Decision – and Its Broader Implications', *Truth on the Market* blog, 28 June 2017; Lamadrid de Pablo, A., 'Google Shopping Decision – First Urgent Comments', *Chilling Competition* blog, 27 June 2017.
3. Akman, P., 'Initial Reactions to the Infringement Decision in Google Search', *supra* note 2.
4. EC Tender, 'Technical expertise to support the Commission on issues relating to an antitrust case in the IT sector', COMP/2017/012, note 3.
5. Walker, K., *supra* note 2.
6. Eg Lamadrid de Pablo, A., *supra* note 2.
7. Case C-7/97, *Oscar Bronner*, EU:C:1998:569, paragraphs 37-47; See also Case T-301/04, *Clearstream v Commission*, EU:T:2009:317, paragraph 147 and case law cited.
8. Akman, P., 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law', *Journal of Law, Technology and Policy*, Forthcoming page 11.
9. Eg Akman, P., *supra* note 2.
10. Eg Lamadrid de Pablo, A., *supra* note 2.
11. Eg Abbott, A., *supra* note 2.
12. Eg Case C-242/95 *GT-Link A/S v De Danske Statsbaner (DSB)*, EU:C:1997:376; Case C-280/08 *P Deutsche Telekom AG v Commission*, EU:C:2010:603; Case COMP/C-3/39.530 – *Microsoft (tying)*. See also IP/00/835, 'Commission acts to prevent discrimination between airline computer reservation systems', EC Press Release, 25 July 2000.
13. See Roth J., *Streetmap.EU Ltd v Google Inc. & Ors* [2016] EWHC 253 (Ch) (12 February 2016) at 60: "I see no reason, as a matter of principle, why the preferential promotion by a dominant company, by means of its power on the market where it is dominant, of its separate product on a distinct market where it is not dominant, may not constitute an abuse if that has the effect of strengthening its position on that other market and is not otherwise objectively justified. To give an example raised with the economic experts, if a supermarket was dominant in a discrete market for supermarket grocery retailing but also produced its own-label brands of tea, sugar and biscuits which competed with those of third party manufacturers, it could be an abuse if the supermarket reserved the preferential display positions for its own brands, notwithstanding that customers who wanted other brands could still find them elsewhere in the store." The *Streetmap* case would seem to underscore the importance of a fact based analysis.
14. Eg Akman, P., *supra* note 2.
15. Eg Jakob Nielsen's Alertbox: 26 September 2005, The Power of Defaults, available at <https://www.nngroup.com/articles/the-power-of-defaults/> (citing a study by Professor Thorsten Joachims at Cornell University et al finding that "42% of users clicked the top search hit, and 8% of users clicked the second hit," and recognising that it is proven that "the top few entries in search listings get the preponderance of clicks and that the number one hit gets vastly more clicks than anything else").
16. Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, paragraph 563.
17. See Waters, R., 'Google criticised as product listing adverts push up prices', *Financial Times*, 24 November 2013.
18. Eg Akman, P., *supra* note 2.
19. Case T-201/04, *Microsoft v Commission*, EU:T:2007:289. The General Court annulled the EC's Decision insofar as it delegated enforcement authority to a monitoring trustee. In this case, the EC has instead invited tenders for technical assistance: EC Tender, "Technical expertise to support the Commission on issues relating to an antitrust case in the IT sector," COMP/2017/012, *supra* note 4.