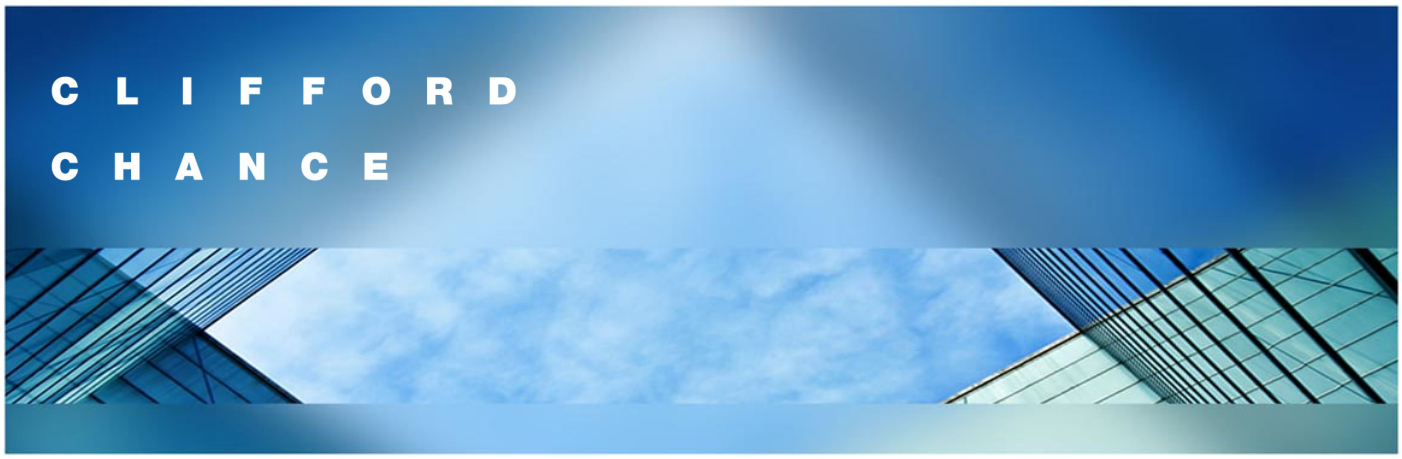

THE GOOGLE SHOPPING EUROPEAN COURT JUDGMENT AND ITS WIDER IMPLICATIONS

On 10 November 2021, the General Court of the European Union (**General Court**) upheld the finding of the European Commission (the **Commission**) that Google abused its dominant position by favouring its own shopping comparison service in its general search results.

BACKGROUND

In its judgment of 10 November 2021 in Case T-612/17, *Google and Alphabet v Commission* (**Google Shopping**), the General Court upheld the fine of **€2.42 billion** imposed on Google for abusing its dominant position by:

- positioning and displaying its comparison shopping services more favourably than those of rivals in its general search results pages (*e.g.*, by placing results at or near the top of the page, with rich graphical features) and
- displaying rivals' comparison shopping services less favourably (*e.g.*, as blue text links) and using certain dedicated algorithms to demote them on its general search results pages.

The Google Shopping case has taken many procedural twists and turns in its lifetime. The Commission initiated proceedings against Google in 2010. Efforts were made to address Google's conduct via commitments, but staunch criticisms of Google's proposals prompted the Commission to revert back to the infringement procedure. Following a lengthy investigation, the Commission issued a prohibition decision in 2017.

The Commission's Google Shopping decision was the first in a series of decisions finding that Google abused its dominant position in search, the others concerning various practices related to Google Android (2018) and Google's AdSense search adverts (2019). Google has also appealed these decisions. The Commission is currently investigating Google in relation to its online advertising practices.

THE JUDGMENT

Google's favouring of its own comparison shopping service was not competition on the merits

The Commission did not rely on an established abuse, but on the general principle enshrined in Article 102 TFEU that a dominant undertaking must not

Key issues

- Google's favouring was not competition on the merits, because its traffic was so important to its comparison shopping rivals and because it was not rational for a search engine to limit results to its own, unless it was dominant.
- The Commission did not need to show that Google's conduct had actual anticompetitive effects, only potential anticompetitive effects.
- The General Court rejected the Commission's theory that Google's behaviour helped to maintain its general search monopoly, on the basis that the Commission did not prove potential anticompetitive effects on the markets for general search services.
- The Court held the infringement was "particularly serious" and intentional, and as such it merited the significant fine imposed, notwithstanding the novelty of the Commission's case.
- The judgment is fact-specific, and it should not be assumed that it establishes a broad prohibition against self-preferencing by all dominant companies in all sectors.
- The judgment does, however, have wider implications for EU abuse of dominance enforcement, and is likely to embolden competition authorities to pursue cases based on new theories of harm.

abuse its market power by engaging in conduct which is outside the scope of competition on the merits. The Commission argued Google's more favourable display and demotion conduct was outside the scope of competition on the merits and enumerated three relevant circumstances to support its conclusion:

- traffic originating from Google is important to comparison shopping services, in part because data generated by users who visit the site refines the algorithm responsible for identifying relevant and useful results;
- users typically pay attention only to the first search results; and
- rivals cannot effectively replace the substantial traffic arriving at their rivals' comparison search services via Google.

In its appeal, Google argued that its behaviour fell within the scope of competition on the merits and that the Commission failed to establish otherwise. However, the General Court disagreed, observing that:

- The rationale and value of a general search engine lie in its capacity to be open to results from external (third-party) sources and to display these multiple and diverse sources on its general results pages. For a search engine, limiting the scope of results to its own comparison shopping services entails an element of risk and is not necessarily rational, except in a situation where an undertaking's market position is and will remain unrivalled.
- Google was under a particularly strong obligation to prevent its behaviour from impairing genuine, undistorted competition on the market for comparison shopping search services due to its "super-dominant" position on, and the very high barriers to entry in, the related market for general search services, as well as its role as a gateway to the internet.
- The distortion of competition is made all the more obvious by the events which preceded Google adopting its infringing conduct. At first, Google treated results directing users to comparison shopping services equally. Google then entered the market for comparison shopping search services, but its dedicated shopping web page, Froogle, experienced limited success. Google then began treating rival comparison shopping services differently, ensuring a change to their visibility in Google's general search results.

The Commission did not need to establish that the strict criteria of the essential facilities doctrine were met

The General Court found that the Commission effectively imposed a duty on Google to supply rival comparison shopping services with equal access to its general results pages. According to Google, requiring access meant the Commission should have legally classified Google's conduct as a refusal to supply or a refusal to provide access to an essential facility. Under the Court of Justice's 1998 judgment in *Bronner*, the criteria for establishing that a refusal to supply is abusive are strict and require, among other things, that access to the dominant company's infrastructure is "indispensable" for competition.

While the General Court acknowledged that the Google Shopping case concerned rival comparison shopping services' equal access to Google's general results pages, it held that not every issue of access necessarily

creates an obligation to apply the *Bronner* criteria and to establish a refusal to supply.

In this case it was inappropriate to refer to *Bronner* because Google's conduct was based on discrimination of comparison search services, namely the simultaneous favouring of Google's own comparison shopping results and the demotion of competitors'. The discrimination against rivals' comparison search services was an integral part of the abuse and did not relate to gaining access to Google's general search results.

The Commission only needed to show that Google's conduct had potential anticompetitive effects, not actual effects

In its appeal to the General Court, Google alleged that the Commission failed to show its conduct had anticompetitive effects as required under Article 102 TFEU.

The General Court judgment makes various pronouncements on the standard of foreclosure under the general principle in Article 102 TFEU, including:

- The Commission must demonstrate "at least potential" anticompetitive effects on the relevant market. As such, the Commission is not obliged to show Google's conduct actually restricted or eliminated competition - even where, as in this case, it had been ongoing for a number of years.
- The Commission was not required to establish systematically what would have happened in a counterfactual scenario in which the infringing conduct did not occur.
- The Commission did not need to prove that Google's conduct foreclosed rival comparison shopping services that were as efficient as Google. The General Court explained that because the requisite as-efficient-competitor test involves the comparison of prices and costs, it does not make sense to apply it to the present case which does not concern pricing practices.

In its assessment, the Court noted how the Commission nonetheless provided probative evidence demonstrating that:

- Google's behaviour decreased traffic to rivals' comparison search services and increased traffic to Google's service; and
- a significant proportion of traffic to rivals' comparison shopping services arrived via Google.

According to the General Court, the Commission thereby established that Google's practices affected "at the very least . . . a not insignificant share of", and "the situation of a significant category of Google's competitors" on, the market for comparison shopping services.

However, the Court annulled the Commission's finding of anticompetitive effects in the market for general search services, as it found that the basis for that conclusion – an assertion that Google's conduct protected revenues that were used to finance those general search services – was insufficiently analysed and evidenced.

The serious and intentional nature of the infringement justified the size of the fine, notwithstanding the novelty of the case

Google put forward two arguments in an effort to convince the General Court to reduce its €2.42 billion fine.

First, Google claimed that the novel nature of the Commission's analysis should have led it to impose no fine because Google could not have committed the infringement "intentionally or negligently" as required under EU law. This argument did not hold for the Court. The Court found:

- Google was aware of both its dominant position in the markets for general search services **and** the importance of general results pages as a source of traffic for comparison shopping services. As such, Google must have known that its favouring and demotion conduct was capable of weakening competition. The General Court concluded that Google **intentionally** engaged in the infringing conduct, whereas the Commission's decision had left open whether Google's conduct was intentional or negligent.
- The fact that the precise type of conduct Google engaged in had not been examined previously did not detract from the foreseeability of the finding of an infringement **nor** the accompanying penalty.

Second, Google argued the level of the fine was too high. As noted above, the General Court annulled a part of the Commission's decision relating to anticompetitive effects on the market for general search services. Despite this, the amount of the fine, €2.42 billion, remains intact. The General Court reasoned that although the annulment militates in favour of a reduction, the **intentional** adoption of the anticompetitive practices militates in favour of an increase. The Court judged that these two factors cancelled each other out and as such the fine should remain at the same level the Commission calculated.

Next steps

- Google has two months and ten days from the date of the notification of the judgment to decide whether to appeal.
- Google's obligation to implement the remedy of the 2017 Decision was not suspended, and Google claims to have implemented this remedy already. However, its implementation faces heavy criticism from rival comparison shopping services and could trigger separate enforcement action by the Commission.
- The Google Shopping judgment could lift the suspension of various damages actions brought in national courts by rival comparison shopping services against Google, which had been put on hold pending the outcome of the appeal.

WIDER IMPLICATIONS

Self-preferencing

It cannot be assumed that the judgment means any form of self-preferencing by other dominant companies and in other sectors is abusive. Google's favouring abuse is very specific to the facts. These distinguishing facts include that:

- Google is "super-dominant", and its position is secured by high barriers to entry;
- Google is a gateway to the internet and its general search results pages have characteristics akin to an essential facility; and
- Google's favouring of its own service consisted not only of promoting its comparison search services, but also demoting other comparison search services.

That said, the judgment is likely to be relied on by other vertical search services to pursue illegal favouring cases against Google before the Commission, national competition authorities or the national courts.

Abuse of dominance enforcement

The judgment will potentially have broad implications for the enforcement of Article 102 TFEU and the regulation of digital gatekeepers:

- The General Court's verdict in Google Shopping is likely to embolden the Commission and national administrative competition authorities to find novel abuses under the general principle laid down in Article 102 TFEU in relation to data, online advertising and video streaming, as it holds, for example, that it is not required for a finding of infringement to:
  - satisfy the conditions of potentially similar, already-established abuses;
  - show actual effects as opposed to merely potential effects;
  - take into account positive effects of the behaviour on consumers in the assessment of whether conduct is competition on the merits (as the Court holds such arguments are to be considered only as potential justifications once the infringement is established, for which the dominant undertaking carries the burden of showing the benefits of the conduct outweigh its negative consequences);
  - show that rival companies are as efficient as the infringer; or
  - run a counterfactual analysis where the actual outcome is assessed against a scenario in which the infringing conduct did not occur.
- The recognition of the concept of "super-dominance" (first advanced by Advocate General Fenelly in *Compagnie Maritime Belge* (1998)) might be used as a basis to impose a heightened responsibility not to weaken competition on other quasi-monopoly companies, such as Facebook/Meta in social media.
- The Google Shopping judgment could strengthen lawmakers' resolve to adopt the (more far-reaching) outright prohibition on digital "gatekeepers" treating their own services or products more favourably in ranking services found in Article 6(1)(d) of the Commission's proposal for a Digital Markets Act (**DMA**).

Clifford Chance acted for two of the complainants in the Google Shopping case: (i) FairSearch, in the administrative proceedings and (ii) Foundem, at the General Court hearing.

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