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Self-preferencing in the EU: a legal and policy analysis of the *Google Shopping* case and the Digital Markets Act

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Abstract: This article discusses the EU General Court's *Google Shopping* judgment (Case T-612/17), which deals with online self-preferencing. Self-preferencing is a novel abuse of dominant position (Article 102 TFEU), which consists of the prominent display and positioning of the dominant undertaking's own service (comparison shopping service in this case), and demotion of the competitors' services, on webpages generated by the dominant undertaking's general search services. The key-principles in the legal reasoning of the General Court's ruling were the prohibition of discrimination and coterminous concepts such as 'equal opportunities to compete' and 'competition on the merits'. The differential treatment between Google's own service and those of its competitors derived from Google's subjection of its adjustment algorithms only to its competitors and not to its own service. While an approach based on non-discrimination is contentious, on the other hand Google's conduct was neither efficient nor did it benefit consumers. The article also examines the EU Digital Markets Act's prohibition of self-preferencing and its relationship with the *Google Shopping* ruling.

Keywords: abuse of dominant position (Article 102 TFEU), self-preferencing, online platforms, prohibition of discrimination, competition on the merits, adjustment algorithms, Digital Markets Act, gatekeepers' obligations

1. Introduction

On 10 November 2021 the General Court[1] rejected Google's challenge to the 2017 decision of the European Commission (Commission) in *Google Shopping*,[2] in which it found that Google had abused its dominant position in respect of specialized shopping services.[3] Although the General Court's judgment has been appealed,[4] it deserves special attention, both because it is concerned with an abuse of a dominant position in the digital economy by a super-dominant undertaking and because it shows the problems in adapting the current antitrust legal categories to the challenges posed by the digital economy.

The Commission's decision concerned Google, which holds a dominant position in the market for general search services, giving preference to its own specialized comparison shopping service (Google's service) at the expense of its competitors' comparison shopping services (competitors' services or rivals' services).

Google's abuse consisted in a two-pronged conduct.[5] First, it displayed the results of its own comparison shopping service in an eye-catching manner, graphically distinct from generic search results, and placed them at the top of the first Google's general search results page (hereinafter: 'prominent display and positioning' or simply 'favourable positioning'). Second, it displayed the competing comparison shopping services in the form of generic search results and gave them a low ranking, which made them appear in the second, third, or successive general search results pages ('demotion of competitors' services' or simply 'downgrading of competitors').

2. Overview of Google's main defence

Since the start of the Commission's investigation, Google consistently argued that the above-mentioned practices

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1 Case T-612/17 *Google LLC v. European Commission* EU:T:2021:763.

2 Case AT.39740 *Google Search (Shopping)* C(2017) 4444 final (27 June 2017) [2018] OJ C9/11.

3 The General Court annulled only a part of the Commission's decision which had found that Google had infringed Article 102 TFEU in 13 national markets for general search services: *Google v. Commission* (fn 1), para 596.

4 Case C-48/22 P *Google and Alphabet v. Commission (Google Shopping)*, pending.

5 *Google Search Shopping* (fn 2), paras 341–344 and *Google v. Commission* (fn 1), paras 69 and 187.

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were in fact an improvement in the quality of its search service and that improving a product or a service is not an abuse of a dominant position because it benefits consumers.

Google's defences were also based on what it considered to be the Commission's wrong legal classification of its practices as being abusive. First, it maintained that favouring its own services could be an abusive practice only if that practice is classified as a refusal to supply – that is, as an abuse of a dominant position which needs to satisfy a legal test. Google argued, however, that the Commission did not apply such a test. Put differently, Google argued that its practices consisted in not giving its competitors access to its search services so as to ensure equal positioning of all comparison shopping services, such that, effectively, not giving rivals' access to its services amounted to a refusal to supply. However, had the Commission classified such a practice as a refusal to supply, then it should have proved that such access was indispensable for its rivals to carry out their business and that denial of such access risked eliminating all competition – something that the Commission failed to do.

Second, it maintained that the Commission wrongly applied the rules on leveraging. Finally, Google argued that its practices did not result in any anti-competitive effects and thus could not be abusive.

Sections 2.1 to 2.8 below examine such arguments and the relevant General Court's response.

2.1. Improvement of services

Google argued that, since quality of a product or service is an aspect of both competition and consumer welfare, improvement in the quality of a product is desirable and does not infringe the competition rules even if it results in competitors losing market share or exiting the market. Indeed, practices that enhance consumer welfare are the essence of competition on the merits. Google maintained that its practices, both the prominent positioning of its specialized shopping service and the demotion of competitors' services in search results, was an improvement of its services and did not depart from competition on the merits.[6]

The General Court disagreed and accepted the Commission's position that demoting the competing shopping services such that they did not show up on the first search results page, but on the second, third, etc. search results pages, meant that those services attracted fewer users, which made it difficult for competitors to attract merchants, thus making competitors' services less relevant. The General Court did not find any quality improvements in Google's services that would improve consumers' shopping experiences, which meant that Google's conduct was not reflective of competition on the merits.[7] In fact, the General Court noted that the value of a general search engine lies in its capacity to include in its search results pages displaying a variety of sources. Thus, limiting the visibility of its results to its own comparison shopping services, like Google did, was not economically rational for a provider of general search services. This was the abnormality of Google's conduct: it knew that it would be more profitable to prioritize its own comparison shopping services despite the loss of revenue from the reduced visibility of its competitors' services.[8]

2.2. Leveraging

Google also maintained that the Commission had misapplied the rules on leveraging. Leveraging is a practice by which a dominant undertaking extends its market power to another market segment (whether upstream, downstream, or ancillary).[9] Leveraging alone does not amount to an abuse of dominant position because the competition rules do not prevent an undertaking from competing in markets other than that in which it holds a dominant position. However, leveraging is an abuse of dominant position when entering a new market segment is accompanied by additional factors or special circumstances that show that such conduct deviated from competition on the merits.[10] Google's practices fitted into the practice of leveraging because it held a dominant position in general internet searches and attempted to use its dominance to gain market power in the adjacent market for specialized comparison shopping services. Google argued that the Commission had not identified any additional features that could have made Google's entry into the market for comparison shopping services an abusive leveraging of its dominance in general search.[11]

The General Court confirmed that leveraging alone was not prohibited per se by Article 102 TFEU, but concurred with the Commission that there were additional circumstances that made Google's leveraging abusive. Such additional circumstances were the unjustified

6 *Google v. Commission* (fn 1), para 158. The meaning of 'competition on the merits' will be examined below.

7 *Google v. Commission* (fn 1), para 185.

8 *Google v. Commission* (fn 1), para 178.

9 A. Jones, B. Sufrin and N. Dunne, *Jones & Sufrin's EU Competition* Law (7th edn, Oxford University Press, 2019) 390.

10 Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB* EU:C:2011:83, paras 85–86.

11 *Google v. Commission* (fn 1), paras 143 and 145.

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different positioning of Google's comparison shopping service and of the rivals' services;[12] the importance of internet traffic generated by Google general search results for Google's competitors; the detrimental impact of diversion of internet traffic; the irreplaceability of such traffic, and users' tendency to focus on the small number of search results displayed on the first webpage.[13] As seen above, the decrease in internet traffic to rivals' shopping websites as a result of Google's practices meant they became less valuable and less competitive.

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2.3. Refusal to supply – essential facility

Another of Google's defences was that guaranteeing equal visibility to competitors' services effectively meant it providing competitors with access to its technology and that, from a legal perspective, the practices should have been classified as a refusal to supply case,[14] which is abusive only if the legal test for refusal to provide access is met.[15] One of the limbs of this test is that the dominant undertaking's input, infrastructure, facility, etc. must be indispensable for other undertakings to be able to carry out their business. On the basis that its conduct fell within the scope of a refusal to supply, Google contended that the Commission had not proved that the indispensability condition was satisfied.

The General Court rejected this argument and noted that not every issue of access to a dominant undertaking's input had to be classified as a refusal to supply.[16] Google's conduct was different from a refusal to supply case because in such a case a dominant undertaking must expressly deny a rival's request to access to its asset. Such express denial did not occur in the present case.[17] Instead, the General Court observed that Google had engaged in active discrimination as it favoured its services over those of its rivals and relegated its rivals' shopping services to subsequent general results search pages.[18] In particular, Google had discriminated against its competitors' services by applying its ranking algorithms only to the rivals' websites. As a result, unlike its competitors whose websites could be demoted, Google's shopping service was always displayed prominently and positioned at the top of the first general search results page.

2.4. Lack of anti-competitive effects: no harm to competitors

Google also disputed that its behaviour affecting internet traffic had had a negative impact on competitors' shopping services.[19] Internet traffic is a strategic asset because the more traffic a comparison website generates, the more merchants are willing to provide data and list their products on that website. Other positive effects include higher revenues, increased relevance of the results of a shopping query and better quality of information relating to users' requests.[20] Google maintained that promoting its comparison shopping service did not have a negative impact on its competitors and that there was no causal link between any diversion of internet traffic and the worsening of the position of the competitors' comparison shopping services. However, the General Court noted that the abusive conduct did not consist only in the prominent display and position of Google's service (i.e. self-preferencing), but also in the application of adjustment algorithms that resulted in the demotion of the competitors' shopping services in search results. Thus, the impact of the whole conduct (self-preferencing and demotion of rivals' services) had to be considered to establish its anti-competitive effects.[21] On this aspect, the General Court recalled that it was necessary to prove the potential anti-competitive effects of Google's conduct and not necessarily that these effects had in fact materialized. It also added that, to assess the anti-competitive effects, it was necessary to compare the market on which Google's conduct took place with a counterfactual scenario in which such practices would not have taken place.[22] If the counterfactual scenario had shown that the competitors would have in any case exited the market or lost market share, then Google's conduct would not have caused any anti-competitive effects. Google maintained that the Commission had not undertaken any such counterfactual analysis. On this point, the General Court

12 *Google v. Commission* (fn 1), para 197.

13 *Google v. Commission* (fn 1), para 169.

14 *Google v. Commission* (fn 1), para 137. The abuse is known in the US as the essential facility doctrine.

15 Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* EU:C:1998:569. On the basis of the Court of Justice's case law, the Commission must apply the following test to establish an abuse: (i) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market; (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market; and (iii) the refusal is likely to lead to consumer harm. See Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 81.

16 *Google v. Commission* (fn 1), para 230. For example, it referred to margin squeeze (*TeliaSonera* (fn 10)) and tying (Case T-201/04 *Microsoft Corp. v. European Commission* EU:T:2007:289) as cases in which an abusive refusal of access to an input of the dominant undertaking was not considered to be an abusive refusal to supply, but a different form of abuse: ibid, para 235.

17 *Google v. Commission* (fn 1), para 233.

18 *Google v. Commission* (fn 1), para 245.

19 *Google v. Commission* (fn 1), para 358.

20 *Google Search (Shopping)* (fn 2), paras 440–453.

21 *Google v. Commission* (fn 1), para 374.

22 *Google v. Commission* (fn 1), para 376.

observed that it was not possible to provide a credible counterfactual scenario because a market without Google's practices of self-preferencing and competitors' demotion had never existed.[23] Therefore, to prove the causal link between Google's diversion of internet traffic and the adverse effects on competition caused by its conduct, the Commission was entitled to rely on two studies provided by Google itself, which showed a correlation between Google's practices and the market position of its competitors.[24]

2.5. Lack of anticompetitive effects: harm to consumers and innovation

Google also submitted that the Commission had not proved that its practices resulted in higher prices for sellers and consumers, and less innovation.[25] Since Google's practices lasted a number of years, it argued that their anti-competitive effects should have materialized on the market, but the Commission had failed to prove any harmful effects on competition. On this argument, the General Court recalled the main principles underpinning Article 102 TFEU, i.e. that its goal is to preserve undistorted competition, and the concept of abuse refers to conduct that hinders competition which is already weakened by the presence of an undertaking in a dominant position, and that takes place through recourse to methods different from those adopted in a situation of normal competition.[26] With regard to exclusionary practices, which was the type of anti-competitive practice at issue, the Court observed that they will breach Article 102 TFEU if they have the potential to produce anti-competitive effects. Accordingly, this meant that the Commission was not required to prove that such practices resulted in actual anti-competitive effects, but simply that they were capable of producing such effects.[27]

2.6. Disregard of merchant platforms' competitive pressure

Another argument examined by the General Court was that the Commission had not considered the competitive pressure from merchant platforms. Merchant platforms are businesses offering a platform where merchants can sell their products, for example, Amazon. Google claimed that such platforms exerted competitive pressure on it, which means that its practices could not have produced anti-competitive effects. The General Court dismissed this argument by recalling that Article 102 TFEU prohibits conduct which has even the potential effect of hindering the degree of competition present in a market. If, in a certain market, there are different categories of competitors, as it was in the present case, conduct will constitute an abuse even if affects only one category of competitor.[28]

2.7. The 'as-efficient' competitor test

Another argument raised by an intervener in support of Google, the Computer & Communications Industry Association, maintained that the Commission did not apply the so-called 'as-efficient competitor' test.[29] This test is based on a hypothetical competitor who is as efficient as the dominant undertaking. If such a hypothetical competitor would not be able to compete against the dominant undertaking, then the dominant's undertaking's practices are deemed to be abusive. Against this plea, the General Court held that the as-efficient competitor test is meant to be applied in abuses of a dominant position involving pricing practices, which was not the case for Google's practices.[30] Therefore, the Commission was correct in not applying this test.

2.8. Objective justification

Google's final argument concerned the presence of objective justifications for its practices, such that they were not abusive. A dominant undertaking will not infringe Article 102 TFEU if it shows that its conduct is objectively necessary or if it has efficiency gains and consumer benefits which offset its negative effects on competition.[31] The burden of proof of the existence of an objective justification lies upon the dominant undertaking. In that respect, Google argued that the prominent display of its comparison shopping service improved the quality of such service for the benefit of online users. However, the General Court accepted the Commission's objection that a favourable positioning and display of its service could not be considered a quality improvement that had benefits for consumers.

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23 *Google v. Commission* (fn 1), para 377.

24 *Google v.* Commission (fn 1), paras 376–382. During the Commission's administrative proceeding, Google presented two studies, a 'Difference-in-Differences' analysis (a cross country comparison) and an Ablation Experiment (analysis of internet traffic in which Google's comparison shopping service is removed): see *Google Search (Shopping)* (fn 2), paras 506–507.

25 *Google v. Commission* (fn 1), para 421.

26 *Google v. Commission* (fn 1), para 437.

27 *Google v. Commission* (fn 1), para 443.

28 *Google v. Commission* (fn 1), paras 502–504.

29 *Google v. Commission* (fn 1), para 514.

30 *Google v. Commission* (fn 1), para 539.

31 *Google v. Commission* (fn 1), para 551.

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In fact, discrimination against other comparison shopping websites in terms of positioning undermined consumers' interests since it is convenient for consumers to find all comparison shopping websites on the same search results page.[32] In fact, Google's discriminatory conduct resulted in a reduction of consumer choice.[33] Google also invoked technical constraints that prevented the equal treatment of competing shopping services.[34] The General Court rejected this claim, noting that the Commission did not require the adoption of a specific algorithm, rather the application of the same algorithms to both Google's s services and the competing shopping services.[35]

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3. Comment: The General Court's legal reasoning

The General Court's legal reasoning is based on the traditional principles underpinning abuse of dominant position, i.e.: the special responsibility of an undertaking in a dominant position not to impair genuine and undistorted competition;[36] the recourse to methods different from those governing competition;[37] the prohibition of discriminatory practices[38] and competition on 'the merits[39] – a principle to be read in conjunction with the goal of fair competition.[40] Therefore, the judgment may be seen as incremental: it prohibits a dominant undertaking's self-preferencing of its own services together with relegation of its competitors' services by relying on the traditional principles and legal categories employed in the interpretation of abuse of dominant position. The judgment may be criticized from a 'rule of law' perspective, as prior to this case, Google's practices were s not formally prohibited.[41] However, it is well known that the text of Article 102 TFEU does not contain an exhaustive list of abuses.[42] New anti-competitive business practices may emerge over time and, therefore, it is important that Article 102 TFEU can catch them. This issue is particularly pressing in the digital economy, which has specific characteristics that differ from traditional markets.[43]

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3.1. Refusal to deal

Prior to this judgment, some antitrust scholars argued that although refusal to deal or provide access to an essential facility was the closest abuse Google could be accused of, they denied that Google's practice could be classified as a case of refusing access to an essential facility. In other words, the problem was not that the Commission had not demonstrated that the essential facility legal test was met; the problem was that Google's internet general search service was not an essential facility. For example, Bo Vesterdorf, the former President of the General Court, concluded that Google search service was not comparable to an infrastructure service.[44] Alternatively, it was argued that in the EU the essential facility doctrine applies to vertically integrated businesses where the holder of the asset operates in the upstream market which provides an input to be used in the downstream market. That was not the case for Google, as the upstream market of general search provides the input to be used in the downstream market of specialized comparison shopping searches.[45] It was also argued that the abuse of 'refusal to deal' applies in situations of monopoly, which was not the case for Google, which, although super-dominant, was not a monopolist in search.[46]

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If the General Court had classified Google's conduct constituting a case of a refusal of access to an essential facility, then it should have concluded that the relevant test for an abusive refusal of access had not been met. For example, with regard to the indispensability condition (i.e. that the asset or service of the dominant undertaking is indispensable for carrying out an entrepreneur's business on a related market), the case-law of the Court of Justice provides that technical, legal or economic obstacles making competition difficult do not meet such condition.[47] In the *Google Shopping* case, the availability of other general search services meant that comparison shopping services providers would have been able to carry out their businesses even if on less advantageous conditions than being listed on Google.

However, the General Court agreed with the Commission that Google's conduct was not a 'refusal to

Replace with 'Instead'

32 *Google v. Commission* (fn 1), para 562.
33 *Google v. Commission* (fn 1), para 566.
34 *Google v. Commission* (fn 1), para 558.
35 *Google v. Commission* (fn 1), paras 572–576.
36 *Google v. Commission* (fn 1), para 150.
37 *Google v. Commission* (fn 1), para 151.
38 *Google v. Commission* (fn 1), para 268.
39 *Google v. Commission* (fn 1), para 152.
40 *Google v. Commission* (fn 1), para 433.
41 Google had raised this argument in the Commission's administrative proceeding: *Google Search (Shopping)* (fn 2), para 646.
42 *Google v. Commission* (fn 1), para 154.
43 Arguably, the most cited characteristic of the digital economy is the presence of network effects, which the Commission referred to in its infringement decision: *Google Search (Shopping)* (fn 2), section 7.2.2.
44 B. Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin' (2015) 1 Competition Law & Policy Debate 4, 8.
45 P. Akman, 'The theory of abuse in Google search: a positive and normative assessment under EU Competition Law' (2017) University of Illinois Journal of Law, Technology & Policy 301.
46 J. Temple Lang, 'Comparing Microsoft and Google: The Concept of Exclusionary Abuse' (2016) 39 World Competition 5. The author was an academic, but also represented Google.
47 *Oscar Bronner* (fn 15).

deal' case. It observed that refusal to deal is not the exclusive doctrine under which refusal to provide access to an input should be treated under Article 102 TFEU.[48] The difference between an essential facility case and the present case was that the abusive conduct did not simply consist of the prominent display of Google's comparison shopping service in its search results, but also in the discrimination against and relegation in the rankings of competitors' services.[49] Here the General Court seemed to emphasize that while in a 'refusal to deal' case the dominant undertaking refuses to grant access to its input (a passive conduct), in the present case Google engaged in active discrimination against its downstream rivals, which consisted of the prominent display of its own service and the demotion of the competitors' services. Arguably, the distinction between passive refusal and active discrimination is questionable. After all, any refusal to deal results in discrimination against the competitor asking for access to a dominant undertaking's asset. However, from a broader perspective, it is doubtful that refusal to deal was the appropriate legal category to deal with Google's conduct. There are instances in which commercial conduct could have been dealt with as essential facility cases, but the Court of Justice gave a different legal classification to the abuses in question.[50]

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In reality, Google's 'super-dominant' position[51] and the centrality of the commodity that it provides (information) cannot be compared to a quasi-monopolist operating in non-digital markets to which antitrust liability is imposed through the essential facility doctrine. In fact, the core issue of Google's conduct was not concerned with access to, and use of, a non-physical asset such as the system of Google's algorithms, but with the way in which the system of algorithms worked. In other words, Google's self-preferencing was a regulatory matter. This classification is confirmed by the recitals of Digital Markets Act,[52] the nature of which is an ad hoc regulation of large digital platforms with market power. Of course, essential facility situations are often the basis of regulatory interventions imposing specific rules upon undertakings owning 'essential' assets and infrastructure. However, in the *Google Shopping* case, its rivals did not ask to use directly or to have disclosed to them Google's adjustment algorithms.[53] In an essential facility case, the monopolist's asset is used by a competitor, which poses the problem of precluding other businesses from using the same asset. This was not the case in *Google Shopping*; as adjustment algorithms are not perishable or exclusive goods, they do not pose the problem of which rival should be granted the right to have access to an asset. As it will be seen later, the Commission did not even require the adoption by Google of a specific algorithm, but instead it framed Google's conduct as an issue of discriminatory treatment between Google's own service and the rivals' services. Rather, the problem was that the issues of the working of the algorithms were dealt with by relying on the vague legal standards of abuse of dominant position, when in fact a regulatory approach would have been preferrable. The enactment of the Digital Markets Act testifies precisely the point that ad hoc regulation is a better approach to dealing with the issues arising from large digital platforms.

3.2. Leveraging

The misapplication by the Commission of the principles applicable to leveraging was one of Google's grounds of appeal, but the General Court rejected that plea. The problem with leveraging is that there is no general test setting out the conditions under which the dominant undertaking's expansion to another market amounts to the abuse of a dominant position.

In *Commercial Solvents* the Court of Justice held that conduct by which an undertaking with market power in one market attempts to extend its dominance into another, associated market amounted to an abuse of dominant position in the presence of 'special circumstances'.[54] However, the Court of Justice did not elaborate a general test applicable to other leveraging situations. Similar considerations can be made in relation to *TeliaSonera*, where the Court of Justice referred to the existence of 'special circumstances' without setting out a legal test to ascertain what constitutes special circumstances.[55] The present case does not provide any clarification about either when leveraging will be abusive or the special circumstances which must be present for an abuse to exist. As seen above, in *Google Shopping*,

48 *Google v. Commission* (fn 1), para 235.

49 *Google v. Commission* (fn 1), para 245.

50 For example, Case C-242/95 *GT-Link A/S v. De Danske Statsbaner (DSB)* EU:C:1997:376. This case was concerned with a public undertaking which owned not charging port duties to its downstream ferry services, but charging them to rivals of the downstream operator. See N. Petit, 'Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf' (2015) 1 Competition Law & Policy Debate 3, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253 (accessed 14 April 2023).

51 The General Court itself used this expression; see *Google v. Commission* (fn 1), para 182.

52 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector[2022] OJ L265/1), recital 2.

53 In *Microsoft* (fn 16), the essential input was framed in terms of disclosing interoperability information.

54 Case C-333/94P *Tetra Pak International SA v. European Commission* EU:C:1996:436, para 27.

55 *TeliaSonera* (fn 10), paras 84–86.

the General Court limited itself to indicating a number of circumstances that made Google's leveraging conduct abusive, i.e. the value of Internet traffic for an online business, user behaviour in not accessing general search results pages beyond the first one, and the difficulties rivals faced in replacing lost internet traffic.[56] Perhaps the diversity of markets makes it difficult to elaborate a general legal test to specify which special circumstances will make leveraging an abusive practice. However, the lack of a general test means that potentially any problematic or unusual factual elements can be considered a special circumstance.

The classification of Google's conduct as leveraging was plausible, given that this abuse is capable of encompassing a great and diverse number of business practices. However, the discussion was intertwined with the issue of competition on the merits. In particular, the Commission conceptualized Google's conduct as a practice falling outside of competition on the merits.[57] The General Court took into account the above-mentioned circumstances (i.e. the value of Internet traffic for an online business, users' behaviour when using online shopping services and the lost internet traffic that could not be easily replaced) to come to the conclusion that the Commission had proved the relevant criteria to establish that Google had engaged in abusive leveraging and therefore Google's conduct fell outside of competition on the merits.[58] Arguably, this ruling does not clarify whether Google's favouring of its service and demoting its competitors' services is pivoted on leveraging (subject to the above-mentioned 'special circumstances') or is a just generic abuse of competition that is not 'on the merits'. Whatever the case, the centrality of Google's conduct was its discriminatory treatment between its service and those of its competitors. This is examined in section 3.3 below.

3.3. Discrimination

Discrimination is present in a number of exclusionary abuses.[59] The main example is the prohibition of price discrimination, which is expressly prohibited by Article 102(c) TFEU. In *Google Shopping*, the General Court stated that abusive practices may take form of unjustified difference in treatment,[60] recalling precedents concerning pricing abuses,[61] price discrimination[62] and general principles of EU Law.[63] However, the conduct in *Google Shopping* did not involve any price discrimination, nor did the General Court rely on the Treaty formulation of abusive discrimination consisting of 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'[64] to assess Google's conduct. However, the prohibition of discrimination was the key principle invoked by the Commission and then the General Court to establish an abuse, even though it was used in the background rather than a constituent element of Google's conduct. Google's conduct has been described as 'self-preferencing', which inherently contains the concept of discrimination. However, on a closer reading of the judgment, the discriminatory treatment did not concern the outcome (i.e. the prominent display and position of Google's service on the first results page and the demotion of rivals' services to subsequent pages), but rather the process which led to such an outcome, i.e.: the application of the adjustment algorithms only to Google's rivals' services and not to its own services, thus ensuring that the latter would always be visible at the top of the first results webpage. The General Court repeatedly stressed that Google's conduct was the combination of the prominent display and positioning of its service and the demotion of its rivals' services. In particular, the Commission did not prescribe any particular algorithms that had to be used by Google. Rather, it criticized that, unlike its rivals, Google's service was not subject to the adjustment algorithms.[65] On this reading, the General Court's judgment does not prevent Google (nor any other platforms in a dominant position) from having its service in a prominent position if this is the outcome of an equal application of adjustment algorithms to all services. This point is important, because it had been suggested that the Commission decision would result in imposing a first ranked position, which is not possible because it can be occupied only by one company.[66] However, this is not what the Commission prescribed. If, after an equal application of the adjustment algorithms to all services, the rivals' services are positioned on the second or subsequent general search results pages, and conversely Google's service appears on the first page because it has the objectively best search result, such conduct does not breach Article 102 TFEU.

Replace with 'Yet'

56 *Google v. Commission* (fn 1), para 169.
57 *Google Search (Shopping)* (fn 2), para 341.
58 *Google v. Commission* (fn 1), paras 175 and 185.
59 Jones, Sufrin and Dunne (fn 9), p. 550.
60 *Google v. Commission* (fn 1), para 155.
61 Case T-228/97 *Irish Sugar v. European Commission* EU:T:1999:246 and *GT-Link* (fn 50).
62 Case C-82/01P *Aéroports de Paris v. European Commission*.
63 *Google v. Commission* (fn 1), para 155.
64 Article 102(c) TFEU.
65 *Google Search (Shopping)* (fn 2), para 512. See also para 440: 'The Commission does not object to Google applying certain relevance standards but to the fact that Google's own comparison shopping service is not subject to those same standards as competing comparison shopping services.'
66 Temple Lang (fn 46), p. 17.

3.4. The theory of harm

An antitrust theory of harm ensures coherence in the application of the competition rules and the pursuit of a policy that is in the general interest. It is premised upon a definition of a competitive market and what harms a competitive market. In this respect, harm to competition should be understood through the normative goal(s) of competition law.

The problem with abuse of dominant position is that different goals may be assigned to Article 102 TFEU – e.g. protection of the competitive process, preservation of the internal market, promotion of consumer welfare, preservation of economic freedom, promotion of efficiency and ensuring a level playing field among the competitors.[67] Among such goals, consumer welfare is the prevailing standard against which allegedly abusive conduct is judged, and consequently the foreclosure of competitors is anti-competitive and unlawful only if it results in consumer harm. Although these principles can be applied to the digital economy too, there are also some specific aspects of the digital economy that require a reconsideration of the meaning of 'competition' in digital markets.

The main aspect is that digital platforms are particularly susceptible to network effects, which means that the value of a platform to users increases with the number of users present on the platform. This results in the incumbent acquiring significant market power, which cannot be easily challenged by new entrants.[68] Thus, strong antitrust measures are desirable in such a situation. On the other hand, the digital economy is driven by innovation. For example, Google operates in high-tech markets, which require significant investments in innovation. In fact, consumers benefit in terms of innovative products and/or services. In turn, this cautions against strong antitrust enforcement, which undermines investments in innovation. Here, opinions are split.[69] Some commentators advocate minimum antitrust intervention to preserve the incentives to invest, which also has the advantage that it does not result in the protection of competitors.[70] However, other scholars dispute that antitrust enforcement undermines innovation.[71]

In the *Google Shopping* case, the Commission and the General Court adopted the theory of harm of the protection of the competitive process: the presence of competitors, which are protected against discriminatory treatment of their services, creates rivalry, which exerts competitive pressure upon the dominant undertaking and, in turn, a market with numerous competitors has positive effects in terms of innovation and consumer welfare.

With regard to innovation, rivalry among competitors promotes dynamic efficiency as competitors can also invest in innovation, thus improving the relevance of their search results.[72] Relatedly, the Commission maintained that less rivalry reduced Google's incentives to innovate.[73] Arguably, both the Commission and the General Court recognized the importance of innovation in Internet search markets, but they did not accept the dominant paradigm whereby market power should not be curbed to allow businesses to make investments in innovation.[74]

With regard to consumer welfare, the Commission argued that Google's conduct foreclosed competitors, which meant that Google would be able to charge higher fees to merchants, which in turn would be passed on to consumers.[75] The General Court accepted the Commission's approach that reducing the number of competitors meant less consumer choice and less relevance in search results.[76] While it accepted that Google's practices could have benefited some consumers, it also maintained that such benefits did not offset the negative effects of Google's practices on other consumers.[77]

Whether or not Google's conduct harmed consumers depended on the definition of consumer welfare. The traditional approach focuses on price, but in the digital economy most consumers do not make direct, monetary payments for internet services, which is also the case for comparison shopping services. In the present case, the Commission identified higher prices as a potential and future anticompetitive effect, but in reality the main harm to consumers took the form of less consumer

67 R. Nazzini, *The Foundations of European Union Competition Law* (Oxford University Press, 2011) 12.

68 J. Crémer, Y. de Montjoye and H. Schweitzer, *Competition policy for the digital era*, Final Report (4 April 2019) 23, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf (accessed 14 April 2023).

69 For an overview of the debate, see R. Cass, 'Antitrust for High-Tech and Low: Regulation, Innovation, and Risk' (2013) 9 JL Econ & Pol'y 169.

70 For the US, see G. Manne and J. Wright, 'Google and the Limits of Antitrust: The Case against the Case against Google' (2011) 34 Harv J L & Pub Pol'y 171. In the EU, see I. Kokkoris, 'The Google Case in the EU: Is There a Case' (2017) 62 Antitrust Bull 313, 328.

71 J. Baker, 'Beyond Schumpeter vs. Arrows: Antitrust Fosters Innovation' (2007) 74 Antitrust LJ 575.

72 *Google v. Commission* (fn 1), para 171 and *Google Search (Shopping)* (fn 2), para 595.

73 *Google Search (Shopping)* (fn 2), para 596.

74 For a recent overview of the debate, see R.D. Atkinson and J. Kennedy, 'The Antitrust "Challenge" of Digital Platforms: How a Fixation on Size Threatens Productivity and Innovation' in D. Evans, A. Fels and C. Tucker (eds), *The Evolution of Antitrust in the Digital Era: Essay on Competition Policy* (CPI, 2020) 11.

75 *Google Search (Shopping)* (fn 2), para 594.

76 *Google v. Commission* (fn 1), paras 451 and 566.

77 *Google v. Commission* (fn 1), para 568.

choice and less relevance in search results, the latter being an aspect of the quality of the service.

These considerations show the controversial aspect of the General Court's judgment: consumer welfare was primarily assessed by using indicators such as choice of service providers and the relevance of search results. This is the correct approach because users do not pay for their searches and therefore price could not be a parameter for measuring consumer harm. However, indicators such as choice and search relevance are more difficult to measure than prices, which poses a challenge to competition authorities to prove consumer harm or potential consumer harm.

It is fair to say that the main weakness of the *Google Shopping* judgment is that it rests on a weak theory of harm. Rather than requiring a tangible and substantial harm to consumers, the judgment is concerned with negative effects on the process of competition causing consumer harm. The discrimination against Google's rivals showed that the competitive process was impaired. This is problematic because the competitive process is a tool, which is supposed to lead to the goal of benefitting consumers and therefore harm to the competitive process should give rise to antitrust liability only if consumers are prejudiced. Section 3.5 below elaborates this point.

3.5. Competition on the merits

'Competition on the merits' is one the foundational principles underpinning EU competition law on exclusionary practices. In the present case, the General Court classified Google's conduct as falling outside of competition on the merits.

The idea of competition on the merits is deceptively simple: it means that when competition takes place by offering better, more innovative and cheaper products and services that better meet consumer's preferences, then the marginalization or market exit of weaker competitors is not of concern to competition law. Conversely, if the dominant undertaking's conduct is designed to drive out competitors without offering any benefits to consumers, then the competition rules may apply. In reality, it is not always easy to assess whether a dominant undertaking's conduct is designed to meet consumers' preferences. Competition on the merits is a contested concept because ultimately any definition of 'competition on the merits' reflects a value judgment on how markets should operate. The concern is that values such as 'fair' business behaviour may be relied on to describe the optimal working of markets, the problem being that 'fairness' is not necessarily conducive to efficiency. As a result, in the name of fairness, Article 102 TFEU may prohibit efficient business behaviour (so-called 'false positives'), the benefits of which will not be passed on to consumers.[78] Various tests have been devised to distinguish desirable from undesirable conduct, the main ones being based on efficiency and consumer welfare.[79]

In this respect, Google argued that its practices were efficient because they were aimed at achieving an improvement in the quality of its services.[80] The low ranking of competitors' shopping services was, according to Google, the outcome of the use of adjustment algorithms that were designed to improve consumers' search results. However, was it really the case that Google's demotion of competitors' searches in its rankings produced efficiency gains that would benefit consumers? The General Court answered this question in the negative. It found that Google had not proved that its conduct would lead to efficiency gains and that it had only advanced some vague and theoretical arguments.[81] In fact, the Commission had found that, at first, Google's comparison shopping service had been unsuccessful[82] and it only subsequently improved its quality following the demotion of competitors.

Another important argument in the General Court's judgment concerned the irrationality of Google's behaviour. The General Court noted that the value of general search results increased with the number of users' queries to third-parties offering comparison shopping services. Thus, if Google had acted to maximize the value of its search engine, then it should have shown the comparison shopping services in the first general results pages so that consumers could have readily accessed competitors' websites. By contrast, demoting competitors' services was not a rational behaviour, because it generated less internet traffic and thus less advertising revenue. In fact, the demotion of competitors' services was part of a strategy designed to drive them out of the market for comparison shopping services. In particular, Google knew that the barriers to entry for new search engines were so significant that competitors did not have a viable alternative to listing their comparison shopping websites on Google's general search engine. Therefore, Google could demote its competitors, afford

78 Indeed, the General Court makes a reference to fairness, stating that 'the objective of undistorted competition implies that competition takes place on a fair basis': *Google v. Commission* (fn 1), para 433.

79 R. Nazzini, *The Foundations of European Union Competition Law* (Oxford University Press, 2011) 51–103.

80 *Google v. Commission* (fn 1), para 139.

81 *Google v. Commission* (fn 1), paras 553 and 567.

82 *Google Search (Shopping)* (fn 2), paras 490–491.

to lose the economic value generated by internet traffic to competitors' websites, and offset this loss by the higher number of accesses to its own shopping comparison service positioned at the top of the first general results page. The General Court characterized this practice as 'abnormal' competition[83] – a concept that evokes the idea of methods different from those governing competition on the merits. Although the General Court did not refer to this test by name, it may be argued that it applied the 'no economic sense' test, which was devised to assess whether an exclusionary practice infringes Article 102 TFEU. This test is based on a dominant undertaking foregoing short-term profits in order to exclude competitor, with such losses being recovered by conduct enabled by the market power resulting from competitors' exclusion.[84] The General Court noticed that Google's practices fell precisely into this scheme, with it foregoing revenues in the first stage and recouping them once its competitors had been marginalized or driven out of the market.

4. Self-preferencing under the Digital Markets Act (Regulation (EU) 2022/1925)

Is it good English: '… posed by self-preferencing by …'? [there are to 'by']

Perhaps better to replace with 'digital platforms with market power engaging with self-preferencing'?

Please choose the best sentence.

The Commission's decision (and now the General Court's judgment) in *Google Shopping* set the agenda for providing a statutory solution to the challenges posed by self-preferencing by digital platforms with market power. After its Decision in *Google Shopping*, the Commission proposed the Digital Markets Act, which came into force in 2022 and which prohibits a dominant undertaking – a 'gatekeeper', in the Digital Markets Act's terminology[85] – from engaging in self-preferencing.[86]

A first aspect to consider is the definition of 'self-preferencing'. According to the *Google Shopping* judgment, the abuse of self-preferencing is a combination of the prominent display and positioning of the gatekeeper's own service and the demotion by it of competitors' services. However, the Digital Markets Act does not define the conduct of 'self-preferencing',[87] as it simply prohibits the more favourable treatment of the gatekeeper's services or products in terms of ranking, indexing and crawling, without mentioning the demotion of other users' services, which is a critical component of the concept of self-preferencing used in the *Google Shopping* judgment. This poses the problem whether demoting competitors services is now a constitutive element of the DMA's prohibition of self-preferencing or whether the prohibition does not require it. Given that the DMA applies in addition to the abuse of a dominant position under Article 102 TFEU,[88] it could be argued that the DMA's prohibition of self-preferencing does not require the demotion of competitors' services, which instead is necessary if self-preferencing is brought within the scope of Article 102 TFEU. This distinction is relevant to the enforcement of the prohibition of self-preferencing because if it is brought under the DMA, then the DMA seems to suggest that consumers can only enforce this prohibition through representative actions.[89] However, if self-preferencing is classified as an abuse of dominant position, then private parties can also bring a civil claim before national courts.[90]

A second aspect which can be inferred from the *Google Shopping* judgment is that the prominent display by a dominant undertaking of its own search results is not prohibited if it is the outcome of a non-discriminatory application of the criteria (the adjustment algorithms) that are used to determine the ranking of the services provided also by its competitors. In this respect, the General Court's judgment is consistent with the Digital Markets Act, which requires the application of transparent and non-discriminatory conditions in determining the ranking of the gatekeepers' and other business users' services.[91] In turn, this provision refers[92] to the Guidelines adopted by the Commission pursuant to Article 5 of the Online Fairness and Transparency Regulation.[93] The goal of the DMA is to promote transparency and fairness and effective redress to business users of online intermediation services.[94] One of the

83 *Google v. Commission* (fn 1), paras 178–179.

84 Arguably, this test is modelled upon the abuse of predatory pricing. For an explanation, see Nazzini (fn 79), p. 66.

85 The 'gatekeeper' is the undertaking upon which the obligations of the Digital Markets Act are imposed: Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) [2022] OJ L295/1, Article 3.

86 Digital Markets Act (fn 86), Article 6(5) provides that 'the gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking'.

87 Neither the definitions (Article 2), nor the prohibition (Article 6(5)) of the Digital Markets Act (fn 85) provide a rigorous definition of this conduct.

88 Digital Markets Act (fn 85), Article 1(6).

89 Digital Markets Act (fn 85), Article 42.

90 Following the Court of Justice's judgment in *Courage v. Crehan*, private parties may bring a claim for compensation in respect of losses resulting from a breach of Articles 101 and 102 TFEU: Case C-453/99 *Courage Ltd v. Bernard Crehan* EU:C:2001:465. See now, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 (Antitrust Damages Directive).

91 Digital Markets Act (fn 85), Article 6(5).

92 Digital Markets Act (fn 85), recital 52.

93 Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.

94 Regulation 2019/1150 (fn 93), Article 1.

obligations imposed upon providers of online intermediation services is to set out to business users the ranking criteria (the parameters)[95] used to improve their predictability and help business users to improve the presentation of their products and services.[96] To facilitate compliance with this obligation, the Commission has issued guidelines.[97] It is still too early to comment on Regulation 2019/1150, which is being evaluated,[98] and its positive impact on the Digital Markets Act. Suffice it to say that in the *Google Shopping* case, both the Commission and the General Court held that they did not prescribe the adoption of any particular adjustment algorithms in order for there to be competition on the merits. The *Google Shopping* judgment is concerned with ensuring equal opportunities and equal treatment for all market participants, but leaves Google free to decide what adjustment algorithms should be applied by it to comply with this obligation. It is not inconceivable that Google will design algorithms that seem neutral, but that in reality will confer an advantage on Google's services. If that is the case, the problem of the systematic downgrading of rivals' services to the advantage of Google's own services is likely to be raised again. In this regard, the Digital Markets Act gives a more structured response, since it provides that the gatekeepers' measures to meet its obligations under the DMA, including the prohibition of self-preferencing, shall be effective. When this is not the case, the Commission may specify the measures to be taken by the gatekeeper to ensure an effective compliance.[99]

5. Conclusion

To deal with large platforms' self-preferencing in the digital economy, the *Google Shopping* case relied on the traditional principles of abuse of a dominant position. These principles are notoriously vague, which gives the Commission a great deal of discretion in their interpretation and application. The main problems with this judgment were that the actual harm caused by Google's practices to competition were not appreciable and the need to respect the rule of law.

The harm to competition was not significant because consumers' choice was restricted by the non-immediate visibility of competing comparison shopping websites. Here, the Commission took a behavioural approach to assess the harm to competition: most of consumers do not progress beyond the first webpage showing the results of their query. Therefore, consumers were harmed by having other comparison shopping websites demoted to the second, etc. search results webpage. Yet, many rivals' websites were still available. However, the main harm to competition was the prejudice to the competitive process. This is problematic because it gives rise to the criticism that EU law is concerned with the protection of competitors and not of the competitive process itself.

Replace with 'Arguably'

Replace with 'the goal of protecting the competitive process is acceptable only if it benefits consumers. As just argued, in this case consumer harm was negligible'.

As for the rule-of-law argument, the criticism is fair, although it is inevitable that new business practices having a wide impact like the one at issue are subject to antitrust scrutiny and that the existing legal categories of abusive conduct are inadequate to deal with such new practices. In this case, the Commission and the General Court departed from the well-established category of an abusive refusal to deal. Had the Commission classified Google's conduct as the refusal of access to an essential facility, it is unlikely that it would have met the required legal test for establishing an abuse. As a result, rather than relying on legal precedents, the Commission relied on policy principles such as 'conduct not falling within competition on the merits' and the principle of non-discrimination in order to establish that Google's conduct was abusive.

Perhaps replace with 'that' ?

In this respect, the Digital Markets Act can be considered an improvement, because it sets up a process through which the Commission will examine gatekeeper platforms' business practices. Arguably, this is better than the amorphous legal standard of 'competition not on the merits' that is applied under Article 102 TFEU.

With regard to the policy implications of the *Google Shopping* judgment, this judgment reflects the problems in implementing two important aspects of antitrust: consumer welfare and innovation.

As to consumer welfare, it has been argued that new antitrust thinking on abusive business practices in the digital economy tends to disregard their positive impact on consumers.[100] To some extent this judgment confirms this view, as no tangible detriments to consumers were identified. However, this judgment also confirmed

95 Regulation 2019/1150 (fn 93), Article 5.

96 Regulation 2019/1150 (fn 93), recitals 24 and 25.

97 Commission Notice, Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150[2020] OJ C424/1.

98 Regulation 2019/1150 itself provides it shall be evaluated: see recital 49. The evaluation has been entrusted to the research centre PPMI: see PPMI press release, *PPMI has been awarded a new research project for DG GROW on a study on 'Evaluation of the Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (the P2B Regulation)'* (21 December 2021), available at: https://ppmi.lt/news-insights/ppmi-has-been-awarded-a-new-research-project-for-dg-grow-on-a-study-on-evaluation-of-the-regulation-eu-20191150-on-promoting-fairness-and-transparency-for-business-users-of-online-intermediation-services-the-p2b-regulation (accessed 14 April 2023).

99 Digital Markets Act (fn 85), Article 12.

100 A. Douglas Melamed and N. Petit, 'The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets' (2019) 54 Review of Industrial Organization 741.

that potential anticompetitive effects are sufficient to establish an abuse of dominant position, which the Commission identified in terms of potential future higher prices and less choice for consumers.

As for innovation, the concern that curbing the market power of large platforms could lessen their incentives to invest in innovation has been mentioned. However, a debate about effects on innovation should also take into account both large platforms and smaller firms relying on such platforms. The empirical evidence on the *Schumpeter v. Arrows*' innovation is still inconclusive.[101] Variables such as firm size, the type of industry, the institutional environment, the capability of employees, organizational features, etc. determine the type of innovation in which either large firms or small and medium-sized enterprises have a comparative advantage.[102] However, what is clear is that small and medium-sized companies need to invest in innovation, given that in high-tech markets innovation is the main driver of competition. It follows that the *Google Shopping* judgment, which provides some protection to rivals against abusive self-preferencing and discrimination, may be desirable because preserving small and medium-sized enterprises' ability to compete could be an incentive for funders to finance their innovation efforts and promote start-ups' access to venture capital.[103]

101 Broadly speaking: Joseph Schumpeter maintained that monopolies promote innovation whereas Kenneth Arrow holds that competition favours innovation: see e.g. Baker (fn 71).

102 S. Parker, 'Small firms and innovation' in D. Audretsch, S. Heblich, O. Falck and A. Lederer) (eds), *Handbook of Research on Innovation and Entrepreneurship* (Edward Elgar, 2011) 357, 361–362.

103 The problem of innovation losses of non-platform businesses, but also the difficulties in measuring such harm, have been discussed by K. Caves and H. Singer, 'When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard' (2018) 26 Geo Mason L Rev 395.