Case Note

The Case Notes section will identify and analyse important judgments that shape the interpretation and application of the EU law in the field of competition and regulation. If you are interested in contributing, please contact the Case Notes Editor, Dimitris Vallindas, at <dvallindas@sheppardmullin.com>.

Fine is Only One Click Away

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Symposium on the Google Shopping Decision

In a US Senate Hearing in 2011, Eric Schmidt, Google's CEO, stated that 'competition is only one click away'. On 27 June 2017, the European Commission fined Google €2.42 billion for allegedly 'abusing dominance as search engine by giving illegal advantage to own comparison shopping service'.[1] Ruthlessly, a fine is only one click away too.

Why did the European Commission impose such a record-breaking fine on Google? According to Competition Commissioner Margareth Vestager,

> Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors' (...) therefore denying 'other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation.[2]

The products referenced on Google Shopping have been promoted in the search results in comparison with other shopping platforms, the Commission considered.

The legal arguments of the European Commission are the following: thanks to its complex algorithms, Google has allegedly manipulated the search results of products in order to promote its own platform, Google Shopping, at the expense of competitors. Since the artificial modification of the ranking of search results is tantamount to a price paid by economic actors, by the manipulation of its search results, Google has abused its dominance. It has infringed Article 102 Treaty on the Functioning of the European Union (TFEU) because it i) 'has systematically given prominent placement to its own comparison shopping service' and ii) 'has demoted rival comparison shopping services in its search results'.[3] Although clear, both legal arguments from the only document yet available – namely the Press Release from t27 June 2017 by the European Commission[4] – are nonetheless unsubstantiated and ungrounded as discussed below successively.

I. Prominent Placement Granted by Google to Google Shopping

In the world of algorithmic antitrust, many types of behaviour can easily be seen as a novelty for restricting competition, however, once compared with traditional corporate strategies, they are non-detrimental from an antitrust perspective. For instance, in the case of Google positioning Google Shopping results in 'prominent' places in its search results, one can see the ability of what can be assimilated to a distribu-

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1 European Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service' (Press release, 27 June 2017) <http://europa.eu/rapid/press-release_IP-17-1784_en.htm> accessed 1 September 2017.

2 ibid.

3 ibid.

4 ibid.

tor (Google distributing third-parties information via search results) willing to promote its marginal end-products (Google Shopping selling services). This corporate strategy involving sister companies of a parent company is very similar to, for example, the one portrayed by a distributor (say, Tesco) putting 'prominent placement' of its own end-products (say, Tesco food products) on end aisle displays. To what extent does the 'prominent placement' given by Google Inc to Google Shopping services differ from the one given by Tesco Inc to Tesco food products on end aisle displays? To no extent.

It is traditional corporate strategy of a parent company to favour its own products that have, through a trial-and-error evolutionary process,[5] emerged as a reward for the economic efficiency of the original distributing services. Fining by-products and the 'prominent placement' parent companies can grant to these by-products leads to the prohibition of end aisle displays for products manufactured by the parent distributing company.

The fundamental flaws in the European Commission's decision are threefold.[6]

Firstly, the European Commission over-exaggerates the entry barriers in the market of shopping services: 'competition is only one click away,' as Eric Schmidt rightly put it. There is no real evidence that customers are deterred from clicking to rival services displayed on the first page of the search results too. Indeed,

> the EU's actions have created a cloud of uncertainty that will make large tech companies overly cautious about making changes to the user experience and service offerings that would benefit consumers,

as Robert Atkinson, President of the Information Technology and Innovation Foundation, a Washington-based think tank, has rightly warned in a statement following the *Google Shopping* decision.[7]

Secondly, the European Commission overlooks the absence of any dominance of Google Shopping on shopping online markets: digital applications platforms and other selling websites such as Amazon and eBay have much a more established reputation on selling services markets. In comparison, Google Shopping is the result of a long and expensive trial-and-error process which ambitions to take some of the market shares of powerful competitors.[8] How can competition authorities refuse the ability of successful parent companies to encourage a weak daughter company to develop? If there is at all a regulatory issue, it should be a transfer-pricing one, not an antitrust one.

Thirdly, and most importantly, the policy chosen by Google to promote Google Shopping services at the top of its search results may very well end up being a bad strategy for consumers as they could prefer a different ordering of search results – namely without shopping results being promoted. Therefore, alternative search engines may, from a competitive viewpoint, emerge as credible substitutes for a shopping-free search engine. Fining Google now is tantamount to rejecting the play of the competitive process by which customers are 'free' to choose shopping services platforms such as Google Shopping and its rivals. Even more importantly, fining Google now is a regulatory intrusion into the competitive process that would lead to portray the promotion of Google Shopping services as a competitive argument for the rise of alternative search engines. Regulating and fining the downstream market (ie the online shopping services market) ultimately reinforces the status quo against the competitive process on the upstream market (ie the search engine market) by recourse to a quasi-essential facilities doctrine as discussed below.

II. Rival Shopping Services Demotion in Search Results

According to the Commission, Google has also been fined because

> rival comparison shopping services appear in Google's search results on the basis of Google's generic search algorithms. Google has included a

5 Geoffrey Manne and Joshua Wright, 'Google and the Limits of Antitrust: The Case Against the Case Against Google' (2016) 34 Harvard Journal of Law & Public Policy 171-244.

6 One early and convincing warning on a potentially detrimental European Commission's fine against Google has been developed by Andrea Renda, 'Searching for harm or harming search? A look at the European Commission's antitrust investigations against Google' (CEPS Report no 118, September 2015).

7 See Robert Atkinson cited by Amar Toor, 'What the EU antitrust ruling could mean for Google search' (*The Verge*, 27 June 2017) <https://www.theverge.com/2017/6/28/15885368/google-eu-antitrust-fine-search-impact> accessed 1 September 2017.

8 For the emergence of Google as the leading search engine, see Renda (n 6) 4-8.

> number of criteria in these algorithms, as a result of which rival comparison shopping services are demoted (...) Google's own comparison shopping service is not subject to Google's generic search algorithms, including such demotions.[9]

Following these alleged abuses, the European Commission considered that the harm was evidenced by the 'sudden drops' of the use of competitors' shopping services, together with an increase in Google Shopping services traffic.

The bone of contention lays not so much on the non-contestable and compelling evidence gathered by the European Commission concerning the importance of appearing in first-page results, but on the actions imposed onto Google in order to comply with the administrative requirements. According to the European Commission, Google must

> comply with the simple principle of giving *equal treatment* to rival comparison shopping services and its own service: Google has to apply the same processes and methods to position and display rival comparison shopping services in Google's search results pages as it gives to its own comparison shopping service.[10]

Disappointingly, this will never truly happen. Indeed, should Google Shopping services be removed from prominent placement in the search results, the Google Shopping 'toolbar' will always remain at the top of the first page of search results. Forever will a parent company propose, in an advantageous position, its own end-products compared to those proposed by downstream competitors (NOT CLEAR). Should competition authorities be concerned about Google's condemned practices? The answer should be negative for two main reasons: i) an efficiency analysis of the decision's consequences reveals its detrimental impact; and ii) the reasoning of the decision portrays a conceptual pitfall by having recourse to the quasi-essential facilities doctrine.

1. Efficiency Cost on Balanced Antitrust Analysis

The harm caused to competitors is outweighed by the benefits gained by customers, therefore the antitrust analysis can conclude the presence of efficiency net benefits for society. From an error cost perspective, which encapsulates the cost of error in curbing firms' practices in expect of limiting anti-competitive behaviours, the cost of errors are clearly greater than the benefits derived from the future behaviour of Google in line with the Commission's requirements.

Indeed, error costs encompass both the cost of imposing a competitively detrimental fine of €2.42 billion but most importantly and less perceptibly, the cost of deterring innovation on the downstream market (online shopping services) and hindering competition on the upstream market (search engine market). The so-called 'error-cost framework'[11] helps understanding that the social cost of Type I errors (false positive) is always greater than the social cost of Type II errors (false negative): Type I errors (*i.e.* erring by committing flawed antitrust interventions) are more costly than Type II errors (ie erring by omitting appropriate antitrust interventions) because market forces compensate for the latter error type (but not the former). Type I errors are indeed more severely enshrined in a legal order by the court or regulator's erroneous decision. Damages are therefore greater with the false positives of Type I errors rather than with the false negatives of Type II errors. This is even truer in an innovative context such as the one encountered in the *Google* decision.[12]

In the case of Google, the costs of innovation deterrence are important because the success of Google's search engine cannot be used to develop other products which are complement to the search functions (eg products such as Google Maps, Google Books, Google Scholar, and of course, Google Shop-

9 Commission, 'Antitrust: Commission fines Google €2.42 billion' (n 1).

10 ibid.

11 Frank Easterbrook, 'The Limits of Antitrust' (1984) 63 Texas Law Review 1; Gary Becker and Steven Salop, 'Decision Theory and Antitrust Rules' (1999) 67 Antitrust Law Journal 41; David Evans and Jorge Padilla, 'Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach' (2005) 72 University of Chicago Law Review 73; Geoffrey Manne and Joshua Wright, 'Innovation and the Limits of Antitrust' (2010) 6 Journal of Competition Law & Economics 153, 157, where the authors state that 'the error-cost framework lies at the heart of modern economic and legal debates surrounding the appropriate scope of monopolization law and other areas of antitrust'; Manne and Wright, 'Google and the Limits of Antitrust' (n 5) 171-244.

12 Indeed, the error-cost framework's insight 'becomes more important as our collective economic wisdom about a new business practice decreases – when a challenged practice or setting is innovative', in Manne and Wright, 'Google and the Limits of Antitrust' (n 5) 180.

ping). The market of online shopping services is dominated by big players, and Google Shopping has suffered multiple failures in the past, as pointed out by the Commission itself[13]. The success of Google's search engine cannot, in the reasoning of the Commission, be used to develop other products in order to enter other markets where Google is not present. Such deterrence to innovation can only generate immensely incommensurable and invisible costs. Google has succeeded in the new digital economy because it pioneered the design of complex and innovative algorithms.[14] The competitive advantage obtained by Google, through a fair and transparent competitive process,[15] in designing complex algorithms enables Google to enter (and even create!) other markets which improve customer experience on Google's search engine. Indeed, by deploying other activities than the sole search engine, Google is progressively and innovatively becoming a general platform, increasing consumers' satisfaction. Consequently, the fine imposed on Google clearly diminishes such prospects without providing competitors substantial benefits.

Indeed, because of Google products' interrelatedness, and because of Google's proprietary rights to organise its different products in a coherent manner from the client's perspective, Google retains the right to put Google Shopping in the 'toolbar' at the top of the search results webpage. Therefore, even after Google complies with the Commission's decision, the 'prominent placement' of Google Shopping in search results shall remain unaffected. Should the Commission force Google to remove the Google Shopping 'toolbar' in order to remove all possible 'prominent placement', the violation of Google's proprietary rights would be manifest. If this potentially wrong requirement imposed onto Google is a manifest violation of its proprietary rights, then the current requirement imposed by the debated decision can be said to be a simple but real violation of its proprietary rights to organise its products in a free and legitimate way.

On the one hand, the costs on innovation are important because of their deterring effect on entering and creating new markets by Google. On the other hand, the benefits of the present decision in terms of antitrust consequences are very limited for rivals. Competitors will indeed continue to 'suffer' from Google's competitive advantage of Google Shopping appearing on the 'toolbar'. Competitors will also continue to enjoy large presence on digital applications (which is the fastest growing sector with the rise of 'M-Commerce'[16]) and websites. Therefore, the decision will have little beneficial consequences for competitors if such benefits were the goals of the Commission's decision. The benefits clearly do not outweigh the efficiency loss in terms of dynamic efficiency (innovative stimulus). However, major costs (error costs and innovative costs) shall be borne by Google – for deterring innovation and complementarity of different markets present on a general platform – and Google's consumers – for both impeding the consumer's choices of complementarities and for reinforcing the position of Google's search engine.

The very limited benefits granted to Google Shopping's competitors in light of the prohibitive social costs on innovation and consumers' preferences lead to the conclusion that the overall net economic impact of the present decision is negative. This is true from transactional and dynamic efficiencies perspectives as discussed so far. It is even truer from an evolutionary perspective when the competitive process as such is considered. It is this evolutionary perspective we will next examine.

2. The Competitive Process Hindered by the EU Essential Facilities Doctrine Applied to Google

The Commission's reasoning is tantamount of treating Google's search engine as a quasi-essential facil-

13 Commission, 'Antitrust: Commission fines Google €2.42 billion' (n 1), where the Commission says that 'when Google entered comparison shopping markets with Froogle, there were already a number of established players. Contemporary evidence from Google shows that the company was aware that Froogle's market performance was relatively poor (one internal document from 2006 stated "Froogle simply doesn't work")'. Apparently, the multiple failures of Google Shopping in the past did not convince the Commission that Google Shopping is not currently dominating its market but precisely is acting pro-competitively as an outsider against established incumbents.

14 See Renda (n 6) 4-8.

15 Google's current super-dominance is the result of the business strategies and innovations which trumped Yahoo as the main search engine. See 'A Tale of Two Brands: Yahoo's Mistakes vs. Google's Mastery' (*Knowledge@Wharton*, University of Pennsylvania, 2016) <http://knowledge.wharton.upenn.edu/article/a-tale-of-two-brands-yahoos-mistakes-vs-googles-mastery/> accessed 1 September 2017.

16 Andrew Meola, 'The Rise of M-Commerce: Mobile Shopping Stats & Trends' (*Business Insider,* 21 December 2016) <http://www.businessinsider.fr/us/mobile-commerce-shopping-trends-stats-2016-10/> accessed 1 September 2017.

ity,[17] reinforcing its dominant position on the search engine market while weakening its outsider position on the shopping services market.[18] A facility is 'essential' whenever a facility is, cumulatively, 'unique'[19] and 'absolutely necessary'[20] to anyone wishing to enter the relevant market. Antitrust analysis challenges the Commission's position when the different relevant markets are considered. Google's search engine is neither unique nor absolutely necessary (alternative search engines exist) to online shopping services (alternative selling services exist such as mobile applications and websites). Furthermore, having not refused to reference rival shopping services (hence no refusal to deal can be evidenced), Google has only increased the costs of rival shopping services via algorithm-driven strategies.

Forcing Google to give access to rival shopping services onto its search engine results reminds us of the Commission's *Microsoft*[21] decision where it forced Windows (the PC operating system) to give access to essential code and interface information for rivals' software products. Windows was treated as an essential facility for software competitors and Microsoft was said to be blocking access to these end-products, it was fined by the European Commission is a similar fashion to the present *Google Shopping* decision.[22]

Considering Google's search engine as an essential facility is both economically wrong[23] and competitively flawed. Forcing Google's search engine to give non-discriminatory access to Google Shopping's competitors would be a 'red herring from an antitrust perspective'[24] since the search results placement is a price. Also, it would reinforce the status quo regarding the dominance of Google's search engine. Indeed, the Commission is de facto giving Google's search engine the status of the essential platform by which most online sales must be fairly referenced.[25] A more dynamic and evolutionary perspective would have considered that customers, by finding search results being algorithmically biased towards Google products at the expense of other interesting competitors' products, would have either swapped to alternative search engine free of algorithmic manipulations or swapped directly to digital applications offering shopping services (eg Amazon app; Ebay app, etc).

The Commission's decision, on the contrary, detrimentally takes Google's search engine dominance as a given, treats it through the lens of a quasi-essential facility, and thus reinforces the dominance of Google

17 See Joined Cases C-241 and 242/91 P *Radio Telefis Eireann v Commission* [1995] ECR I-743 for adopting implicitly in the EU the essential facilities doctrine. See also, Joined Cases T-69/89 and T-76/89 *RTE & ITP v Commission* [1991] ECR II-485 and 575; Case 53/87 *Maxicar v Renault* [1988] ECR 6039; Case 238/87 *Volvo v Veng* [1988] ECR 6211; Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeinungs-und Zeitschriftenverlag Gmbh & Co KG* [1998] ECR I-779. For an overview of EU essential facilities doctrine and restraints on contracts, see Damien Neven and Petros Mavroidis, 'The Interface Between Competition and Contract Law. The Case of Essential Facilities' (EUI 2003 EU Competition Law and Policy Workshop/Proceedings) http://www.iue.it/RSCAS/Research/Competition/2003/200306COMP-Neven-Mavroidis- sII.pdf accessed 1 September 2017.

18 The Commission considers a facility to be deemed 'essential' 'if without access there is, in practice, an insuperable barrier to entry for competitors of the dominant company, or if without access competitors would be subject to a serious, permanent and inescapable competitive handicap which would make their activities uneconomic', see OECD; 'The Essential Facilities Concept' (Report on European Commission in OECD/GD(96)1139) 93-108, 87.

19 Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services* [1998] ECR II-3141.

20 Case C-79/00 *Telefonica de Espana* [2001] ECR I-10057.

21 Commission Decision of 24 March 2004, COMP/C-3.37.792, C(2004) 900 final.

22 Interestingly too, Microsoft was allowed, in this Commission Decision, to receive a reasonable remuneration, under the surveillance of a Monitoring Trustee named by the Commission decision, for disclosing interface code information since intellectual property may protect these information. A similar conclusion could be reached if Google's algorithms were protected by intellectual property rights.

23 As of April 2017, it is estimated that Google represents 'only' 79.4% of market shares of the search engine market. See, 'Desktop Search Engine Market Share' (*Netmarketshare*, no date) https://www.netmarketshare.com/search-engine-market-share.aspx?qprid=4&qpcustomd=0&qpcd=1300 accessed 1 September 2017. Despite being considerably large, the market shares of Google are both well below 100% (perfect monopoly) and declining. Indeed, competitors are progressively gaining great market shares on the search engine market. See, 'Google's Search Market Share Down in Year-Over-Year Numbers' (*Search Engine Journal*, 22 August 2015) https://www.searchenginejournal.com/googles-search-market-share-down-in-year-over-year-numbers/139588/ accessed 1 September 2017.

24 Manne and Wright, 'Google and the Limits of Antitrust' (n 5) 243; arguing that 'no business firm, even a monopolist, has an antitrust duty to reveal to competitors formulas that its uses to set prices (…) Google's success in matching keywords to ads will be compromised by disclosure of the algorithm because it would open opportunities to game the auction process'.

25 Such duty to share its strategic information would contradict the very purpose of antitrust law as the US Supreme Court explained in the *Trinko* case: 'Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforce sharing also requires antitrust court to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion', in *Verizon Communications v Law Offices of Curtis V. Trinko, LLP* (2004) 540 US 398, 407-508.

by implicitly distrusting customers' choices to favour more 'neutral' search results. As a consequence, the switching costs for customers to go away from Google-manipulated search results towards non-manipulated search engines is increased by the Commission's decision.

Alleged algorithmic manipulation by Google should lead search engine competitors to emerge if, and only if, customers are dissatisfied with the Google search results.[26] Thanks to an evolutionary process which would instil effective competition on the search engine market, it should be customers (not the Commission) who force Google not to manipulate its algorithm. If such manipulation were giving Google a non-competitive position, real competition on the search engine market would presumably weaken Google's search engine dominance. Also, considering Google as having blocked access to downstream competitors is fallacious since no 'refusal to deal' can be argued by shopping services competitors.

Therefore, it is doubtful that the European Commission can have recourse to a quasi-essential facilities doctrine since such doctrine hinders the competitive process on the upstream market without tangible benefit for the downstream market.

Manne and Wright aptly argued that 'antitrust lawyers and economists have a long and storied history of systematically assigning anticompetitive explanations to conduct that is novel and not well understood'.[27] Certainly, Google's mastering of complex and innovative algorithms coupled with advertised placements has been the main source of its success so far but is now the source of criticisms from some competition regulators. Has the European Commission just sanctioned novel ways of competing and entering new markets? There is, as discussed, a great probability that this decision causes more harm than benefit to the new, complex and still largely unknown sector of algorithm-driven data-laden companies.

26 On the contrary, Google emerged as the most innovative and efficient search engines over competitors. See Renda (n 6) 4-8.

27 Manne and Wright, 'Google and the Limits of Antitrust' (n 5) 162.