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The EU General Court hears an appeal for abuse of dominance in online comparison shopping services *(Google Shopping)*

UNILATERAL PRACTICES, DOMINANCE (ABUSE), DISCRIMINATORY PRACTICES, REFUSAL TO DEAL, RELEVANT MARKET, ACCESS TO FACILITIES, SANCTIONS / FINES / PENALTIES, JUDICIAL REVIEW, EUROPEAN UNION, MARKET DEFINITION, ADVERTISING , ONLINE PLATFORMS, BIG TECH, ALGORITHMS

EU General Court, *Google Shopping*, Case T-612/17, 12 February 2020

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Background

On 27 June 2017, the European Commission imposed a record fine of 2.42 billion euros to Google for abuse of dominant position under Article 102 TFEU consisting in self-favouring its own Comparison Shopping Service ("CSS") by displaying it more prominently and under enriched features compared to its competitors' services. The Decision has been appealed by Google to the European Union's General Court before where the hearings took place in Luxembourg the 12,13 and 14 th of February 2020. For three days, EU judges have heard both parts and interveners on Google's main arguments - notably that the Commission wrongly (I) considered improvements as abusive and imposed a duty to share them without meeting the required conditions, (II) assessed the anticompetitive effects and (III) imposed a penalty. [*1*]

Day one: factual and legal matters related to the context of the case

This three-day session opened with the factual aspect of Google's conduct. Google claimed that the display of its general search results was relevance-based – realising product and generic results comparisons to display the most relevant and emphasizing the importance of demotion algorithms for qualitative results - representing therefore competition on the merit [*2*]. On the contrary, the Commission, considered the display as being driven by the promotion of its own CSS [*3*] . Then the debate migrated to the legal aspect of the case concerning the existence of a duty to share innovation with rivals. While Google asserted such a duty did not exist in the present case because the required conditions for the essential facilities doctrine were not met, CCIA's lawyer Assimakis Komninos added that legal coherence should be protected [*4*]. The Commission, for its part, reiterated that the case was not a refusal to supply case but a classic leverage by Google's "double-headed" strategy consisting in promoting its own CSS while demoting its rivals' [*5*]. It then implied Google was trying to pick the legal standard it desired [*6*].

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Day two: legal test and effects assessment

During the morning of the second day, a hour long Q&A session had seen Google's lawyers put in a uncomfortable position by the intervention of judge Colm Mac Eochaidh declaring that " (…) this case really is visibility. (…). It is perfectly apparent that you have promoted your own and demoted others. That is a clear infraction" [*7*]. He did not stop there and repeatedly asked Google what it failed to supply, arguing that if Google could not answer this, its argument on the legal test was meaningless [*8*].

The debate then shifted to the effects' assessment involving two arguments. The first related to the market used by the Commission to assess the anticompetitive effects. On one hand, Google claimed that the Commission must consider the competitiveness on the market to examine the likelihood of anticompetitive effects and that it failed to integrate the retail platforms in that market [*9*]. Yet, retail platforms exercise an important competitive pressure on CSS and so prevent anticompetitive effects from Google's practice [*10*]. On the other hand, the Commission stated that retail platforms pressure had been considered in the analysis but seen as not important regarding the different purposes of retail platforms and CSS [*11*]. Visual Meta [*12*] explained that while it was possible to purchase directly on retail platform such Amazon, the purchase was hosted by the retailers on CSS [*13*]. The second argument was based on the weakness of the evidences showing the diversion traffic. For Google, the Commission failed to prove the link between competing CSS traffic decrease and Google's conduct [*14*]. It argued the traffic decrease was due to other factors than its behaviour, such as users' preferences – Google's CSS being an improvement - and competitors' lack of innovation, and relied on a counterfactual analysis to demonstrate that traffic decrease would have been similar without Google's conduct [*15*]. The Commission stated on the contrary that Google's counterfactual analysis was flawed, and that the competitors' weakness came from Google's conduct [*16*]. In this regard, some competing CSS, added that no evidence was shown of Google CSS's better relevance and that rivals' ability to innovate had been annihilated by the traffic decrease and the lack of revenue it had caused [*17*].

Final day: calculation of the fines and final conclusions

The last day of hearing started with the discussion on fines. Google argued that as the conduct was not considered as anticompetitive under the existing caselaw and the case had been opened under a commitment procedure, it should not have been fined by the Commission [*18*]. Assuming that the Court would find the conduct abusive, Google considered the Commission's calculation as wrong notably in regard to the additional deterrence multiplier applied by the Commission [*19*]. The Commission replied that Google should have been aware of the anticompetitiveness of its conduct and that it was entitled to change the procedure's nature and fine Google [*20*]. Concerning specifically the deterrence multiplier, the Commission justified its presence and amount by the deterrence effect the fine must enjoy and its link with the turnover of the fined undertaking – which in this case is particularly important [*21*]. Still in relation to the deterrence effect, the judge Colm Mac Eochaidh asked Google if it has "(…) been sufficiently deterred from repeating the behavior?" pointing to new complaints made against Google for the same type of conduct [*22*]. Finally, a discussion took place over the possibility for the General court to increase the fine. While Google argued the General court could not increase the fine if the Commission did not request so, the Commission considered it possible [*23*]. But the most surprising in this discussion was an allusion made by the judge Colm Mac Eochaidh implying that judge Gervanosi had argued the fine could be decrease – thus revealing the two lines of thought existing among the panel of judges [*24*]. Finally, there was no surprise when the time of final conclusions came, the parties stayed on their stands : Google's competition on the merit versus Commission's classic leverage [*25*].

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Conclusion

The most renown aspect of this case is obviously the applicable legal standard and the extension of the duty to share outside the essential facilities doctrine [26]. However, we could regret the lack of arguments over the central point: the creation of a new kind of abuse with its own legal standard. When one side attempts to depart from the abuse applied and to select its desired legal standard, the other tries to forge a patchworked caselaw background for the new kind of abuse it has created. Another interesting - yet less debated – point of this case is the discussion over the conduct's effects, especially the delimitation of the competitive constraints underlying Google's argument over the role of retail platforms. For some time now, we assist to a blurring of product market boundaries in the technology area - phones used to watch series and listening to music or watches displaying mailbox and steps – and some guidance over this new feature would be welcome [27]. Nonetheless, regarding the opposite views lying inside the panel of judges, it seems the case is not as straightforward as the parties try to imply. We are at a crossroad where the General Court's judgement will determine the future of the duty to share extent and (potentially) of the competitive constraints' assessment.

[1] Appeal Google Inc et Alphabet Inc c. Commission européenne, 11 septembre 2017, T-612/17, JOUE C 369/37.

[2] L. CROFTS, "'Colossus' Google condemned rivals to dark depths of search results, EU tells court", MLex, 12 February 2020.

[3] Cleary Gottlieb, February 2020 EU Competion Law newsletter.

[4] L. CROFTS, "'Colossus' Google condemned rivals to dark depths of search results, EU tells court", op. cit.; Report for the hearings, T-612/17, para. 331.

[5] Cleary Gottlieb, op. cit.; L. CROFTS, Twitter, 12 February 2020.

[6] L. CROFTS, "'Colossus' Google condemned rivals to dark depths of search results, EU tells court", op. cit..

[7] S. VAN DORPE, "EU judge tells Google it landed on Monopoly's 'Go to jail' square", Politico, 13 February 2020.

[8] L. CROFTS, Twitter, 13 February 2020.

[9] F. Y. CHEE, "Google's fight against EU antitrust fine comes up against critical judge", Reuters, 13 February 2020; Report for the hearings, T-612/17, para. 274.

[10] Report for the hearings, T-612/17, para. 286.

[11] Ibid. para. 278; L. CROFTS, Twitter, 13 February 2020.

[12] Google CSS' competitor.

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[*13*] L. CROFTS, Twitter, 13 February 2020.

[*14*] Cleary Gottlieb, op. cit.

[*15*] Ibid.; L. CROFTS, Twitter, 13 February 2020.

[*16*] Cleary Gottlieb, op. cit.; Report for the hearings, T-612/17, para. 305.

[*17*] L. CROFTS, Twitter, 13 February 2020.

[*18*] M. ACTON, Twitter, 13 February 2020; Cleary Gottlieb, op. cit.

[*19*] Cleary Gottlieb, op. cit.

[*20*] Ibid.; Report for the hearings, T-612/17, para. 349.

[*21*] S. VAN DORPE, "EU judge suggests Google fine should be higher", Politico, 14 February 2020.

[*22*] Ibid.

[*23*] Ibid.

[*24*] S. VAN DORPE, "EU judge tells Google it landed on Monopoly's 'Go to jail' square", op. cit.

[*25*] Cleary Gottlieb, op. cit.

[*26*] See link.

[*27*] Which seems to be also a Commission's preoccupation since it launched a public consultation on the Market definition notice in June 2020. See link.

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