The Google Shopping Decision and Whether Digital Platforms Can Constitute Essential Facilities

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Introduction

From 12-14 February 2020, the European Union’s General Court (the “General Court”) heard Google’s appeal of the European Commission’s 27 June 2017 abuse of dominance decision pursuant to Article 102 TFEU (the “Decision”) involving on-line comparison shopping services (“CSSs”). A central pillar of Google’s appeal submissions was that the legal case advanced by the Commission was a refusal to supply, but that the Commission had failed to satisfy the applicable legal tests for such a determination. Specifically, Google asserted that the Commission had failed to establish that ‘access’ to Google’s shopping box[1] was indispensable for a comparison shopping service.

The eventual ruling from the General Court on this appeal will be important, not least because it is expected to clarify the legal basis of the Commission’s abuse of dominance determination. Whatever the outcome, it may also assist in resolving the current debate about whether the ‘tech giants’ such as Google and Amazon should be considered “essential facilities,” considering their function as ‘gatekeepers’ to digital markets.[2] There is growing concern, both in Europe and elsewhere, that without legislative intervention,[3] there will be increasing exploitation of market power by the tech giants, and leveraging of their overwhelming dominance into secondary markets to the detriment of consumers and competition.
The Google Search (Shopping) Decision and Google's Appeal

At first glance, Google's argument that the abuse sanctioned by the Decision was a refusal to supply may appear puzzling, not least because the operative part of the Decision makes no reference to a refusal to supply. Instead, the Commission stated that the abuse comprised “the more favourable positioning and display by Google, in its general search results pages, of its own competing comparison shopping services.”[4] Also notable is that the Commission's finding that there was an abuse of dominance in this case did not require Google to be dominant in the affected market (comparison shopping services). It was deemed sufficient from a legal perspective, that Google is dominant in a given market (general search services), and leverages its (undeniably) dominant position into “a neighbouring but separate market” (comparison shopping services) thereby distorting competition.[5]

The Decision described the two constitutive elements of the abuse as: (i) the prominent positioning and display of Google's CSS in its general search results pages (the “SERP”); and (ii) the demotion of competing CSS in the SERP by Google's algorithms: “While competing comparison shopping services can appear only as generic search results and are prone to the ranking of their web pages…being reduced (“demoted”) by certain algorithms, Google's own comparison shopping service is prominently positioned, displayed in rich format and is never demoted by those algorithms.”[6] The language of the abuse finding in the Decision focused not on ‘access' but instead on the differences in treatment by Google of its CSS and that of its competitors.

The Commission was categorical that Google's assertions[7] that the Commission's case was one of refusal to supply, and that the relevant conduct could be considered abusive only if certain criteria were fulfilled, (explained later) were fundamentally flawed. The Commission's simple rebuttal was that the abusive conduct in question was not a refusal to supply and that those criteria were therefore irrelevant.[8]

Google's Argument Before the General Court

So, what is the basis for Google's contention that the Commission's abuse finding should properly be understood as a refusal to supply case, notwithstanding the clear language in the Decision itself, and the Commission's statements in written and oral argument in the appeal proceedings to the contrary?

The answer may turn on Google's “remedy” to the abuse. At the appeal hearing, Google's counsel submitted that, in the case of a refusal to supply abuse, there are only two ways in which a company can bring that abuse to an end: either to give access to; or, to eliminate the product/facility to which 'access' was refused. Google's proposition was that, if the abuse was brought to an end by granting competing CSSs ‘access' to its Shopping Unit, then the abuse must be one of refusal to supply.

To understand this, it is necessary to consider the changes implemented by Google to its Shopping Unit following the adoption of the Decision, which required Google to cease its unlawful conduct within 90 days of the date it was notified of the Decision. Google made changes to its Shopping Unit to make it possible, in certain circumstances, for a form of CSS that satisfied certain criteria to be included within the Shopping Unit. Google's submission to the General Court was that, if the Decision required it to bring the unlawful conduct to an end, and if the Commission had accepted Google's changes to its Shopping Unit as doing so; the analysis of the legal form of the abuse should be informed by those changes.

Essential Facilities/Refusal to Supply

Google's argument merits further analysis. It is necessary to consider first, the legal test for an abusive refusal to supply; and second, the merits of Google's claim that: if the abuse can be remedied by granting access; then the abuse must be a refusal to supply.
The categories of abuse of dominance prohibited under Article 102 TFEU are open-ended. A refusal to supply is a well-established form of abuse of dominance which has been considered in detail by the European Court of Justice (the “CJEU”) over the years and assessed by reference to essential facilities case law. The central precept of the essential facilities case law is that a company dominant in the provision of an essential facility it uses in a downstream market, abuses that dominance when it refuses other companies access to that facility, or grants them access only on terms less favourable than those it accords its own services (without objective justification).

In Bronner,[9] the CJEU held that the denial of access to the only nation-wide newspaper home delivery scheme in operation did not amount to an abuse of dominance because alternative means of newspaper distribution were available, even when those alternatives were not economically viable. The court declared that an obligation to grant access/supply only exists in exceptional circumstances, when: “the dominant undertaking's refusal to supply is likely to eliminate all competition in a downstream market.”[10] The CJEU set out three criteria for a refusal to supply to be capable of constituting an abuse of dominance:

1. The conduct must be likely to eliminate all competition in the downstream market;

2. The conduct must be incapable of being objectively justified; and

3. The service being refused must itself be indispensable to carrying out the requesting person's business.

According to Google, the Commission failed to satisfy the Bronner criteria. It is, for example, not an abuse for a dominant undertaking to favour itself by restricting the use of an asset to itself. This can be viewed as a reward for innovation. According to the CJEU's case law, this type of favouring is only abusive when access to the asset is indispensable to a competitor in carrying out its business. Google argued that the Commission had failed to prove that access to Google's Shopping Unit was indispensable, or that Google's conduct foreclosed effective competition.

However, in making these submissions, Google did not address the subsequent case law from the European Courts, which has further clarified, and to a certain extent, relaxed these conditions. In Microsoft,[11] the General Court softened the criterion of the elimination of all competition to the elimination of all effective competition. It is also the case, that there can still be an abusive refusal to supply in breach of Article 102 without it being necessary for the service to be "indispensable". The court in Microsoft held that competitors should be able to "compete on an equal footing" with the dominant company rather than there being a requirement to show that access to the facility was indispensable.

The Commission's Position

The Commission was categorical that its abuse finding was not one of refusal to supply. In response to Google's submission that if granting 'access' remedied the abuse, it must be a refusal to supply case, the Commission stressed that it did not specify the manner in which the abuse should be remedied, only that it should be remedied; nor, was there only one manner in which the abuse could be remedied. The fact that Google had made changes to its Shopping Unit that enabled some forms of CSS to be displayed in the Shopping Unit in certain circumstances did not mean that the abuse was Google's refusal to grant access to competing CSSs to the Shopping Unit. The Commission was clear that the abuse was one of anticompetitive leveraging, and involved two elements, both the favourable positioning and display of Google's own CSS and the demotion of competing CSSs. This could only be remedied by "equal treatment".

The Commission stressed that it was a “misrepresentation” of the Decision to assert that the anti-competitive conduct in question concerned the refusal to include rival CSSs in the Shopping Unit. The Commission was unequivocal that the abusive conduct was Google reducing the visibility of rivals to its own CSS in Google's general search results, and the "systematic" increasing of the visibility of its own CSS in its general search results pages, not access to the Shopping Unit.

Assessment

A plain reading of the Decision makes two things quite clear: Google's abusive conduct was not 'passive' in the sense that it only concerned CSSs' access to Google's technology. The abuse of dominance was the active promotion of Google's own service in a separate but related market, coupled with the active demotion of competing services in that secondary market. Additionally, and relatedly, the remedy imposed by the Decision did not require Google to grant access to its Shopping Unit.
CSSs do not wish to purchase access to Google's Shopping Unit. They wish to be treated equally in Google's general search results. They want to rank in those search results according to their relevance to a user's query. They do not want to be demoted by algorithms while Google's own CSS is immune from any form of algorithmic demotion. Fundamentally, they wish to compete on the merits.

**Conclusion**

While Google's submissions have triggered an interesting debate regarding the circumstances in which the *Bronner* essential facilities criteria are to be applied, Google's duty to supply argument relies upon an incorrect interpretation of the Decision. The Decision does not require Google to grant competing CSSs access to Google's technology. What it requires is the cessation of the self-preferencing of Google's own CSS and demotion of rivals. It is self-evident that, from a policy perspective, the legal construct of an abuse cannot be determined by the remedy the dominant enterprise adopts to attempt to bring an end to the abuse.

The debate on this issue demonstrates that Article 102 TFEU has the flexibility to encompass a wide range of anticompetitive conduct, including in novel, fast-paced technology markets. The debate about the duties of dominant digital platforms to share data and/or access to their services continues within the European Commission and by other regulators. On 22 April 2020, Andreas Mundt, the head of the German competition authority, raised the possibility of using the essential facilities doctrine in Germany to compel digital platforms to share data with competitors to lower barriers to market entry. Margarethe Vestager's (Commissioner for Competition and current Executive Vice-President of the European Commission For a Europe Fit for the Digital Age) has also indicated that regulators would need to "*identify the relevant criteria and thresholds*" triggering the application of the essential facilities doctrine. Following a series of market studies into digital platforms, regulators are increasingly looking to implement *ex ante* regulatory regimes, with the UK's Competition and Markets Authority promoting a code of conduct for digital platforms in online advertising and the Australian Competition and Consumer Commission finalising a code between media companies and digital platforms this year.